



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 5 OF 2016

CONSOLIDATED WITH

JUDICIAL REVIEW (MISC. APPL.) NO. 59 OF 2016

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....1ST INTERESTED PARTY

THE CHIEF MAGISTRATES ANTI-CORRUPTION COURT, ELDORET...2ND INTERESTED PARTY

***EX PARTE* PAMELA INDIMULI & 6 OTHERS**

RULING

1. The seven *ex parte* applicants are employees of the County Government of Trans Nzoia. They are also named as the 4th, 5th, 6th, 7th, 8th, 11th, and 12th defendants in the charge sheet presented before the Chief Magistrates Anti-Corruption Court at Eldoret in criminal case number 3 of 2016 *Republic v Fredrick Sifuna Wakofula & 11 others*. The *ex parte* applicants are aggrieved by the decision of the 1st interested party recommending their prosecution.
2. By separate chamber summonses dated 19th July 2016 and 10th August 2016 respectively, the *ex parte* applicants sought leave to bring proceedings in judicial review for the writs of *certiorari* and *prohibition*. On 15th August 2016 the two applications were consolidated.
3. On 29th July 2016 and 15th August 2016 respectively, the *ex parte* applicants were granted leave to bring the proceedings. The prayer for *certiorari* was to bring into the High Court; and, to quash the decision of the 1st respondent recommending their prosecution. They also craved an order of *prohibition* to restrain the respondent from proceeding with the hearing of the criminal case.
4. The *ex parte* applicants also prayed that the *leave* operates as a *stay* of the hearing in the anti-corruption court slated for 16th September 2016 or on any other subsequent dates pending the hearing and determination of the substantive notices of motion. The High Court declined to grant a *stay ex parte*. It directed instead that the prayers for *stay* be canvassed *interparties*.

5. The respondent and interested parties contest the prayer for stay. The respondent has filed grounds of opposition dated 12th August 2016. On 15th August 2016, I heard learned counsel for all the parties. I have considered the pleadings, depositions, grounds of opposition and the rival submissions.
6. The substantive notices of motion are yet to be heard. It would be prejudicial at this stage to make conclusive findings on the matter. That will be the true province of the trial judge. The only live issue is whether the *ex parte* applicants deserve a *stay* pending the hearing and determination of the substantive notices of motion.
7. Order 53 Rule 1 (4) of the Civil Procedure Rules 2010 gives the court wide and unfettered *discretion* to grant a stay. That discretion must be exercised judiciously. The key considerations are whether the applicant has established an arguable case worth of further investigation during the substantive hearing; whether the stay would be efficacious in the circumstances; and, whether failure to grant the stay would render the substantive motions nugatory. See *R v Registrar of Companies ex parte Githongo* [2001] KLR 299 at 306, *Oil Com Kenya Limited v PS Ministry of Roads & Public Works & another* [2008] KLR 104 at 110, *Jared Benson Kangwana v Attorney General*, Nairobi, High Court No. 446 of 1995 (unreported), *R v Clerk County Assembly of Baringo Ex Parte Kamket*, Eldoret, High Court, J.R. 8B of 2014 (unreported).
8. Applying those principles to the matter at hand, I find as follows. It is common ground that the *ex parte* applicants have been charged with various counts of *corruption* contrary to sections 45 and 46, as read with section 48, of the Anti-Corruption and Economic Crimes Act. The pith of the case before the Anti-Corruption Court is that the *ex parte* applicants *abused* their offices.
9. The substance of the six counts is that the *ex parte* applicants irregularly acquired land and buildings for a referral hospital in Kitale; or, conferred a benefit worth Kshs 185,000,000 on one Vipul Dodhia contrary to procurement regulations; or, failed to comply with the Public procurement and Disposal Act; or, failed to involve the Tender Committee; or, failed to inform the Public Oversight Authority of their decision; or, proceeded with the acquisition without prior planning; and, awarded the contract without ensuring that funds were available.
10. The *ex parte* applicants are accused of abusing their offices of county secretary; or, county executive members; or, as members of the tender committee; or, as persons in charge of management of public revenue. I have studied the verifying affidavit of the 1st to 6th *ex parte* applicants sworn on 19th July 2016; the verifying affidavit of the 7th *ex parte* applicant sworn on 10th August 2016; and, the 18 annexures. The *ex parte* applicants retort that they are not members of the tender committee; or, involved in the management of public revenue relating to the land.
11. To buttress their point, they have given their job descriptions as follows. *Pamela Indimuli*, is the Assistant Community Development Officer in the Department of Gender, Sports, Culture and Tourism in the County Government of Trans Nzoia. *Lawrence Kirui* is the Systems Administrator in the Department of Education and Information Communication and Technology. *Florence Otieno* is the Welfare Officer in the Department of Gender, Sports, Culture and Tourism; and, is currently deployed as the personal assistant to the County Executive Committee member for Economic Planning, Commerce and Industry. *Timon Koross* is the Chief Officer in the Department of Water, Environment and Natural Resources. *George Malimo* and *Jane Aluodo* are health officers in the Department of Health. Lastly, *Emelda Agoi* is a Senior Assistant Director, Human Resources Management.
12. It is the *ex parte* applicants' case that management of public revenue in this case fell within the docket of the Chief Officer of the Department of Health; and, that the *ex parte* applicants have never been designated as such or involved in planning. They aver that save for the 4th applicant, Timon Koross, they are not qualified to be appointed members of the tender committee; and, they were never appointed. They claim that they neither approved direct procurement of the contract nor were they responsible for ensuring availability of funds. Lastly, they aver that there is a paucity of evidence to back up any of the charges.
13. All those matters fall within the true province of the trial judge at the hearing of the substantive

notices of motion. I cannot prejudge them. The same is true of the question whether the respondent acted *maliciously* in charging the *ex parte* applicants. It will be the duty of that court to determine whether the respondents' decisions and actions in prosecuting the applicants were tainted with *illegality, irrationality or procedural impropriety*. See Republic v Inspector General of Police Ex-parte Patrick Nderitu Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR.

14. A number of authorities cited to me by learned counsel for the *ex parte* applicants will be more *relevant* during that inquiry. They include George Okungu & another v Chief Magistrates Court Anti-Corruption Court & another Nairobi, High Court Petitions 227 & 230 of 2009 [2014] eKLR; and, Republic v Director of Public Prosecutions & 3 others ex parte Praxidis Saisi & another, Nairobi, High Court Judicial Review 502 of 2015 [2016] eKLR.

15. I can however safely state the following: Article 157 of the Constitution grants the office of the Director of Public Prosecution the mandate to prosecute criminal matters. The 1st interested party on the other hand is established under Article 79 of the Constitution. Its functions are found in chapter six of the Constitution as well as section 11 of Ethics and Anti-Corruption Act. Section 11 (d) of Ethics and Anti-Corruption Act, 2011 mandates the 1st interested party to “*investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of the codes of ethics or other matters prescribed under this Act or any other law enacted pursuant to chapter six of the Constitution.*”

16. Furthermore, the 2nd interested party is a *court of law*. There is no allegation at the moment that the court is proceeding in an *unfair* manner; or, that the rights of the accused persons guaranteed by Article 50 of the Constitution have been infringed by that court.

17. The criminal case is slated for 16th September 2016. It is material that *five* of the accused persons are *not* parties to these judicial review proceedings. If the criminal proceedings are stayed, the five will be prejudiced. True, the *ex parte* applicants have an arguable case worth of further investigation during the substantive hearing. But the substantive notices of motion are likely to be determined quickly by the High Court. I accept that a criminal trial can be inconvenient; and, there are obvious costs that go with it. But those would not be a good grounds to stay the proceedings. See Republic v Director of Public Prosecutions & 3 others ex parte Bedan Mwangi & another, Nairobi, High Court Petition 332 of 2014 [2015] eKLR. I am accordingly not persuaded that granting a stay would be *efficacious* in the circumstances; or, that failure to grant the stay will render the substantive notices of motion *nugatory*.

18. The upshot is that the leave granted on 29th July 2016 and 15th August 2016 respectively to bring proceedings for the writs of *certiorari* and *prohibition* shall *not* operate as a stay of the impugned decision; or, of the proceedings before the Chief Magistrates Anti-Corruption Court at Eldoret in criminal case number 3 of 2016 Republic v Fredrick Sifuna Wakofula & 11 others. Costs shall abide the substantive notices of motion.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 1st day of September 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open Court in the presence of:-

Mr. Gachuba for the *ex parte* applicants instructed by Onyoni Opini & Gachuba Advocates.

Mr. J. Mulati for the respondent and 2nd interested party instructed by the Director of Public Prosecutions.

Mr. Maina for the 1st interested party instructed by the Ethics & Anti-Corruption Commission.

Mr. J. Kemboi, Court clerk.