



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA, AT NAIROBI
ANTI-CORRUPTION & ECONOMICS CRIME DIVISION
ACEC MISC. APPLICATION NO. 26 OF 2016

REPUBLICAPPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

AND

ETHICS & ANTI-CORRUPTION COMMISSION1ST INTERESTED PARTY

ATTORNEY GENERAL on behalf of the Chief Magistrate, Anti-Corruption Court,

Milimani Law Courts, Nairobi2ND INTERESTED PARTY

JOSPHAT SIRMAEXPARTE

RULING

1. **Josphat Sirma** the Exparte/Applicant filed the Chamber Summons dated 19th September, 2016 seeking the following orders;

i. THAT the Applicant be granted leave to apply for the Judicial Review Order of Prohibition, prohibiting the Respondent by themselves, their officers and/or whosoever from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in the Anti-Corruption Case No. 22 of 2015 between the Republic vs Josphat Sirma before the Chief Magistrate's Court (Milimani Law Courts) Nairobi so far as they touch on or relate or howsoever concern the 1st Accused (the ex parte applicant herein) JOSPHAT SIRMA in Counts 1, 2, and 6 or instituting any other charges in another court against the Ex parte Applicant over the award of Tender No. Ref. SU/QT/3097F13 which resulted in the signing of a Local Purchase Order No. 4500068941 between Kenya Pipeline Company Limited and Redline Limited.

ii. THAT the Applicant be granted leave to apply for the Judicial Review Order of Certiorari to remove and bring to this Honourable Court for the purposes of quashing the decision of the 1st Interested Party recommending that the Ex parte Applicant be charged with various anti-corruption offences to the Respondent and the decision of the Respondent to direct prosecution of the Ex parte Applicant JOSPHAT SIRMA contained in the Report File No. EACC/F1/INQ/59/2015 from the Office of the Director of Public Prosecutions dated 29th

October, 2015 and in the charge sheet in Anti-Corruption Case No. 22 of 2015 Republic of Kenya vs Josphat Sirma & 4 Others before the Chief Magistrate's Court (Milimani Law Courts) Nairobi.

iii. THAT the grant of leave to operate as stay of any further proceedings pending the hearing and determination of the Judicial Review Application.

iv. THAT any such further or other relief as this Honourable Court may deem just and expedient to grant in the circumstances.

v. THAT costs of and incidental to the application be provided for.

The application is supported by the statement, verifying affidavit and the grounds in the statement.

2. The brief facts as can be gleaned from the statement are that the Applicant was employed by the Kenya Pipeline Company Ltd. as an Engineer and later promoted to Senior and Chief Engineer respectively. His roles and duties include overseeing operations, staffing, procurement, big projects, commission new plants and preparation of budgets for the section. He also served as the Chairman of the Goods Inspection and Acceptance Committee from 28th January 2011.

3. That on 13th June, 2013, Kenya Pipeline Co. through direct procurement initiated the need to procure auto transformers pursuant to the Public Procurement and Disposal Act and Regulations 2005. This resulted in the tender No. Ref. SU/QT/3097F/13 which resulted in the signing of the LPO No. 4500068941 between Kenya Pipeline Company Ltd. and Redline Ltd.

4. He states that the contract was awarded to Agecelec Industries of France which had appointed Redline Ltd. as their agent to supply the three autotransformers at a cost of 261,070.43 Euros i.e. Kshs.29,239,887/= though there was no formal contract between the parties.

5. He admits having been involved in the procurement process at the inspection of the goods when they arrived, signing of the material, arrival advice, note/inspection and witnessing factory acceptance tests (FAT) on behalf of the company.

6. He further admits that the 1st Interested Party received a report that the Kenya Pipeline Company had procured the auto transformers without following the requisite procurement procedures. It began investigations whereby the Applicant was summoned to give his statement.

7. At the end of the investigations, the 1st Interested Party recommended that the Applicant be charged over the irregularities. He is before this Court challenging this decision to have him charged for the following reasons;

i. The investigations were not conducted in good faith nor in a professional manner, as he was never heard.

ii. The Public Procurement and Disposal Act, 2005, The Public Procurement Regulations among others were not adhered to by the 1st Interested Party.

iii. The 1st Interested Party did not understand the functions of the Inspection Committee nor the Public Procurement and Disposal Regulations 2005.

iv. The criminal proceedings are an abuse of the criminal justice system and are oppressive as they have no evidentiary basis.

8. The Application was opposed through the replying affidavit of Andres Lekamparish on behalf of the 1st Interested Party. The deponent was part of the team that conducted investigations. He stated that the 1st

Interested Party in exercise of its mandate under Section 11 (1) (d) of the EACC Act and Article 252 of the Constitution carried out investigations in respect of misappropriation of public funds at Kenya Pipeline Company.

After the investigations, it was found that the actions by the Applicant and others in the procurement process at the Kenya Pipeline Company was illegal and fraudulent.

9. That the investigations revealed severe procurement irregularities. After completion of the investigations, they forwarded a report to the respondent who made an independent decision to prosecute the Applicant together with four other persons.

10. The Respondent and 2nd Interested Party though served, did not file any response to the Application. Both M/s Sirma for the Applicant and M/s Munyolo made oral submissions when the application came for hearing. Their submissions reiterated what is in the Applicant's statement and the Replying Affidavit respectively.

11. I have considered the application, statements, annexures, replying affidavit and the submissions. I wish to point out that prayer 1 and 2 have already been spent as leave to apply for Judicial Review was granted on 28th October, 2016. What the Applicant is now seeking before this Court is for the leave granted to operate as stay of the proceedings in the lower court.

12. A perusal of the annexures herein confirms that the Applicant and five others have been charged with criminal and corruption related charges vide Nairobi Chief Magistrate's Anti-Corruption Case No. 22 of 2015. He has already taken plea in the said case and hearing dates fixed. The principles governing the grant of stay were captured by Justice Maraga (as he then was) in the case of **Taib A. Taib –vs- Minister for Local Government & 3 Others [2006] eKLR**, he observed as follows;

“I wish to state that, as injunctions are not available against the Government and public officers, stay is a very important aspect of the Judicial Review jurisdiction. It is the non-availability of injunctions against the government that Glidewell LJ had in mind when in the case of Republic - vs Secretary of State for Education and Science, Ex-parte Avon County Council (No. 2) CA (1991) 1 ALL ER 282, he said;

“An order that a decision of a person or body whose decision are open to challenge by Judicial Review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay”.

That this Court has jurisdiction to grant orders of stay has never been in issue given the provisions of Order 53 Rule 1 (4). What is always in issue is whether, in the circumstances of any particular case, a stay order is efficacious.

I also want to state that in Judicial Review, applications like this one, the Court should always ensure that the Ex-parte applicant's application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore, where the order of stay is efficacious, the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the Judicial Review jurisdiction?

The purpose of a stay order in Judicial Review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act.”

13. It is clear from the above authority that the Order of stay is discretionary. The issue this Court has to address is whether in the circumstances of this case, a stay order would be efficacious. I have gone through the pleadings filed and find the verifying affidavit to be so bare. It does not state why the stay order should be issued at this stage. The Applicant has not explained what loss he will suffer if stay is not granted.

14. The Court of Appeal in the case of *Commissioner General KRA –vs- Silvano Owaki t/a Mariga Filling Station, Civil Appeal No. 45 of 2000* observed as follows;

“We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for Judicial Review.”

15. The Applicant concentrated more on the grounds for grant of leave to apply for Judicial Review. He completely overlooked the fact that it was his duty to convince this Court that stay would be efficacious in the circumstances of this case. This Court has already granted the Applicant leave to apply for Judicial Review. I am clear in my mind that if the parties move with speed, the substantive application for Judicial Review will be heard and determined by the end of the year.

16. I am therefore satisfied that the Applicant has failed to convince this Court that he is warranted of the stay he seeks. The result is that prayer No. 3 of the Application dated 19th September, 2016 is declined.

No order for costs.

Dated and delivered this 15th day of November 2016 in open Court at NAIROBI

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HEDWIG I. ONG’UDI

HIGH COURT JUDGE