



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC REVISION NO 27 OF 2019

SHAKIL AHMED KHAN

NAZIR AHMED MATABKHAN

TORNARDO CARRIERS LTD.....APPLICANTS

VS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

(Being an application for revision with respect to Anti-corruption Case No. 6 of 2019)

RULING ON REVISION

1. The applicants have filed an application for revision by way of a letter dated 19th June 2019 from their Advocates, Kinyua Muyaa & Co. Advocates. Their Advocates state that the three applicants, who are the 17th, 18th and 19th accused persons in ACEC No. 6 of 2019 now pending before the Anti-corruption Court, have instructions to seek orders of revision, it would appear, of the case pending before the Magistrate's Court, on the basis that it is (an) incompetent, illegal, unconstitutional, vindictive and malicious prosecution.
2. The applicants also seek revision on the basis that there is no law or procedure in Kenya that immovable property in Kenya registered to a non-citizen may not be used as security by a surety to secure the release of an accused person. They ask that the applicants' bail terms be reviewed in the event that their prosecution is not quashed. The application is expressed to be brought under section 362 and 364 of the Criminal Procedure Code.
3. The Advocates for the applicants have set out in extensive detail the facts relating to the charges against the applicants. These charges arose in relation to acquisition of the 3rd applicant's land parcel L. R No. MN/VI/3801 by the National Land Commission (NLC). The charges relate to an award of Kshs 109,769,363, out of which a sum of Kshs 55,269,363 had been paid to the 3rd applicant, while a sum of Kshs 54,000,000.00 was paid to a firm of Advocates whose proprietor is charged alongside the applicants and officials of the NLC, in Anti-corruption Case No. 6 of 2019.
4. The applicants are charged with the offence of fraudulent acquisition of public property contrary to section 45(1)(a) of the ACECA. The property they are charged with acquiring is Kshs 55,269,363.00 belonging to the Kenya National Highways Authority (KENHA) as purported compensation for compulsory acquisition of land parcel number MN/VI//3801 while knowing that the said property is charged.
5. The present application, judging from the detailed contents of the letter seeking revision as well as the detailed submissions and revised submissions by their Counsel (I note that the applicants rely on both their initial submissions and the revised submissions) is effectively an application to stop the prosecution of the applicants. The applicants' Counsel, Mr Kinyua, has placed before the Court the decision of the Court of Appeal in **Prof. Njuguna S. Ndungu v EACC & 3 others (2018) eKLR** in support of the application.
6. He submits that this court has the jurisdiction, power and authority to stop the malicious prosecution. He further argues that the court has powers under sections 362 of the CPC which are so wide as to be unlimited in relation to proceedings that are ongoing before a subordinate court. Learned Counsel also goes into great detail on the charge sheet and the charges against the applicants, as well as the evidence that the prosecution intends to present before the trial court. He urges the court to consider cautiously any decision on revision that would tend to limit the powers of the High Court under section 362 of the CPC.
7. The respondent filed submissions in response dated 19th July 2019. It notes that the applicants had been given bond by the trial court,

which had been reviewed by this court, and the applicants had met the bail terms. It notes further that the applicants had already taken plea, and there was nothing irregular in the proceedings before the trial court. The respondent notes that what the applicants are challenging in the present application is the prosecutorial decision, which they allege is incompetent, unconstitutional, vindictive, and malicious.

8. The respondent takes the position that such a challenge can only be mounted by way of a judicial review application, not by way of an application for revision under section 362 of the CPC. The respondent further notes that the matters of fact raised in the application for revision, as well as the documents annexed thereto, form part of the prosecution's evidence which will be made available for scrutiny by the applicants in their defence, and by the court. It cannot be the subject of scrutiny by this court in an application for revision.

9. I have considered the application for revision and the submissions by the parties. The application is premised on sections 362 and 364 of the Criminal Procedure Code which, so far as is relevant for present purposes, provide as follows:

362. Power of High Court to call for records

The High Court may 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 passed, and as to the regularity of any proceedings of any such subordinate court.

...

364. Powers of High Court on revision

(1) In the case of a proceeding in a subordinate court the record of which has

been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c)...

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

10. I note that section 362 empowers the court to call for and examine the record of any criminal proceedings before any subordinate in order to satisfy itself as to the "correctness, legality or propriety" of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. In the case before me, there is no finding or order or sentence of the subordinate court in ACEC No. 6 of 2019 that has been placed before me as requiring revision.

11. As is evident from the applicants' application and submissions, as well as the decision in **Prof. Njuguna S. Ndung'u v EACC** (supra) relied on, the applicants are inviting the court to embark on an examination of matters that, in my view, it has no jurisdiction to do under section 362 or 364 of the CPC. They ask the court to enter into an examination, first, of the charges and evidence against them. Secondly, they want the court to consider the constitutionality, legality or otherwise of the decision of the Director of Public Prosecutions to prosecute them. This is an invitation that this court cannot accept.

12. Section 362 and 364, though they predate the 2010 Constitution, have received constitutional underpinning in Articles 165(6) and (7) which provide that:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may 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 the fair administration of justice.

13. The constitutional mandate and the powers of revision under section 362 and 364 do not, with respect to Counsel for the applicants, extend to overreaching in terms of jurisdiction in the manner suggested by the applicants. There is a very clear limit to what the powers of revision under section 362 extend to. They do not extend to examination of the charges or evidence, or to an examination of the question whether the office of the DPP, in which the state powers of prosecution are vested by the Constitution, were properly exercised.

14. As observed by Counsel for the applicants when the parties appeared before the court and as emerges from their two sets of submissions and the letter seeking revision, the bulk of the application challenges the prosecutorial decision, the argument being made centred on the contention that the decision to prosecute was made by an accountant at the EACC instead of a lawyer.

15. I accordingly find that the application for revision is without merit, and I decline to exercise powers under section 362 and 364 of the CPC. The application for revision is accordingly dismissed.

Dated and Signed at Nairobi this 2nd day of October, 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Nairobi this 3rd day of October 2019

JOHN ONYIEGO

JUDGE