



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION & ECONOMIC CRIMES DIVISION

CRIMINAL REVISION NO 13 OF 2018

- 1 PROF. MUHAMMEDABDALLA SWAZURI...APPLICANT/1ST ACCUSED
- 2 DR. SALOME LUDENYI MUNUBI.....2ND ACCUSED
- 3 TOM AZIA CHAVANGI.....3RD ACCUSED
- 4 FRANCIS KARIMI MUGO.....4TH ACCUSED
- 5 ATANAS KARIUKI MAINA.....5TH ACCUSED
- 6 VICTOR WAHOME KARIUKI.....6TH ACCUSED
- 7 ELIJAH MWENDA NYAMU.....7TH ACCUSED
- 8 JOHN MWANGI MWANIKI.....8TH ACCUSED
- 9 CAROLINE NABLAYO KITUYI.....9TH ACCUSED
- 10 PETER NO. NGANGA MBURU.....10TH ACCUSED
- 11 GRADYS MWIKALI MUYNGA.....11TH ACCUSED
- 12 OBADIAH MBUGUA WAINAINA.....12TH ACCUSED
- 13 DAVID BARNO SOME.....13TH ACCUSED
- 14 ESTHER FURA SOME.....14TH ACCUSED
- 15 DASAHE INVESTMENT LIMITED.....15TH ACCUSED
- 16 KEIBUKWO INVESTMENT LIMITED.....16TH ACCUSED
- 17 OLOMOTIT ESTATE LIMITED.....17TH ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Prof Muhammad Abdalla Swazuri the Applicant brought this application by way of Notice of Motion under section 123(3) and 362 of the Criminal Procedure Code (CPC), section 10 of the National Lands Commission Act, (NLCA) section 62(6) of the Anti Corruption & Economic Crimes Act (ACECA), Articles 49(1) (h); 67, 165(6) and (7), 248(2) (b), 249(2) 250(b), 251 and 252 of the Constitution seeking

the following orders:

(2) That this Honourable court be pleased to call for an 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 bail terms issued and imposed on 13th August 2018 and subsequently reviewed/set aside by an order made on 28th August 2018

(3) That the Honourable Court be pleased to set aside the orders made on the said 13th August 2018 and 28th August 2018 imposing bail terms on conditions that constructively constitute the removal and/or suspension of the Applicant from office and allow unrestricted access of the Applicant to his place of work being a constitutional office.

(4) Any other relief that this honourable court shall deem fit to grant in lieu of (3) above.

(5) Cost of this application be provided for.

2. The application is supported by the fifteen (15) grounds on the face of the application plus the Applicant's supporting affidavit. The Applicant's counsel Prof Ojienda filed written submissions and a list of authorities.

3. In opposing the application the Respondent filed a replying affidavit by Jacinta Nyamosi a senior assistant director with the office of the DPP and one of the counsel in conduct of this matter. She also filed submissions and a list of authorities.

The Applicant's case

4. The Applicant is the Chairman of the NLC since February 2013 and his term ends in 2019. He states that he was arraigned in the Chief Magistrate's Court Nairobi on 13th August 2013 in respect to ACC No 33/18 where he was granted bail with conditions. One of the conditions was that he does not access his office unless accompanied by a Police officer and with authorization from the Investigator. This he says amounts to his removal and/or suspension from office in violation of section 62(6) of ACECA, section 10 NLCA article 248(2)(b), 250(6), and 251 of the Constitution.

5. He avers that being a Constitutional office holder he can only be suspended and/or removed from office through the laid down procedure. He has deponed that since none of the processes set out in the above listed provisions of the law have been complied with he cannot be barred from accessing his office.

6. On 22nd August 2018 he sought to have the bail terms reviewed and the trial Magistrate on 28th august 2018 partially allowed his application and gave the following orders:

“The Applicant obtains a prior authorization by the person exercising the duties of the secretary/CEO of the commission authorizing access after due consultations with the investigative agency in this case.”

He says this was despite the fact that investigations had been concluded.

7. He laments that the bail terms have subjected him to the authority of the CEO and EACC itself. That he has further been estopped from carrying out his constitutional mandate by the CEO and administrative officers.

8. Prof Ojienda in his submissions in support of the application contended that none of the conditions imposed by the trial court have been complied with, as the EACC has not authorized access. He submitted that in interpreting article 49 (1) (h) as he had been called to do, Hon. Mugambi Chief Magistrate failed to consider section 62(6) ACECA, section 10 NLCA, articles 248(2)(b), 250 and 251 of the Constitution. Counsel submitted that the Applicant is covered by the last part of section 62(6)ACECA which shields him from suspension. He referred the court to the process of removal and suspension of a commissioner under articles 251 and 252 of the Constitution. He argued that by being stopped from attending to his duties by virtue of the bond terms imposed the Applicant had been suspended by the trial court. Further that he had been reduced to an employee of the Commission and made to be subject to his investigator.

10. Counsel further submitted that investigations were concluded, and the Applicant could not be subject to the EACC. He referred the court to the case of **Republic vs Speaker of the National Assembly and 4 Others exparte Edward R.O Ouko [2017] eKLR**

On the need to safeguard the independence of constitutional offices counsel referred to various authorities namely:

- Constitutional Application no. 2 of 2011 – Re: The Matter of the IEBC [2011] eKLR

-Petition No 230 of 2015 – Engineer Michael Sister, Mwaura Kamau & Others vs EACC and Others

11 He finally urged the court to review the bond terms of the Applicant arguing that the Applicant's failure to attend to his office had paralysed operations at the NLC.

The Respondent's case

12. The Respondent relied on the replying affidavit by Jacinta Nyamosi. She averred that the terms of bail given by the trial court did not

amount to a suspension or removal from office of the Applicant or any other accused person. She admitted that the Applicant is not subject to section 62(1) of the ACECA by virtue of section 62(6) of the same Act.

13. She deponed that upon review of the bond terms vide the Ruling of 28th August 2018 the Court ruled that the Applicant required a prior written authorization by the Secretary/CEO of EACC after consultations with the investigative agency. She said this was due to the fact that the Applicant's office remained an essential part of the crime scene as most of the witnesses are his juniors. The terms given were according to her lenient, and reasonable given the circumstances.

14. She averred that the Magistrate's order is not a violation of Article 249(2) or any other provisions of the Constitution and neither does it belittle the Applicant's office. That he has not demonstrated any difficulty in the exercising of his mandate while complying with the bond terms, nor has he shown why the trial court's discretion in this matter should be faulted.

15. Mrs Obuo for the Respondent submitted that the prayers sought do not meet the requirements of the provisions of section 362 CPC. Further that the trial court clearly stated it had not suspended the Applicant. She argued that section 10 NLCA among other provisions refer to removal of a person which was not the case here.

16. Mr. Owiti also for the Respondent submitted that the Applicant was not sure of what he wanted. The reason being that he had an application dated 20th September 2018 before the trial court seeking to cite several persons for non-compliance which meant that the orders by that court are proper. It was his submission that the orders complained of are in line with article 49(1)(h) of the Constitution. That the word to be marked is **Reasonable Conditions**.

17. He contended that section 362 CPC requires 3 things of this court i.e **whether the conditions are proper, legal and correct.**

In answer to this he submitted that the trial court has power to grant bail which it did; conditions were given. To the Respondent everything was properly done. Counsel argued that denial of bail did not amount to removal from office, and gave the example of the removal of a Governor. The fact that one was not able to avail security did not amount to removal from office.

18. He finally submitted on the issue of the exercise of discretion by the trial court. He contended that there were no material facts ignored by the court to make this court interfere with the exercise of discretion by the trial court. He referred to the following cases to support this submission.

-Child Welfare Society of Kenya v Republic & 2 Others exparte Family Focus Kenya (Civil A12); [2017] eKLR

-Edward Kiprop Langat v Republic (Criminal Revision 775 of 2018); 2018 eKLR

-Silas Mwithalii M'Mauta v Republic Revision 301 of 2017/; 2018 eKLR

19. Mr Okubasu for the Applicant in a rejoinder submitted that the word suspend actually meant constructive removal. That the reasons for denial of bail are not the same as conditions for bail. He added that they disagreed with the lower court order but it still has to be complied with hence their application before that court.

20. He submitted that the lower court in this case refused to comply with Article 27 of the Constitution. That the order of the court was to veto the exercise of Constitutional authority by the EACC. He argued that the Governor's matter was under the Penal Code while the Applicant's matter is under ACECA. In other words the two matters cannot be considered to be on the same footing.

Determination.

21. I have considered the application, affidavits, submissions and cited authorities. This application arises from two rulings delivered by Hon. Mugambi in Nairobi Chief Magistrate's Anti Corruption case no 33 of 2018 on 13th August 2018 and 28th August 2018 respectively. The orders complained of were made pursuant to an application for bail/bond for the Applicant herein and others and subsequently an application for review of the ruling of 13th August 2018.

22. In its ruling of 13th August 2018 the learned trial magistrate made the following orders:

“For 1st and 2nd accused who face more charges, each faces at least seven counts, as well as accused A13, 14, 15 who faces at least six count each; they shall be released with executing a bond (six million) for a surety of like amount or in the alternative each shall deposit cash bail of Kshs. Three million five hundred thousand only (3.5) million.

(i) As for accused A3, 4, 5 and 16. Nos. 12, 6, 7, 8, 9, 10 and 11 who face count 1 and XIX only and separate alternative counts, each shall be released on a bond of Kshs 3,000,000 (three million) plus a surety of like amount or an alternative of Kshs One million five hundred thousand (1.5) million each.

(ii) They shall further be required to deposit their passports with the court.

(iii) For public officers who have been in office, they are hereby ordered to keep off their offices unless accompanied by police officers and upon prior arrangement with the new management of those institutions.

(iv) The accused person shall not make contact either by themselves or through proxies with witnesses whom they shall be aware of.

Orders accordingly”.

23. After hearing all counsel on the review application dated 22nd August 2018 the learned trial magistrate stated as follows:

“The condition requiring that accused be accompanied by police officer appears to have been misconceived. However, it is a condition which in my view is still relevant for reasons explained in the foregoing. The court considers that since the essence is to safeguard evidence by reducing the frequency of contact with witnesses or any possible suppression of evidence to ensure credibility of the judicial process, an order modifying the same to make it less onerous is necessary. The order to have police escort every time they make visit to their offices is vacated and replaced with the following:

1 For public officers who do not hold Constitution Offices; they are hereby barred from accessing their offices unless there is prior written authorization by the respective Heads of departments who shall be notified to the Investigative agency in advance of any such visit so that if a need arises for any arrangements to minimize contact with the witnesses who will testify against the accused or secure any other evidence appropriate measures can be taken in that regard.

2 For the Constitution office holders, the 1st accused, who has been at the helm of the NLC and indeed any other “Constitutional office holder for that matter, a prior written authorization by the person exercising the duties of the Secretary/CEO of the Commission, who is also not an accused in this case, authorizing access after due consultations with the investigative agency in this case so that any appropriate arrangements can be made to ensure contact with witnesses who are expected to testify against the accused is minimized and/or any other form of evidence secured.

24. There is no dispute that the Applicant is the Chairman of the National Land Commission (NLC) which is a Constitutional office, under article 248 of the Constitution. Article 251 of the Constitution sets out the procedure for removal of a member of a commission or independent office holder. There is also no dispute that there is no petition for removal of the Applicant as a member and chair of the NLC, as provided for under Article 251(2)(3)(4) and 252(2).

25. It has however been the submission by Counsel for the Applicant that the condition imposed by the trial court on the bond in respect to the Applicant amounts to a removal or suspension from office, through the back door. It is in light of this interpretation of the condition by the trial court that this application has been filed.

26. Section 362 Criminal Procedure Code provides:

“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”..

Article 165 (6) provides:

“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.”

Article 165 (7) provides:

“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”

27. In line with the above provisions this court has called for the lower court file to satisfy itself of the **correctness, legality or propriety** of the orders that were made on 13th and 28th August 2018 respectively. The issue that falls for determination is whether the issues raised herein fall for determination under section 362 of the Criminal Procedure code.

28. Article 49 (1) (h) provides:

(1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

29. The constitution provides that the bail or bond be on reasonable conditions. Neither the “Constitution nor CPC sets down the conditions to be given by the court. Section 123A (1) CPC however provides as follows:

(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

- (a) the nature or seriousness of the offence;
- (b) the character, antecedents, associations and community ties of the accused person;
- (c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;
- (d) the strength of the evidence of his having committed the offence

30. It is therefore clear that the court granting bond exercises discretion in either giving or not giving any conditions upon granting the said bond. The trial court must however consider all the relevant circumstances as it exercises that discretion.

Can an appellate court interfere with such discretion of the trial court at will whether *suo moto* or on application? In the case of **Mbogoh & Anor v Republic [1968] EA 93 Sir Clement de Lestang V.P** stated this:

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

32. In the same case **Sir Charles Newbold** the Court President stated:

“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the judge in exercise his discretion(sic) has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis justice.”

33. The orders by the learned trial magistrate show that he appreciated that:

- (i) The Applicant is a Constitutional office holder.
- (ii) That the court could not remove or suspend the Applicant from his office at NLC. He further stated that the orders he gave were meant to safeguard the integrity of the process before the court and not to remove the Applicant.

34. The issue that follows is whether the condition requiring the Applicant to seek authority from the Secretary/CEO amounts to a removal/suspension from his office. Besides what he is complaining about the Applicant has not been denied his emoluments and all other privileges that go with his office. He cannot therefore say he has been removed or suspended.

35. His issue is therefore his inability to conduct the affairs of his office because he has to seek written authority from the EACC, and the said authority has not been forthcoming. What must be appreciated is that unlike other public officers who are suspended upon being charged with corruption and economic crimes related offences, Constitutional office holders like the Applicant are exempted by virtue of section 62(6) of ACECA which provides:

“This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated”

Such officers may only be removed or suspended upon Article 251 being complied with.

36. Section 10 of the NLC Act provides:

The office of the chairperson or a member shall become vacant if—

- (a) the holder—
 - (i) dies;
 - (ii) by notice in writing addressed to the President, resigns from office;
 - (iii) is convicted of a felony;
 - (iv) is absent from three consecutive meetings of the Commission without justifiable cause;
 - (v) is removed from office under any of the circumstances specified in Article 251(1) of the Constitution; or
 - (b) the term of office of the holder expires.
- (2) The President shall publish every resignation, vacancy or termination in the Gazette within seven days of such resignation,

vacancy or termination.

The matter before the Magistrate's court has yet to be determined hence the inapplicability of the above section to the Applicant herein. He therefore remains in office.

37. It is a fact that the charges facing the Applicant in ACC case no 33 of 2018 arise from his operations at the NLC. Some of the witnesses are staff at the NLC and are obviously his juniors. I understand the trial court to mean that there could be fears of interference with the junior officers who are witnesses hence the need to secure the credibility of the judicial process.

38. I appreciate this concern by the trial court but add that the securing for this credibility must be done within the confines of the Law and Constitution. In the instant case the investigating agency is EACC. The office supposed to give the authorization is the Secretary/CEO of EACC. The order further states that the Secretary/CEO shall give the authorization after due consultation with the EACC. This in fact is where the problem lies.

39. What happens if any of these two parties refuses to have the authorization given? It would mean the Applicant does not go to the office. It has been submitted by counsel for the Applicant Prof Ojienda that following this condition of authorization set by the trial court, the Applicant has not been able to discharge his duties as the Chairperson of NLC.

40. I find a big conflict of interest in the operation of the order by the learned trial magistrate. This is because the Secretary/CEO of EACC and the investigating agency (EACC) could be seen to be controlling the affairs at the NLC yet both EACC and NLC are independent commissions. See Re; **The matter of the Interim Independent Electoral Commissions [2011] eKLR** at paras 59-60 on the purposes and workings of independent commissions.

41. Assuming for a minute that the Applicant wanted to be in his office every day would it be practical for the Secretary/CEO EACC and the EACC to be consulting and issuing authorization on a daily basis? The answer is NO. It was submitted that the investigations into this matter are complete. That being the position it means that the case is ripe for hearing and all that is required is to safeguard against witness interference.

42. From my analysis above and especially on the issue of the operationalization of the Order in respect of the Applicant, I am satisfied that the trial court did not assess the practical impact of the orders it gave in respect to the Applicant. I therefore find that section 362 CPC is applicable in the circumstances of this case. This is for the purposes of making it practical for the Applicant to carry out his official duty and not earn a full salary for doing nothing.

43. I therefore set aside the order complained of and substitute it with an order directing the Applicant to make an undertaking not to interact and/or interfere with the witnesses at his work place or any other witness. He will also undertake not to interfere with the records and/or documents relevant to the case at hand. Failure to comply will lead to automatic cancellation of his bond.

Orders accordingly.

Dated, signed and delivered this 1st day of November 2018 in open court at Nairobi.

HEDWIG I. ONG'UDI

JUDGE