



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

RULING

1. On 24.4.19, Shakeel Ahmed Khan and Nazir Ahmed Matabkhan (the Applicants) filed an application of even date (the Main Application) seeking inter alia 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, detainiong, 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.

2. In addition to filing a replying affidavit and grounds opposition on 25.4.19, the Ethics and Anti-Corruption Commission, the 4th Respondent filed an application dated 24.4.19 seeking the transfer of this matter to the Anti-Corruption and Economic Crimes Division (ACEC Division) established in the High Court of Kenya vide the to the Chief Justice Practice Directions dated 9.12.16, 2016 as amended on 9.7.18 (the Practice Directions) for purposes of taking directions on the hearing and determination of the Applicants' application dated 24.4.19.

3. The Application is premised on the grounds that the Chief Justice made the Practice Directions pursuant to section 5 of the Judicial Service Act No. 1 of 2011 and section 16 of the High Court (Organization and Administration) Act, No. 27 of 2015 and the said Practice Directions were amended on 9th July, 2018. It is in the interest of justice and consistency in the administration of justice and expediency that the Applicants' application be heard and determined by the ACEC Division in Nairobi. Further, the Applicants filed this matter Constitutional and Judicial Review Division in Nairobi on 9.1.19 instead of the ACEC Division. It is in the interest of the administration of substantive justice and fairness that the orders prayed herein be granted.

4. In a Further Affidavit/Replying Affidavit, F Kinyua Kamundi the Applicants' counsel averred in the relevant sections that at the time the Applicants filed the Main Application, they had not seen the charge sheet in Anti- Corruption Criminal Case No. 6 of 2019 which the Applicants are the 17th and 18th accused persons. In Count 1 they have been charged amongst 24 accused persons with conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act (ACECA). In Count 11 they have been charged with Tornado Carriers Limited with the offence of fraudulent acquisition of public property contrary to Section 45 (1)(a) as read with Section 48 of ACECA.

5. The Applicants are charged in Count 1 and 11 under a law that does not exist and by a Commission that does not exist. According to Counsel ACECA interprets the word "Commission" as follows:

"Commission" means **the Independent** Ethics and Anti-Corruption Commission established under Section 3 of **the Independent** Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011) pursuant to **Article 79 of the Constitution.**"

6. Counsel avers that there is no law or statute in Kenya known as the **Independent** Ethics and Anti-Corruption Commission Act, 2011. There is also no Commission in Kenya known as **The Independent** Ethics and Anti-Corruption Commission. He further charges that Parliament has not enacted any legislation under Article 79 of the Constitution to establish an Independent Ethics and Anti-Corruption Commission. Counsel further averred that the word "Commission" was also defined in Section 36 of Ethics and Anti-Corruption Commission Act, 2011 to mean **The Independent** Ethics and Anti-Corruption Commission established under Section 3 of **The Independent** Ethics and Anti-Corruption Commission Act 2011, pursuant to Article 79 of the Constitution.

7. It was further averred that in 2016 Parliament revised Ethics and Anti-Corruption Commission Act No. 2011 and amended among other things Section 36 to redefine the word "Commission" to mean Ethics and Anti-Corruption Commission established under Section 3 of the Ethics and Anti-Corruption Commission Act, 2011 pursuant to Article 79 of the Constitution. The Court will see that Parliament changed its mind in 2016 and denied Ethics and Anti-Corruption Commission the independence it is supposed to have under Article 79 of the Constitution. Thus the Commission is not the Commission contemplated in Article 79 of the Constitution with the status and powers of Commissions under Chapter 15 and therefore cannot have or exercise any sovereign power or authority under Article 252 of the Constitution.

8. Counsel further averred that contrary to the claim by the 4th Respondent, the Applicants have not filed any proceedings on 9.1.19 in the Constitutional and Judicial Review Division or in any court in Kenya. As such the application to transfer the matter to Nairobi being based on a false affidavit should be dismissed with costs.

9. In a further affidavit the 4th Respondent clarified that the Applicants had in fact not filed any matter in the Constitutional and Judicial Review Division on 9.1.19 as alleged. It was also clarified that there is no matter between the parties herein pending before the ACEC Division. He further averred that the Applicants have filed Constitutional Petition No. 32 of 2019 Shakil Ahmed Khan, Nazir Ahmed Matabkhan and Tornado Carriers Ltd vs Ethics and Anti-Corruption Commission and 6 others.

10. At the hearing, counsel for the parties urged their respective positions. The 2nd, 3rd and 5th Respondents supported the 4th Respondent's application.

11. For the 4th Respondent, it was submitted that the Hon. Chief Justice did in his practice directions dated 9.12.16 as amended on 9.7.18 direct vide Kenya Gazette Notice No. 77262 that applications relating to economic crimes and filed under the Anti-Corruption and Economic Crimes Act and the Proceeds of Crime and Anti-Money Laundering Act be filed in the ACEC Division in Nairobi. The 4th Respondent contends that the Applicants filed the Main Application in utter breach of the Practice Directions which are mandatory in nature. The Main Application will be heard expeditiously in the ACEC Division which is specifically mandated to deal with corruption and economic crimes. It was submitted that for this breach, the 4th Respondent's application for the transfer of this matter to the ACEC Division in Nairobi is merited.

12. For the Applicants, the application was opposed on 2 fronts. First, the Applicants contend that the 4th Respondent is non-existent. To begin with, when the Applicants filed the Main Application, they included the Ethics and Anti-Corruption Commission as the 4th Respondent. The question that begs is if the Applicants are of the view that the 4th Respondent is non-existent, why would they file an application against it? Having named the Ethics and Anti-Corruption Commission as the 4th Respondent in their own application, are they not then estopped from denying or challenging its existence? The Applicants cannot on the one hand acknowledge the existence of the 4th Respondent by filing the Main Application against the 4th Respondent but when the 4th Respondent files an application against them, they seek to have the same dismissed on the ground that the 4th Respondent does not exist.

13. Article 79 of the Constitution of Kenya 2010 provides:

Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

14. Pursuant to Article 79, Parliament did enact the Ethics and Anti-Corruption Commission Act which established the 4th Respondent, the envisaged independent commission with the status and powers of a commission under chapter fifteen of the Constitution. Section 3 of the Act provides:

(1) There is established an Ethics and Anti-Corruption Commission.

(2) In addition to the powers of the Commission under Article 253 of the Constitution, the Commission shall have the power to—

(a) acquire, hold, charge and dispose movable and immovable property; and

(b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution, this Act or any written law, as may lawfully be done or performed by a body corporate.

15. The definition of the Commission under the Anti-Corruption and Economic Crimes No. 3 of 2003 (ACECA) contained the word “Independent”. Section 2 of ACECA defined the Commission as:

“Commission” means the Independent Ethics and Anti-Corruption Commission established under [section 3](#) of the Independent Ethics and Anti-Corruption Commission Act, 2011 ([No. 22 of 2011](#)), pursuant to Article 79 of the Constitution;

16. Parliament later amended the name of the Commission in ACECA by removing the word “independent”. Section 36 of the Ethics and Anti-Corruption Commission Act amended Section 2 of ACECA as follows:

The Anti-Corruption and Economic Crimes Act, 2003 ([No. 3 of 2003](#)), is amended in [section 2](#), by deleting the definition of “Commission” and substituting therefor the following new definition—

“Commission” means the Ethics and Anti-Corruption Commission established under [section 3](#) of Ethics and Anti-Corruption Commission Act, 2011, pursuant to Article 79 of the Constitution.

17. If I follow the Applicants’ argument, they seem to suggest that the removal of the word “independent” from the name of the Commission in ACECA somewhat takes away the independence of the Commission contemplated by the people of Kenya when they promulgated the Constitution of Kenya, 2010. As such, the Applicants argue, the 4th Respondent is not the independent commission envisaged under Article 79 of the Constitution.

18. I have carefully taken a look at Article 79 of the Constitution. It required Parliament to enact legislation to establish ***an independent ethics and anti-corruption commission***. It must be noted that the indefinite article “an” precedes the commission referred to that would be established. Further, none of the words underlined is in capital letters. This then means that the commission to be established in the legislation to be enacted by Parliament did not necessarily have to be named the ***Independent Ethics and Anti-Corruption Commission***. The Commission did not also have to have the word “independent” as part of its name. Indeed Parliament could have called the commission ***“Tume ya Maadili na kupambana na Ufisadi”*** or any other name it deemed fit and still be in compliance with the requirement in Article 79. All that the people of Kenya required was that the commission to be established would be independent. If however Article 79 had the definite article “the” preceding the name, in initial capital letters of the commission and provided that ***Parliament shall enact legislation to establish the Independent Ethics and Anti-Corruption Commission*** then Parliament would have had no discretion or option but to name it such. When one looks at the commissions referred to in Chapter Fifteen of the Constitution, one notes that they are all referred to by name and are preceded by the definite article “the”. The names of those commissions are also in initial capital letters and can therefore only be changed or amended by means of a constitutional amendment.

19. Did Parliament satisfy the constitutional imperative in Article 79 of establishing an independent commission? The answer is in the affirmative. Parliament did clothe the 4th Respondent with independence from any person or authority. Section 28 of the Ethics and Anti-Corruption Commission Act provides:

28. Independence of the Commission

Except as provided in the Constitution and this Act, the Commission shall, in the performance of its functions, not be subject to

the direction or control of any person or authority.

20. In view of the foregoing, the argument by the Applicants that the 4th Respondent does not exist simply because its name does not contain the word “independent” is in my view a misapprehension of the import of Article 79 of the Constitution of Kenya, 2010.

21. The second front on which the Applicants oppose the application to transfer the Main Application to the ACEC Division in Nairobi is that this would violate their rights of access to justice and fair hearing. It will be costly for the Applicants as it will entail incurring travel and accommodation costs for the Applicants and their counsel. The Applicants contend that this Court has jurisdiction to hear the main Application.

22. Access to justice and the right to a fair trial are fundamental rights enshrined in Articles 48, 49 and 50 the Constitution of Kenya 2010. Indeed Article 25 clearly stipulates that the right to a fair trial is one of the rights which shall not be limited. The question this Court has to consider is whether the transfer of the Main Application to the ACEC Division in Nairobi will hinder the Applicants’ right to access to justice or limit their right to a fair trial or indeed delay the hearing and determination of the Main Application.

23. Direction 6 of the Practice Directions lists the matters that shall be heard by the ACEC Division. These include *inter alia*:

(c) cases relating to corruption and economic crimes filed under the following Acts:

(i) Ant-Corruption and Economic Crimes Act, Cap 65...

24. The matter herein relates to corruption and economic crimes. Direction 2 of the Practice Directions requires that all cases such as the present one involving corruption and economic crimes shall be filed in Nairobi:

All new cases relating to corruption and economic crimes shall be filed in the Principal Registry of the Division at Nairobi for hearing and determination.

25. The 2018 Practice Directions amended the 2016 Practice Directions. This followed the decision in Nairobi High Court Constitutional Petition No. 534 of 2016 Peter Wanyama Manyonge v Chief Justice of the Republic of Kenya & 5 others where the 2016 Practice Directions were challenged as unconstitutional for requiring that all matters be filed in Nairobi. The parties in the said Petition entered the following consent:

1. THAT the Practice Directions dated 9th December, 2016 vide Gazette Notice No. 10263: Rule No. 2 of the said Practice Directions be amended to allow the Chief Justice to establish sub registries outside Nairobi.

2. THAT upon such amendment being effected, the Petition herein be marked as settled.

3. THAT there be no order as to costs.

26. The 2016 Practice Directions were indeed amended vide Kenya Gazette Notice No. 7262 of 2018 being the 2018 Practice Directions. Direction 3 thereof provides:

The Chief Justice may establish additional Sub-registries outside Nairobi.

Regrettably, no sub-registry appears to have been established in Mombasa. This is what has prompted the 4th Respondent to file the present application for the transfer of the Main Application to the ACEC Division in Nairobi. The 4th Respondent argues that the requirement under Direction 2 is couched in mandatory terms.

27. Article 165(3) of the Constitution of Kenya 2010 confers upon this Court unlimited original jurisdiction in criminal and civil matters. Does Direction 2 have the effect of taking away the jurisdiction of this Court? In Ethics and Anti-Corruption Commission & another v William Baraka Mtengo & 4 others [2017] eKLR, Korir, J. had occasion to consider the argument that the Practice Directions have taken away the jurisdiction of the High Court. He observed:

The Respondent contends that the said Practice Directions have taken away the jurisdiction of this Court and that the Chief Justice has no power to take away jurisdiction from the High Court. I entirely agree with the Respondent that the Chief Justice has no authority whatsoever to take away jurisdiction from any court or to confer jurisdiction to any court.

28. The Chief Justice as head of the Judiciary has power under Section 16 of the High Court (Organization and Administration) Act to establish sub-registries of the ACEC Division and indeed full ACEC divisions outside Nairobi. The failure to do so has in my view the net effect of stripping the High Court in stations outside Nairobi of the jurisdiction conferred upon it by the Constitution.

29. Korir, J. went on to say in the William Baraka Mtengo case (supra):

Whereas the Constitution at Articles 48 requires that justice be accessible, the same Constitution at Article 159(2)(b) demands that justice shall not be delayed. The right to access justice ought to be balanced with the need to ensure that justice should not be delayed. As already noted the Practice Directions, were among other things, intended to aid the efficient and timely disposal of the matters identified therein. A special Division was, in my view, therefore necessary in order to attain those goals. A judge

engaged in hearing kinds of cases may not have room for prioritising the matters identified in the Practice Directions.

30. Direction 4 of the Practice Directions lays down the overriding objective of the Practice Directions which is the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes. The Main Application was filed on 24.4.19 and was on the same date certified urgent and a priority hearing date given. To now direct that the matter be transferred to the ACEC Division in Nairobi would in my view delay the hearing of the same. The intention of the Practice Directions to facilitate the efficient and timely disposal of the matter would be defeated. Corruption and economic crimes have become rampant in this country to the extent that there have been calls to declare corruption a national disaster. As long as sub-registries or divisions are not established outside Nairobi, the Practice Directions will not enhance the overriding objective but will do the exact opposite including increasing the costs of justice. The Practice Directions will also fly in the face of the constitutional imperative that justice shall not be delayed;

31. My conclusion is that allowing this application will militate against the overriding objective of the very practice directions relied upon by the 4th Respondent of the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes. For this reason I am constrained to disallow the Application dated 24.4.19. Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 3rd day of May 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the 1st Respondent**

..... **for the 2nd Respondent**

..... **for the 3rd Respondent**

..... **for the 4th Respondent**

..... **for the 5th Respondent**

.....**Court Assistant**