



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC MISCELLANEOUS NO. 6 OF 2018

**IN THE MATTER OF: AN APPLICATION BY WILSON KIPKOTI FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI
& MANDAMUS**

IN THE MATTER OF: THE ETHICS AND ANTI CORRUPTION COMMISSION

RULING

1 By a chamber summons dated 12th February 2018, the ex parte Applicant **Wilson Kipkoti** moved this court under Order 53 Rule 1 Civil Procedure Rules section 7 of the Fair Administration Act seeking the following orders:

2 *Leave be granted to the applicant herein to apply for Judicial review orders of*

(a) An order of CERTIORARI to bring into Court and quash the decision of the Secretary/Chief Executive officer, Ethics and Anti-Corruption Commission to summon the Applicant, Wilson Kipkoti for purposes of interviewing and recording statements pursuant to the letter dated 12th January, 2018.

(b) An order of PROHIBITION preventing/restraining the Secretary/Chief Executive Officer, Ethics and Anti-corruption Commission (or any other person acting on his behest) from summoning, interviewing and/or recording the statement of Wilson Kipkot, pursuant to the letter dated 12th January, 2018.

3 *The costs of this application abide the result of the Notice of Motion hereinafter.*

The application is supported by the supporting affidavit and a further affidavit of the ex parte Applicant and a statement.

2 The Respondent filed a Replying affidavit with authorities in opposing the application, while the ex parte Applicant filed written submissions and the respondent only did oral submissions.

The Ex parte Applicant's case

In his supporting affidavit the ex parte Applicant states that the Respondent vide a letter dated 12th January 2018 (W-1) which was received on 15th January 2018 invited him to report to its premises on 17th January 2018. This was for purposes of interview and recording a statement in respect to land reference 209/6238 IR no 74856. That the said letter made mention of a civil case no 42 of 2007 pending before the Court which he was not aware of. He said he only knew about the case Nairobi ELC case no. 5 of 2008.

3 He deponed that he was not able to attend to the Respondent's invitation due to the short notice (W-2). He was however concerned that the Respondent was summoning him to interrogate him over the land in issue which is the subject matter in ELC case No. 5 of 200 which case had already undergone the pre-trial conferencing procedures and had a hearing set for 26th June, 2018.

4 He expressed fears of intimidation and even arrest by the Respondent. He further averred that the Respondent is through the said summons looking for evidence to seal the loop holes in its case. He states that he is the director of Standard Assurance Co. Ltd (currently in liquidation) which is the registered owner of the suit property having purchased the same for value.

5 Ms Kweng and Co advocates for the *ex parte* Applicant filed written submissions dated 13th June 2018. Through them a background to this matter was given showing how the land was acquired by Standard Assurance Ltd. Reliance was placed on the case of **George Saitoi vs Judicial Commission of inquiry into the Goldenberg Affair and Others [2016] eKLR**. It was submitted that the investigations involving the land had taken a very long time just as was the case in the above cited matter.

6 This to them was a violation of the exparte Applicant's rights to a fair and legitimate expectation of an efficient and fair administrative action. During the hearing Mr. Cheboi submitted that the letter by the Respondents CEO summoning the Applicant over the land in issue was tainted with malice. The reason being that the Nairobi ELC NO. 5 of 2008 had been set down for hearing. Secondly, the Respondent had for over 10 years not summoned the Applicant and there was no basis for issuance of the summons for interrogation.

THE RESPONDENT'S CASE

7 The Respondent filed a replying affidavit by Adulhamid Farooque Low a forensic investigator with the Respondent and a member of the team investigating the matter herein. He referred to the respondent's mandate under Article 79 of the Constitution, the Anti-corruption and Economic Crimes Act 2003, (ACECA) and Ethics and Anti Corruption Commission Act 2011 (EACCA). He averred that in 2006 the defunct Kenya Anti Corruption Commission investigated the matter in issue and orders preserving the property were obtained vide **Misc Application No 42 of 2007 Kenya Anti Corruption Commission vs Wilson Kipkoti & 4 Others (EAAC 1 and 2)**

8 He stated further that after investigations the Respondent on 14th January 2008 instituted a suit for recovery of this property (Nairobi ELC No 5 of 2008 EACC 3). At para 18 of the affidavit he states what the findings by the Respondent were in respect of this property. That the said investigations revealed a criminal element touching on the Applicant which led to the opening of the present investigation/inquiry. He confirmed that the Respondent summoned the Applicant in conformity with Article 47 of the Constitution but he has never appeared to date for purposes of the investigations.

9 M/s Jemtai submitted that the application was premature as no leave had been granted. She relied on the replying affidavit which she said had set out the whole background. That after compliance with Order 11 Civil Procedure Rules forensic investigations in the matter took off. There was no demonstration of an illegality in the decision to summon him she said. She submitted that the decision was not irrational nor ultra vires.

10 She further submitted that there was no danger of arrest awaiting the Applicant to warrant the intervention of this court. She referred to the authorities filed and made mention of **the Joshua Chelego Kulei v Republic & 9 Others [2014] EKLK case.**

11 In a rejoinder Mr. Cheboi submitted that the interrogation sought of the exparte Applicant ought to have been done long time ago.

DETERMINATION

12 I have considered the application, affidavits and the submissions by both counsel. The applicant seeks leave to apply for Judicial Review orders of Certiorari and prohibition. The certiorari order is to quash the Respondent's decision to summon him for purposes of interviewing him in respect to L.R. 209/6238 I.R No 74856 (Kilimani Nairobi). The prohibition order is to restrain the Respondent from summoning, interviewing and/recording any statement from the Applicant.

13 The genesis of this application is a letter dated 12/1/2018 (W-T) from the respondent to the Applicant's Counsel. It sought to have the Applicant go to the Respondent's offices for interview and recording of a statement in respect to some property being L.R. 209/6238 IR No. 74856 (Kilimani Nairobi).

14 It is not disputed that this property is the subject of Nairobi ELC NO. 5 of 2008. The said matter before the Nairobi ELC is a substantive suit seeking various orders in respect to the said property including cancellation and/ or revocation of title documents.

15 The summoning of the Applicant by the Respondent is in respect of investigations related to the said land.

16 There is no dispute that the Respondent indeed invited the Applicant to its offices for interrogation and probable recording of a statement. He has not complied with the summons. Since this application is only for leave to file a Judicial Review application I would not wish to make any determination which would result in the determination of the substantive application.

17 I therefore grant the leave sought by the Applicant. Owing to the fact that this matter has been pending for quite sometime, I direct that the Applicant files and serves the substantive Motion within 7 days.

(b) The Respondent to file and serve its response within 7 days of

service of the motion.

(c) The Applicant to file and serve a further affidavit (if need be) within 3 days of service of the Respondent's response.

(d) Application to be heard on 18th October 2018.

Orders accordingly.

Dated signed and delivered this 20th day of September 2018 in open court at Nairobi.

HEDWIG I. ONG'UDI

JUDGE