



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC MISC NO. 41 OF 2018

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 21(1)(2) & (4)23, 24,25(C), 27(1), 28, 33(3), 38, 48, 196(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE LAW REFORM ACT, SECTION 8 AND 9 CAPS 26

IN THE MATTER OF: THE LEADERSHIP AND INTEGRITY AT NO 19 OF 2012

AND

IN THE MATTER OF: ANTI CORRUPTION ND ECONOMIC CRIMES ACT 2003

AND

IN THE MATTER OF: ETHICS AND ANTI CORRUPTION COMMISSION AT NO 22 OF 2011

AND

IN THE MATTER OF: THE COUNTY ASSEMBLIES POWERS AND PRIVILEGES ACT NO 6 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

VS

ETHICS AND ANTI CORRUPTION COMMISSION.....RESPONDENT

AND

NAIROBI CITY COUNTY ASSEMBLY1ST EXPARTE APPLICANT

HON MARGARET W. MBOTE.....2ND EXPARTE APPLICANT

HON PETER W. KIMUHU.....3RD EXPARTE APPLICANT

HON JACOB NGWELE.....4TH EXPARTE APPLICANT

HON HABIBA HASSAN.....5TH EXPARTE APPLICANT

HON ESTHER NYANGWESO.....6TH EXPARTE APPLICANT

HON EVE MURENYA.....7TH EXPARTE APPLICANT

HON JOSEPHINE KAMAU.....8TH EXPARTE APPLICANT

HON BERLY OGUTA.....9TH EXPARTE APPLICANT

JUDGMENT

1. By way of Notice of Motion dated 26th September 2018 the Applicants moved the court seeking the following orders.

a. That the Honourable court be pleased and do hereby grant judicial review order of CERTIORARI to remove into this Honourable court and quash the summons dated 11th September 2018 by the Ethics and Anti-Corruption Commission summoning the 2nd -9th Applicants for investigation on 24th and 25th September 2018 over alleged bribery allegedly undertaken in the course of performance of their duties within the precincts of Nairobi City County Assembly.

b. That the Honourable court be pleased and do hereby grant judicial review order of PROHIBITION to remove into this Honourable court and prohibit the Ethics and Anti Corruption Commission from summoning the 2nd-9th Applicants for investigation on 24th and 25th September 2018 over alleged bribery allegedly undertaken in the course of performance of their duties within the precincts of Nairobi City County Assembly.

c. That the Honourable court be pleased and do hereby grant judicial review order of PROHIBITION to remove into this Honourable court and prohibit the EACC from purporting to investigate the 2nd to 9th Applicants over alleged bribery allegedly undertaken in the course of performance of their duties within the precincts of Nairobi City County Assembly.

d. That costs of and incidental to this application.

e. That such further and other reliefs that this HONOURABLE court may deem just and expedient to grant.

2. The Notice of Motion is premised on the grounds in the statutory statement, verifying affidavit of Ahmed Siro Makokha and the grounds on the face of the application. The 2nd -7th Applicants are members of the County Assembly of the Nairobi County Assembly, whereas the 8th and 9th Applicants are employees of the said County Assembly.

3. This application was triggered by a letter by the Respondent dated 11th September 2018 and addressed to the clerk of 1st Applicant giving notice for provision of information under section 27 of the Anti Corruption and Economic Crimes Act (ACECA). There was an allegation of bribery at the Nairobi City County Assembly being investigated. The letter further summoned the 2nd-9th Applicants between 24th and 25th September 2018. The bribery claims were in respect to an award of the health insurance contract to AAR health services (ASM1)

The Applicants case

4. The Applicants accuse the Respondent of acting illegally by summoning them, before first submitting them to the jurisdiction of the Committee of Powers and Privileges. That the alleged bribery was allegedly undertaken in the course of performance of their duties within the precincts of the 1st Applicant.

5. They claim that the summons is a violation of their legitimate expectation and an abuse of power by the Respondent in terms of article 196 (3) of the Constitution. That the Respondent's action of summoning them is ultra vires sections 15, 16 and 17 of the County Assemblies Powers and Privileges Act.

6. Mr Makokha for the Applicant submitted that their first issue is on the powers and privileges of the committee of the County Assembly. It was his argument that the County Assembly Privileges Act provides for the procedure in a matter of this nature. That the committee endowed with power to investigate should be allowed to carry out this complaint. He referred to several matters/scandals which had been investigated by the Senate Powers/Privileges Committee, and asked that the same be applied to this matter.

7. He further submitted that a complaint was lodged together with a video to the EACC by Hon. Sonko the Governor of Nairobi City County. The audio transcript he contends are not admissible in law, as the court has not listened to it nor have they. They have not even seen it. It was therefore his prayer that the Applicants be first investigated by their committee which is in place.

8. Mr Andere also for the Applicants submitted that the committee can recommend for prosecution once investigations are done. See **Republic v National Assembly Committee of Privileges and 2 Others Ex parte Ababu Namwamba [2016] eKLR**. That the duties of such committee have been outlined in the case of: **In the matter of Interim Independent Electoral Commission [2011] eKLR**.

9. He further submitted that for purposes of good order the EACC should not interfere with the work of the Powers/Privileges Committee. He referred to:

i. Rosemary Mulee v County assembly of Machakos & Another [2016] eKLR

ii. County Government of Kiambu & Anor v Senate & Others[2017]eKLR

10. Further he submitted that the doctrine of separation of powers must be observed by all means. To support this he referred to the Supreme Court case of **Justus Kariuki Mate & Another v Martin Nyaga Wambora & Anor [2017] Eklr**. In reference to the cases of **Suchan Investment Ltd v Ministry of National Heritage & Culture & 3 Others [2016] eKLR & Republic v Kenya Revenue Authority exparte Tom Odhiambo Ojienda SC t/a Prof Tom Ojienda & associates [2018]eKLR** Counsel submitted that the two cases speak of an expansion of the powers of Judicial Review to look at the evidence in the matter.

11. Counsel in response to Mr. Murei's submissions contended that the EACC and the committee could not be allowed to perform similar duties. Further that investigations can still be challenged. Mr Andere argued that as per Misc. application No 362 of 2014 (supra) the freedom of speech is privileged and privilege in Parliament is a corporate right. That the action of the Respondent violated the Applicants rights under articles 29 and 47 of the Constitution.

The Respondent's case

12. The Respondent filed a replying affidavit by Mr Ditin Musi an investigator with the Respondent. He averred that on or about 19th June 2018, the respondent received a complaint from the Governor Nairobi City County alleging bribery against AAR health/services and Members of Nairobi County Assembly (**Letter EACC1**). Alongside the letter was an audio recording of a press address by a member of the Labour and social welfare committee. He annexed a transcript (EACC 2).

13. He further deponed that all the Applicants save for the 3rd and 5th exparte Applicants responded to the summons and have recorded their statements. Those who have recorded statements are clear in their statements that they have been enjoined in these proceedings without their consent.

14. The Respondent has conducted investigations which have revealed elements of bribery. That the summons were not meant to condemn anyone. Further that the immunities and privileges of members as provided for under sections 8 and 11 of the County Assemblies Powers and Privileges Act No 6 of 2017 as read with section 16 and 17 of the County Governments Act does not apply to the conduct attributed to the exparte Applicants.

15. It was his position that the Respondent was acting well within its jurisdiction, and should be allowed to carry out the investigation to the end.

16. Mr Murei for the Respondent submitted that in Judicial Review applications the court looks at 3 things namely:

- Illegality
- Irrationality
- Breach of the Rule of Natural justice

That this court was being asked to stop an investigation and not a prosecution.

17. Referring to the replying affidavit by Musi he submitted that the basis of the complaint is a recorded video clip. Further that the complainant is the Governor Nairobi and the issues raised are weighty since they revolve around bribes. He contended that section 17 of the County Powers/Privilege Act outlines what the committee may do.

18. It was his submission that the Respondent was not in competition with the Committee as the work they do is so different. Receipt of a bribe is not one of the privileges envisaged. He referred to the case of **Francis Matheka and 9 Others Misc ApplicationNo 362 of 2014 [2015]eKLR** para 52-56; (ii) **Hon Elizabeth Manyalla & 12 Others v AG & EACC ACEC Misc application No 42 of 2016** to buttress this submission.

19. He further submitted that immunity is not meant to cover unlawful acts, and referred to the cases of (i) **Abdulkadir Athmani Salim El Kindy vs DPP & EACC Pet No 181 of 2016 [2017]eKLR**. (ii) **Republic vs EACC exparte County Assembly of Homa Bay, Homa Bay Judicial Review No 2 of 2018**. He finally submitted that the applicants could not turn criminal activities into privileges. He added that the 3rd and 5th Applicants had not recorded statements with the EACC.

Determination

20. I have considered the application, affidavits, and submissions and authorities herein. The issues I find falling for determination are:

- i. Whether bribery is a privilege under the County Assembly's Powers and Privileges Act.
- ii. Whether EACC can investigate bribery allegations against members of the County Assembly.

21. There is no dispute that the 2nd-7th exparte applicants are Members of the County Assembly of Nairobi City County while the 8th and 9th exparte applicants work for the said County Assembly. There is also no dispute that the Respondent received a letter of complaint from none other than the Governor of Nairobi City County into bribery allegations. The allegations were against some Members of County Assembly of the Nairobi City County Assembly. The letter requested the Respondent to carryout out investigations into the same. Does EACC have the

mandate to carry out investigations?

22. The EACC is a creature of article 79 of the Constitution which 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.”

23. Chapter six which the Respondent enforces mainly deals with leadership and integrity issues relating to state officers, a category in which majority of the Applicants fall. Under article 252(1) the Respondent has the mandate to conduct investigations on its own initiative or on a complaint made by a member of the public.

24. Similarly under section 11(1)(i) of the Ethics and Anti-Corruption Commission Act the Respondent is endowed with the following mandate

“(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—

i. subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and

Section 3 of the Bribery Act 2016 provides:-

“The Commission shall be responsible for the enforcement this Act”

The commission under the said Act refers to the Ethics and Anti Corruption Commission.

25. Article 196(3) of the Constitution has been implemented through the enactment of the County Assemblies Powers & Privileges Act No 6 of 2017. The Act creates a committee called “the committee of Powers and Privileges” under section 15(1) of the said Act. Section 15(5) of the said Act provides:

5) The Committee of Powers and Privileges shall, either of its own motion or as a result of a complaint made by any person, inquire into the conduct of a Member whose conduct is alleged to constitute breach of privilege in terms of section 16, within fourteen days of receipt of complaint.

(6) The Committee of Powers and Privileges shall, within fourteen days of the conclusion of an inquiry, table its findings in the relevant county assembly together with such recommendations as it considers appropriate.

Section 28 of the same Act provides:

(1) A person shall not, by fraud, intimidation, force, insult or threat of any kind, or by the offer or promise of any inducement or benefit of any kind, or by any other improper means—

(a) influence a member in the performance of the member's functions as a member;

(b) induce a member to be absent from a county assembly or a committee at a particular time; or

(c) attempt to compel a member to declare himself or herself in favour or against a matter pending before or proposed or expected to be submitted to a county assembly or a committee.

(2) A member shall not solicit, receive or accept any fee, compensation, gift, reward, favour or benefit of any kind for the member or another person in respect of—

(a) voting in any particular manner or not voting on a matter before a county assembly;

(b) promoting or opposing anything pending before or proposed or expected to be submitted to a county assembly; or

(c) making a representation to a county assembly.

(3) A person who contravenes this section commits an offence.

26. It is the Applicant’s submission that the issue at hand falls under the preview of the Committee of Powers and Privileges which should be left to it to deal. They further argue that if the Respondent investigates this matter it will be violating the doctrine of separation of powers as stated in the case of Justus Kariuki Mate (supra). Secondly it will be doing double work.

27. This is far from the truth. The Respondent is the body bestowed with the mandate to enforce chapter 6 of the Constitution on leadership and integrity. The Applicants are State Officers and subject to the said chapter 6. The body mandated to enforce the Bribery Act is the Respondent. The allegations as far as this matter is concerned are on bribery. It is nowhere indicated in the County Assemblies Powers and Privileges Act that no other Agency can investigate members of the County Assembly on alleged criminal activities.

28. This is what the said Act states at section 17(2)

“An inquiry by a County Assembly into a matter shall not preclude criminal investigations or criminal proceedings against a member in connection with the matter concerned.”

In my view even where the Respondent is carrying out investigations into a matter there is nothing that precludes the County Assembly Powers and Privileges Committee from carrying out its obligations.

29. It must be appreciated that the Respondent received a letter of complaint which it must act on and give results/report on its findings based on the fact that it is the body that has been mandated to enforce the relevant provisions of the law in relation to matters of corruption, bribery etc.

30. There is nothing to show that the Nairobi City County Committee on Powers and Privileges has taken any steps towards what its obligated to do under the Act that created it as far as this matter is concerned. Nobody stopped the committee from doing its work.

31 All the Applicants save for exparte Applicant No 3 and 5 have recorded statements in response to the summons. The summons were not warrants of arrest. It is part of an investigation by a legitimate body. That is why the 2nd, 4th, 6th -9th exparte Applicants submitted themselves to the investigation, and have recorded statements. The exparte Applicants like all other state officers must submit themselves to the Law as stated in article 75(1)(c) of the Constitution which states:

75. (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

(c) demeaning the office the officer holds.

32. The authorities cited by the Applicants in particular the **Suchan Investment Ltd R Vs National Assembly Committee & Privileges** (supra) are all challenging a decision made by a committee or individual with the court finding that such a decision ought not to have been made or the court can't interfere with it.

33. In this case, the decision made by the Respondent was to investigate this case and issue summons to appear to the ex parte Applicants. The Respondent acted within its mandate to receive the complaint and investigate it. It must be appreciated that the Respondent does not charge, it only investigates. Summoning the exparte Applicants for purposes of hearing their side of the story is an integral part of the investigations and the tenets of Natural justice.

34. Bribery is an offence which must be investigated and no privilege should bar such an investigation. I add that the Powers and Privileges Act is there to enable Hon. Members of the National and County Assemblies to conduct the business of the house in a conducive environment and not to perpetuate or cover up criminal activities.

35. I therefore find that the Respondent is acting squarely within its mandate and should not be stopped from doing so. I wish to add that the issue of the video clip and transcript is part of evidence and this court is not dealing with the evidence gathered. That is for another day. All in all I find no merit in this application which I dismiss with costs.

Orders accordingly.

Dated, signed and delivered this 5th day of December 2018.

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HEDWIG I. ONGU'DI

JUDGE