REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC PETITION NO. E006 OF 2021

ABDI SHALE BULEE...1ST PETITIONER

IBRAHIM MALLOW SHURIE..2ND PETITIONER

AHMED ABDULLAH ADEN...3RD PETITIONER

VERSUS

E.A.C.C...1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS...............................2ND RESPONDENT

THE ATTORNEY GENERAL... 3RD RESPONDENT

THE C.M. - ANTI-CORRUPTION COURT................................4TH RESPONDENT

AND

ALI BUNOW KORANE...1ST INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioners moved the court vide a Petition dated 22nd June, 2021 supported by an affidavit sworn on their behalf by Abdi Shale Bulle, the 1st Petitioner herein. Contemporaneous with the Petition, the Petitioners filed a Notice of Motion dated 22nd June 2021 under Certificate of Urgency of even date seeking interim conservatory orders. However, when the application came up for hearing on 12th July, 2021, the Petitioners with the consent of the respondents abandoned the same leaving room for fast tracking the hearing of this petition.

2. The 1st Petitioner **Abdi Shale Bulle,** 2nd Petitioner **Ibrahim Mallow Nur Shurie,** 3rd Petitioner **Mohamed Ahmed Abdullahi** and the 4th Petitioner **Ahmed Abdullahi Aden** are employees of the County Government of Garissa holding the positions of Municipal Manager of the Garissa Municipal Board, Chief Finance Officer, Head of Treasury and Head of Accounting respectively. They have been charged with corruption related offences in ***Chief Magistrates Court ACEC No. E039 of 2020 Republic v Ali Bunow Korane and 4 Others*** as the 4th, 2nd, 3rd and 5th accused persons respectively. The Interested Party Ali Bunow Korane is the Governor of the Garissa County Government and is the 1st accused in the criminal proceedings.

3. The Petition which is expressed to be brought under **Articles 10,27,28,29,47,50 and 159 of the Constitution** seeks the following orders: -

> ***"1) THAT a declaration do issue that the arrest, charging, on the seven [7] counts (Conspiracy, Count 1, Section 47 and 48 of the Anticorruption and Economic Crimes Act, 2003 and misappropriation of funds, Count 3 to 8 Sections 198 and 199, Public Finance Management Act 2012), plea, and ongoing prosecution of the 4 Petitioners in CM ACEC No. E039 of 2020- Republic vs Ali Bunow Korane And 4 Others have violated and will continue violating their fundamental rights and freedoms as to due process, fair administrative action, fair application of the law, rule of law, equality and freedom from discrimination, human***

dignity, fair hearing and protection of the law under Articles 10, 27, 28, 47, 50 and 159 of the Constitution.

2) THAT a declaration be issued that the arrest and subsequent prosecution of the 1st to 4th Petitioners for purposes of being charged with offences preferred as Conspiracy Count 1, and misappropriation at Counts 3, 4, 5, 6, 7 and 8 in CM ACEC E039 of 2020 Republic vs Ali Bunow Korane And 4 Others constitutes abuse of power by the Respondents.

3) A declaration that in presenting the charges levelled against the Petitioners, the 1st and 2nd Respondents engaged in a strict and narrow interpretation of Section 154 (1) of the Public Finance Management Act, 2012 in a manner that offends other empowering provisions of the same Act and the Regulations made thereunder.

4) THAT a declaration be issued to declare that no criminal offence obtains in the alleged acts of inter account borrowing of funds from one account, into another account, and thereafter restoring the borrowed funds upon receipt of monies and funding, all accounts and monies belonging to Garissa County, considering inter-alia (i) Articles 207 Constitution, Section 119 and 151 of the Public Finance Management Act 2012 and Regulations 41 (4), 83, 95, 96 and 111(2) Public Finance Management Act Regulations 2015 and as such the charges lack legal and actual foundation.

5) THAT declaration do issue that the Petitioners' rights and freedoms have been so fatally violated in the sense of (i) Abuse of office by the Respondents and or (ii) misapprehension of the law and or (iii) Ulterior motives by the Respondents and or (iv) Abuse of court process, all as to fair trial hence incompatible with any possibility of any fair criminal charges and prosecution on the alleged intra-county account borrowing and subsequent restoration of the borrowed monies.

6) THAT a declaration do issue that,(i) fair trial is not possible, (ii) the Respondents jointly and severally have no prima-facie and or culpable criminal cause against the Petitioners, (iii)The Respondents jointly and severally misapprehended the law and or (ii) are motivated by extra-judicious and or ulterior motives in bringing the charges in respect to the Petitioners' work as employees of Garissa County, in the borrowing, and refunding monies from the accounts set out into Count 3 to 8 and in acting in manifest ultimate good faith in the face of the facts, and the circumstances of the case.

7) THAT an order do issue to restrain and prohibit the Respondents jointly and severally from presenting any other charges against the 2nd, 3rd, 4th and 5th Accused/ Petitioners as presented in the CM ACEC No. E039 of 2020, or any other charges on the same set of facts, and in relation to the Accused' work as employees of Garissa County in the County's accounts on the restored borrowings.

8) THAT an order of Certiorari do issue to bring into Court and to quash the decision of the Director of Public Prosecution/2nd Respondent to prosecute and the decision of the 4th Respondent to accept the charges and prosecution of the Petitioner on the implicated Count 1, [conspiracy], Count 3 [misappropriation of public funds] Count 4 [misappropriation of public funds] Count 5 [misappropriation of public funds] Count 6 [misappropriation of public funds] Count 7 [misappropriation of public funds] Count 8 [misappropriation of public funds] as captured in the Charge sheet dated 14th September 2020.

9) THAT orders do issue for such quantum as is fair redress, compensation and damages to the Petitioners/Accused on account of the prejudice, violations of their rights, freedoms and entitlements.

10) THAT any other or further orders and or directions do issue as this Honourable Court may consider just, appropriate and mete in the circumstances.

11) *THAT the 1st and 2nd Respondents do jointly and severally pay costs*."

4. The Petition is supported by an affidavit sworn on 23rd June, 2021 by Abdi Shale Bulle the 1st Petitioner herein and 3rd accused in the criminal case in the court below which case is the subject of this petition. The petitioners have attached several annextures to the supporting affidavit and marked the same as EXB 1 page 1 to 43. The said exhibits are expressed to be: -

"a) The charge sheet upon which we are being tried, together with schedule thereof. Annexture B-1 page 1 to 6.

b) The Notice dated 10th September, 2020 from the Director, 2nd Respondent/DPP explaining, rationalizing, and justifying the charges. Annexture B-1 page 7 to 10.

c) Witness statement, investigating officer 1st Respondent, EACC, Annexture B-1 page 11 to 20.

d) Report by commission on implementation of the Constitution, B-1 page 21 to 23.

e) Media reports Annexture B-1 page 24 to 39.

(i) Kenya Wall Street https://www.theeastafrican.co.ke/tea/business/east-african-states-op-for-one-bank-accunt-to-curb-misuse-1396778.

(ii) Kenya Wall Street

https://kenyanwallstreet.com/britam-report-effects-proposed-treasury-sigle-account/

(iii) The East African

https://www.theeastafrican.co.ke/tea/news/east-african/kenya-to-launch-treasury-single-accounts-in-fight-against-graft-1343324

f) IMF working paper May 2010 Annexture B-1 page 40 to 43 captions of (i) page 4 paragraph 2 (ii) page 5 paragraph 1."

5. The gist of the supporting affidavit is that the petitioners deny that they committed the offences for which they are facing trial in the **Chief Magistrates ACC No. E039 of 2020**. **That** the charges against them are based on the prosecution's preposition that money borrowed from one County account stands "misappropriated" even if the funds are refunded and even when the borrowing is without prejudice to the money and the project from which the borrowing was done; **That** whereas it is true that the money subject of the criminal proceedings was borrowed from the Garissa Kenya Urban Support Programme Account none of it was stolen and a substantial part had already been refunded and there were undertakings in place to refund the balance. They contend, in the affidavit that the charges facing them relate to funds belonging to the County borrowed from one County account to another and that such borrowing is lawful and no criminal offence obtains.

6. In opposition to the petition the 1st Respondent filed a Replying Affidavit sworn on 8th July, 2021 by Justus Wangia, its Forensics Investigator. The 2nd Respondent relied on Grounds of Opposition dated 1st July, 2021 while the 3rd and 4th Respondents filed 12 Grounds of Opposition which are similar to those of the 2nd Respondent.

The Petitioners' case

7. The Petitioners state the facts, basis and grounds of the Petition as follows: That in the financial year 2018/2019 the County Government of Garissa was allocated Kshs.233,506,000/- under the County Allocation Revenue Act as Conditional Grants to Counties and the amount was received and deposited in the Garissa County, Kenya Urban Support Special Purpose (KUSP) Account held at the Central Bank of Kenya. The source of the funds was the World Bank the sum being a loan to the County Government through the National Government for support of municipalities in all the counties. The funds allocated to Garissa were to be specifically used for three municipal projects namely: construction of Qorahey market, re-carpeting of Garissa Township Central Business District roads, and construction of storm water drainage and pedestrian walk ways. For purposes of managing the said money a Contract Agreement was executed between the National Government and the County Government of Garissa. The Petitioners state that subsequently Garissa County opened an account for the KUSP programme with Equity Bank, Garissa Branch. On or about 10th July 2019 the said sum of Kshs. 233,506,000/- was transferred from the Central Bank of Kenya special purpose account to the Kenya Urban Support Special Purpose Account opened at Equity Bank Ltd, Garissa Branch. The position of the petitioners and Interested Party is that the expenditures for the said amount in respect of the three projects were not yet ripe as the procurement processes for the same were yet to be concluded and the leadership of the County Government of Garissa therefore moved the money for use in other departments within the County government owing to cash flow shortages and urgent need which included the kalazaar and cholera outbreaks and drought. They contend that the departments to which the funds were moved were the Garissa County KUSP- Urban Institutional Grant, Garissa County Health Donor Account, Garissa County Water Department Account and Garissa County Water Sewerage Company Limited. They further contend that this movement was necessitated by the urgent needs of the County and that the funds were later refunded to the source accounts to implement the projects under the Grant. The Petitioners' and Interested Party's position is that no money was lost or transferred to any personal accounts. They state that on 14th September 2020 they together with the Interested Party were charged with corruption related offences in **Chief Magistrates Court ACEC No. E039 of 2020** and they all pleaded not guilty to the charges levelled against them and were granted bail by the trial court.

8. The charges facing them are as follows:

"i. Count I

Conspiracy to commit an offence of economic Crime contrary to Section 47 A (3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars are that between 25th February 2019 and 30th September 2019 within Garissa County in the Republic of Kenya, conspired to commit an economic crime namely mismanagement of public funds allocated to the County Government of Garissa as a conditional grant for the Kenya Urban Support Program (KUSP) amounting to Kshs. 233,506,000/-

ii. Count II

Willful failure to comply with the law relating to management of funds contrary to Section 45 (2) (b) as read with Section 48 of the Anticorruption and Economic Crimes Act, 2003.

The Particulars of the offence are that between 5th February 2018 and 3rd February 2020 at the Garissa County within the Republic of Kenya, being the Governor and Chief Executive Officer of Garissa County Government, willfully failed to comply with the law relating to the management and use of county resources to wit Section 30 (2) (a) and Section 30 (3) (f) of the County Government Act, 2012 thereby resulting to mismanagement of Kshs. 233,506,000/- allocated to the County Government of Garissa as a conditional grant for the Kenya Urban Support Program (KUSP)

iii.. Count III

The 2nd and 3rd Petitioners were charged with the offence of Misappropriation contrary to Section 198 (1) (b) as read with Section 199 of the Public Finance Management Act, 2012.

The Particulars of the offence are that between 25th February 2019 and 21st May 2019 being the Chief Officer Finance and Head of Treasury at the said County Government respectively, they unlawfully authorized the transfer of Kshs. 205,234,132/- from Garissa County Kenya Urban Support programme account no. 1000385618 to various Garissa County Government accounts held at Central Bank of Kenya.

iv. Count IV

The 1st and the 4th Petitioners were charged with the offence of Misappropriation contrary to Section 198 (1) (b) as read with Section 199 of the Public Finance Management Act, 2012.

The Particulars of the offence are that between 9th July 2019 and 14th July 2019 being the Municipal Manager Garissa Municipal Board and Head of Accounting, Garissa Municipal Board, they unlawfully authorized the transfer of Kshs. 41,000,000/- from Garissa County KUSP account no. 0580279018087 to Garissa County KUSP- Urban Institutional Grant account no. 0580279032289 held at Equity Bank (K) Limited Garissa Branch.

v. Count V

The 1st, 2nd and 4th Petitioners were charged with the offence of Misappropriation contrary to Section 198 (1) (b) as read with Section 199 of the Public Finance Management Act, 2012.

The particulars of the offence are that between 23rd May 2019 and 31st July 2019 being the Chief Officer Finance, the Municipal Manager of Garissa Municipal Board and the Head of Accounting of Garissa Municipal Board respectively unlawfully authorized the transfer of Kshs. 21,663,000/- from Garissa County KUSP account no. 0580279018087held at Equity Bank Ltd to Garissa County Health Donor Account no. 0009577701 held at First Community Bank Ltd Garissa Branch.

vi. Count VI

The 1st, 2nd and 4th Petitioners were charged with the offence of Misappropriation contrary to Section 198 (1) (b) as read with Section 199 of the Public Finance Management Act, 2012.

The particulars of the offence are that that between 2nd September and 5th September 2019 being the Chief Officer Finance, the Municipal Manager of Garissa Municipal Board and the head of Accounting of Garissa Municipal Board respectively unlawfully authorized the transfer of Kshs. 2,000,000/- from Garissa County KUSP account no. 0580279018087 held at Equity Bank Ltd to Garissa County Health Donor Account no. 0009577701 held at First Community Bank Ltd Garissa Branch.

vii. Count VII

The 1st , 2nd and 4th Petitioners were charged with the offence of Misappropriation contrary to Section 198 (1) (b) as read with Section 199 of the Public Finance Management Act, 2012.

The particulars of the offence are that that between 30th June 2019 and 31st July 2019 being the Chief Officer Finance, the Municipal Manager of Garissa Municipal Board and the head of Accounting of Garissa Municipal Board respectively unlawfully authorized the transfer of Kshs. 30,000,000/- from Garissa County KUSP account no. 0580279018087 held at Equity Bank Ltd to Garissa County Water Department Account no. 01001113524200 held at National Bank of Kenya.

viii. Count VIII

The 1st, 2nd and 4th Petitioners were charged with the offence of Misappropriation contrary to Section 198 (1) (b) as read with Section 199 of the Public Finance Management Act, 2012.

The particulars of the offence are that that between 12th August 2019 and 20th August 2019 being the Chief Officer Finance, the Municipal Manager of Garissa Municipal Board and the head of Accounting of Garissa Municipal Board respectively unlawfully authorized the transfer of Kshs. 30,000,000/- from Garissa County KUSP account no. 0580279018087 held at Equity Bank Ltd to Garissa Water Sewerage Company Limited account no.107767741 held at Kenya Commercial Bank Limited Garissa branch."

9. The Petitioners argue that the afore-stated charges violate their right to equal protection of the law under **Articles 10, 27 and 50** of the **Constitutio**n; **That** the charges brought against them lack a proper legal and factual basis or foundation and cannot stand any trial and that allowing the trial to proceed will be a gross violation of their constitutional rights.

10. The Petitioners also argue that the law does not criminalize borrowings and refunds of monies between accounts of the same entity such as a County Government; **That** the charges based on these borrowings which in any case were later restored and refunded are void as they do not disclose any offence; **That,** as indeed admitted by the Respondents no money was stolen, lost or misappropriated and as such the arrests, the charges based on such borrowings and the subsequent prosecution has and will continue to violate their fundamental rights and freedoms.

To support their arguments Counsel representing them cited the case of **Director of Public Prosecutions v Martin Maina & 4 Others [2017] eKLR** and the case of **Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] eKLR**.

11. The Petitioners based their legal arguments on six broad grounds which they summarized as follows: First that the provisions of the **Regulations 41 (4) and 112 (2) Public Finance Management Regulations (PFMAR) 2015, Section 151 of the Public Finance Management Act (PFMA) 2012 and Article 207 of the Constitution of Kenya 2010** allow for the inter- account borrowing rendering the charges unjustified and that, these provisions permit the inter-account borrowing for purposes of "temporary treasury liquidity management operation(s)". Secondly, that **Section 119 of the Public Finance Management Act** and **Regulations 83, 95 and 96 of the Public Finance Management Regulations 2015** in law require creation of a County Treasury Single Account to administer operating balances to a minimum through consolidation which effectively allows for movements and borrowings between accounts and which accordingly voids the charges brought against them due to such borrowing. Thirdly, they argue that contrary to the 2nd Respondent's contention that **Section 154 (2) of the Public Finance Management Act (PFMA) 2015** is only in respect of a development account but not a grant, the said section does not refer to monies in the bank accounts of counties but appropriated money hence budgetary allocations. They assert that the operating words under the said section are **"an amount that is appropriated"** which in their view refer to budgeted or voted amounts but not money in the accounts. Further, that **Section 154** prohibits reallocation of funds appropriated in a budget from one entity to another but the case facing the Petitioners is not one of reallocation of appropriated funds in a budget but transactions that were only undertaken as part of liquidity management and which did not in any way affect the budgetary allocations and that the **Section 154** allows for inter-borrowing within defined guidelines. They assert that permissible borrowings include inter-borrowing between development accounts and also borrowing from wages account to non- wages accounts and to the extent that the Petitioners did not violate these guidelines, their actions in the borrowings and the refunds do not attract the charges brought against them.

12. The Petitioners also contend that the Public Finance Management Act (PFMA) allows the movement and comingling of money between County accounts; **That Section 119** of the **Public Finance Management Act** read together with **Regulations 83, 95 and 96 of the Public Finance Management Regulations** allow the borrowing, commingling of money, and maintenance of County money between County accounts within budget lines; That the said **Section 119** requires the creation of a County Treasury Single Account (CTSA) and the County treasury is in law mandated to ensure management of operating balances to a minimum through consolidation. They assert that the County Treasury Single Account (CTSA) enables unified banking and facilitates oversight of all county funds and the only condition on the commingling and borrowing in the County Treasury Single Account under **Section 119** of the **Public Finance Management Regulations** is that the borrowing or commingling must have been authorized by the County Treasury. They state that in their case the County Treasury Single Account and the borrowings were authorized; That in fact the defunct Commission on Implementation of the Constitution emphasized that government entities do not take costly commercial loans while they have idle funds in other accounts belonging to them so as to ensure that a County government does not borrow its own monies at a cost owing to walls created between accounts belonging to the same entity. They argue that the CTSA or the Single Account concept in **Section 119** of the **Public Finance Management Act (PFMA)** contemplates that money is fungible and allowed to move and that Section **154 (2)** of the **Public Finance Management Act** also permits borrowing within guidelines. They contend that while **Section 154 (1)** of the Act prohibits transfer of appropriated funds to other entities or to personal accounts, **Section 154(2)** of the Act creates an exception to the general rule permitting for borrowing. **That, Section 154 (2)** of the **Public Finance Management Act** allows limited power to borrow, also called inter-borrowing, between development accounts and from wages to none-wages. They assert that this borrowing relates to programmes and sub-votes. The Petitioners argue that the funds borrowed from KUSP were refunded, and no person took the funds for personal use and that accordingly, counts 3 to 8 which allege breach of **Sections 198** and **199 of** the **Public Finance Management Act (PFMA)** are defective as the two sections cited do not quantify nor disclose any crime which the Petitioners can answer to.

13. Fourthly, they assert that the money being fungible, a criminal cause cannot be advanced as though a marked or serialized coin or note or denomination for one purpose or account cannot be used for any other purpose. The Petitioners argue that in so far as money is fungible then it can be legitimately inter-used for correlated County purposes provided that the core programme is not delayed or over-funded or under-funded as provided in the budget or is not diverted and so long as the programme is not prejudiced. They contend that accordingly in so far as monies were fungible, were moved without prejudice to the intended plan, the charges against them have no basis in law.

14. Fifthly, they argue that the substantive **charges Counts "3" to "8"** allege that the 1st to 4th Petitioners committed the crime of "misappropriation" in contravention of **Sections 198** and **199** of the **Public Finance Management Act 2012** but the said **Sections 198** and **199** do not create an offence and do not give an explanation of what actions amount to misappropriation. They state that **Section 198 1(b)** merely states that a crime is committed if a public officer misappropriates public funds or assets and that **Section 199** provides the penalty where no other punishment is given. The Petitioners state that they are not able to discern the criminal offences in **counts "3" to "8"** of the charges which are premised on the said **Sections 198 and 199**. They contend that the transactions forming the basis of the charge did not contravene **Section 154** of the **Public Finance Management Act** and thus the charges lack legal foundation in law. Finally, Counsel for the Petitioners submits that in law the crime of 'misappropriation' requires that the conduct alleged contains some element of fraud which on its face should disclose the intentional, illegal use of property or funds of another for one's own gain or for other unauthorized purpose but that in this case the funds were not used for a personal purpose. Counsel contend that all the funds were used for authorized purposes and there is no iota of evidence that there was intent on the part of the petitioners to embezzle the funds. Counsel submit further that from the trail highlighted by the Petitioners it is very clear that the funds were moved from one government account to another and that the particulars in Counts "3" to "8" of the charge do not disclose any misappropriation. Counsel state that the particulars of the charge are based on the "borrowing" and "refund" of the funds and not on any other conduct. They contend that everything was done in good faith and for the common good of the people of Garissa and it would be unfair, unjust and inhuman to crucify the Petitioners for bona-fide transactions. Counsel contend that the charges (count "3" to "8") are unsupported by the material disclosed and as summarized by the Investigating Officer and hence no offence of misappropriation is established on the face of the charge. To support this submission Counsel rely on the cases of **Benard Saidimu & 4 others, v Republic [2019] eKLR, Kisilu Musa Omar V Republic [2020] eKLR and BND V Republic [2017]eKLR**

15. In closing Counsel urged this court to make a finding that the criminal charges are unfounded both in fact and in law and that arrest of the petitioners and the charges subsequently brought against them violated their rights and fundamental freedoms and in the circumstances the Respondent has no bona-fide case against them. This Petition should be allowed in toto.

The Interested Party's case

16. The submissions on the Interested Party are dated 15th October 2021. Like the petitioners the Interested Party challenges decision of the 2nd Respondent to charge. The Interested Party's case is that the prosecutorial discretion conferred upon the Director of Public Prosecutions (DPP) under **Article 157(11) of the Constitution** is not absolute and is subject to review by this court; That the 2nd Respondent in exercising the powers conferred upon him must have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. To support of this submissions Counsel for the Interested Party relied on the decision of the Court of Appeal in the case of **Diamond Hasham Lalji & Another v Attorney General and another [2018] eKLR**. Counsel submits that the **Public Finance Management Act** permits inter-account borrowing, refunds and also allows for some latitude in the use and allocation of County funds in accordance with the law. Counsel states that the core question for determination in this petition is whether in view of the provisions of the **Public Finance Management Act**, the charges against the Petitioners and the Interested Party are sustainable in law.

17. Counsel contends that **Regulation 41(4) of the Public Finance Management Regulations (PFMA) 2015** read together with **Article 207** of the **Constitution** and **Regulation 111(2)** and **Section 151 of the Public Finance Management Act** sanctions inter-borrowing done as temporary treasury liquidity management measure, so long as it is within expenditure that is (**a) appropriated in the relevant bill (b) provided for as a direct charge.** Counsel contends that in the instant case no money was misappropriated, stolen or lost and that the transactions undertaken were only part of management of liquidity but the same did not affect the budget of any County department or entity. Counsel argues therefore that in the circumstances, there is no basis for bringing charges by the 2nd Respondent. Counsel further argues that in reviewing the DPP's decision to charge, this court is required to consider whether the acts or omissions of the accused persons constitute the alleged criminal offence and that this court must also ought to carry out an objective assessment of the legality of any intended prosecution and investigation. For this Counsel cited two Court of Appeal decisions. **Prof. Njuguna Ndung'u v The Ethics and Anti-Corruption Commission and 3 others [2018] eKLR and Director of Public Prosecutions v Justus Mwenda Kang'ethe & 2 others [2016] eKLR**.

18. The Interested Party also asserts that **Section 119 of the Public Finance Management Act and Regulations 83,95, and 96** allow for borrowings and refunds; That the borrowing is intended to ensure that the County does not take heavy commercial loans on exhausted or lean accounts whilst idle funds are available in other accounts belonging to the same County. Further, that the Treasury Single Account makes borrowing across government accounts possible by keeping track of the balances of all government accounts in one place under a single unified account. Counsel argues that this way, if one account is short of funds, a short-term loan can be made between the two accounts so as to prevent the government from needless borrowing. I support of this argument Counsel referred this court to a report by the **Commission on Implementation of the Constitution** titled **"50 Things Every County Government Official Needs to Know About Public Finance Under the Constitution.**" Counsel contends that it is evident that no money was wired into any of the party's personal accounts and that a proper scrutiny of the evidence tendered by the Respondents confirms that no offence capable of conviction is disclosed. That in the circumstances, in charging the Petitioners and the Interested Party, the 2nd Respondent did not have any regard to public interest and the administration of justice and accordingly the prosecution is an abuse of court process. On this Counsel for the Interested Party cited the case of **Agnes Ngenesi Kinyua aka Agnes Kinywa and Director of Public Prosecutions & another [2019] eKLR,** the case of **Benard Mwika Mulinge v Director of Prosecutions & 3 others [2019] eKLR** and the case of **Kuria & 3 Others v Attorney General General [202] 2KLR 69**.

19. Finally, Counsel reiterated that the criminal prosecution was commenced in the absence of proper factual foundation, that an objective appraisal shows no discernible offence in law has been disclosed, no funds were lost, that none of the funded projects were impeded and that therefore no public interest arises in the continued subsistence of the criminal proceedings. Counsel cited **R v Attorney General ex parte Kipngeno Arap Ngeny HCCCA no. 406 of 2001**, **R v Kra, Kenol Kobil Ltd Nakuru Judicial Review No. 1 of 2018 Benard Saidimu & 4 others v Republic [2019] eKLR, Kisilu Musa Omar v Republic [2020] eKLR, B N D v Republic [2017] eKLR and Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR.** Counsel urged this court to allow the petition, to terminate the criminal proceedings and to set the interested party and the Petitioners at Liberty.

The Respondents' case

20. 1st Respondent vehemently opposes the application. In the replying affidavit of the 1st Respondent it is deposed that in January 2020, the Commission received allegations that the petitioners had embezzled and or misappropriated public funds amounting to Kshs.233,506,000/= under the Kenya Urban Support Program (KUSP). That pursuant to its Constitutional and Statutory mandate the Commission commenced independent investigations into the said allegations and established that the sum of Kshs. 233,506,000 was allocated to the County Government by the World Bank as a conditional grant intended to be used in line with program objectives as defined in the **Kenya Urban Support Program Appraisal Document and Financing Agreement dated 14th September 2017**. That investigations established that on diverse dates between 26th February 2019 and 20th May 2019, in breach of the **Public Finance Management Act (PFMA)** the 2nd and 3rd Petitioners approved the transfer of a total of Kshs.205,234,132 from the KUSP account to various Garissa County Government Accounts and utilized the same for programs not envisaged under the Garissa KUSP Appraisal and Financing Agreement and the **Public Finance Management Act (PFMA).** The beneficiary accounts and the monies transferred thereto were cited as the Garissa County KUSP Institutional Grant Kshs. 41,000,000, Garissa County Health Department Kshs 23,663,000, Garissa Health County Donor Kshs. 2,000,000, Garissa County Water Department Kshs. 30,000,000 and Garissa Water and Sewerage Company Kshs. 30,000,000. The 1st Respondent asserts that as at February 2020 the only bonafide payments were those made to Aspire Kenya Ltd Kshs 18 million for the construction of the Qorahey market and Kshs. 28 million made to Modern Transbridge Ltd for re-carpeting and beautification of CBD Roads. The 1st Respondent argues that the money that had been advanced to the County Government was a conditional grant by the World Bank that fell under the category of what is referred to as "**ring fenced finances"** and was strictly to be used for the implementation of the specific projects under the Grant. That the "Conditional grants," "ring fenced finances" were supposed to be deposited in a separate account, and were not available for borrowing and therefore the fiscal rule of fungibility does not apply. To support this submission the 1st Respondent relies on the case of **Council of County Governors v Attorney General and 4 others; Controller of Budget (Interested Party) [2020] eKLR** and the case of **Yeziel Mathufali Daddah v Chaiman Tarasa Youth Polytechnic [2020] eKLR.** The 1st Respondent's contends that it was after Petitioners learnt of the investigations by the Commission that they returned the funds to the special purpose account. The 1st Respondent submits therefore that there was an elaborate scheme and criminal intent by the Petitioners to defraud the Garissa County Government and the refund of the funds does not negate that the purported reallocation and/or transfer of the said funds was an offence under the **Public Finance Management Act** and also under the **Anti-Corruption and Economic Crimes Act**.

21. Counsel for the 1st Respondent further asserted that the criminal culpability of the petitioners can only be determined by the trial court after hearing and considering the evidence adduced by the parties and that this court will be usurping the role of the trial court if it were to allow the petitioners to argue their case before it. Counsel urged this court to conclude that the Petitioners are not deserving of the orders sought and hence dismiss this Petition with costs to the Respondents. Counsel also put reliance on the following cases:-. **Pauline Adhiambo Raget v Director of Public Prosecutions and 5 others (2016) eKLR and Kipoku Ole Tasur v Inspector General of Police & 5 others [2014] eKLR.**

22. In opposition to the application, the 2nd Respondent filed Grounds of Opposition dated 1st July 2021. The 2nd Respondent's arguments may be broadly reduced to three; **that this court lacks jurisdiction to hear and determine the Petition; the Petitioner has not met the threshold for the grant of the orders sought and the Petition is vexatious, frivolous and an abuse of the court process**. These grounds are echoed in the submissions of Counsel for the 2nd Respondent which I need not reproduce here. Like Counsel for the 1st Respondent Counsel for the 2nd Respondent submits that this petition does not meet the threshold for this court's intervention; that granting the orders sought would without proper basis result in curtailing the powers firstly of the trial court to try the case and secondly of the 2 nd Respondent to prosecute the petitioners. Counsel urges this court to dismiss the petition in the interest of justice and public.

23. The 3rd and 4th Respondents filed joint Grounds of Opposition dated 4th October 2021. The gist of those grounds and the submissions of their Counsel is that under **Sections 5** and **6** of the **Office of the Director of Public Prosecutions Act** and **Articles 157 (6)** and **157 (11) of the Constitution** the 2nd Respondent has the powers to institute and undertake criminal proceedings, to take over and continue any criminal proceedings and to discontinue any criminal proceedings before judgment is entered; That there has been no demonstration that the 2 nd Respondent has violated the statutory and constitutional edicts of its mandate to warrant the granting of the orders sought; That a finding that no criminal offence obtains in the circumstances would be prejudicial to the functions of the Respondents and an affront to **Articles 47 and 50 of the Constitution** and that granting the Orders sought would amount to hamstringing the 2nd and 4th Respondents from executing their statutory mandates without a demonstration as to which Article of the Constitution they have violated. They also argue that the factual basis upon which the Application and Petition are premised raises issues that can only be dealt with by the trial court and not by this court; That the Petition is otherwise incompetent, misconceived, misplaced and an abuse of the process of this court as the Petitioners' rights and fundamental freedoms have not been violated in any manner.

Issues for determination

24. From a review of the Petition, the Supporting Affidavit, the responses thereto and the rival submissions of learned Counsel for the parties, the following issues arise for determination:

> ***i. Whether the Petitioners have made out a good case to warrant this court to halt the criminal proceedings instituted against them by the 2nd Respondent.***
>
> ***ii. whether the criminal proceedings are a violation on their constitutional right.***
>
> ***iii. who shall bear the costs of this petition.***

Issue i:

25. It is now trite that the powers donated to the 2nd Respondent under **Article 157** of the Constitution are not absolute but are subject to review by this court. In the case of **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR** the Court of Appeal stated:-

> ***"[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in <u>Mohit v Director of Public Prosecutions of Mauritius</u> [2006] 5LRC 234:***
>
> > ***"these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all…"***
>
> ***In <u>Regina v. Director of Public Prosecutions ex-parte Manning and Another</u> [2001] QB 330, the English High Court said partly at para 23 page 344:***
>
> ***"At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied."***
>
> ***Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP."***

26. In the case of ***Kipoki Oreu Tasur v Inspector General of Police & 5 Others [2014] eKLR*** Mumbi J, as she then was, observed (and I fully agree with her) that:-

> ***"20. The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper***

functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, <u>except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated</u>." (Underlining mine)

27. There is no doubt therefore that this court has jurisdiction to review the 2nd Respondent's "decision to charge". The discretion must however be exercised sparingly and in the clearest of cases.

28. As was held by the Court of Appeal in the case of **Diamond Hasham Lalji (Supra)** the burden of proof in a case like this lies with the person alleging breach of the Director of Public Prosecution's constitutional power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the Director of Public Prosecutions to justify the prosecutorial decisions. (see paragraph 42 of the Judgment).

29. It has also been held that in considering such a petition this court must be careful not to delve into the merits of the case or proceedings in the trial court. This was the dicta of Majanja J, in the case of **Thuita Mwangi & 2 others v The Ethics & Anti-Corruption Commission [2013] eKLR** where he stated:-

"While these arguments are forceful, attractive and cogent, I am afraid that the High Court at this point is not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of these allegations. In Meixner & Another v Attorney General (Supra), the Court held that "It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court." Similarly in Beatrice Ngonyo Kamau & 2 Others v Commissioner of Police and the Director of Criminal Investigations Department & Another Petition 251 of 2012 [2013] eKLR, Lenaola J., captured this balance as follows; "[22]. The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. <u>Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial</u> but merely show a <u>prima facie</u> case before mounting a prosecution. The proof of the charge is made at trial." (Underlining mine)

30. This was reiterated by the Court of Appeal in the case of **Diamond Hasham Lalji & Another v Attorney General (supra)** when it observed:- -

"At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal, that is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative. State of Maharashua & Others V Arun Gulab Gawal & Others - Supreme Court of India – Criminal Appeal No. 590 of 2007 paragraph 18 and 24, Meixenen & Another v Attorney General [2005] 2KLR 189"

The above dicta was reiterated by Githinji JA, in the case of Njuguna **Ndungu v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR** when he stated:-

"[24] The charges against the appellant were largely dependent on documentary evidence and most of the facts were not in controversy. The High Court was called upon to find out whether or not the omissions allegedly committed by the appellant prima facie constituted the alleged criminal offences under the procurement law.

A decision on that issue could have been made without embarking on a trial by scrutinizing the documents and upon consideration of the circumstances of the case and the law.

In my respectful view, the High Court erred in law by failing to scrutinize the charges, the relevant documents including the decisions of Evaluation Committee, Tender Committee, Review Board and the High Court proceedings and reach a conclusive and objective decision on whether or not the charges had any legal or factual foundation and also a realistic prospect of conviction."

31. It is apparent therefore that this court is enjoined to scrutinize the evidence laid before it by the petitioners so as to determine the issues raised in this petition while being careful not to delve into the merits of the criminal proceedings so as not to usurp the jurisdiction of the trial court.

32. The gist of the Petitioners' and the Interested Party's case is that their conduct in borrowing the funds from the Kenya Urban Support Programme which they later refunded in full does not constitute an offence. On the other hand the Respondents contend that the funds in the Kenya Urban Support Programme account were not fungible and hence not open to borrowing and that as such the conduct of the petitioners and the Interested Party which was in violation of the agreement dated 14th September, 2017 amounted to embezzlement of the funds and hence a criminal offence. While I appreciate that in determining this petition I have jurisdiction to scrutinize the charges, the documents availed and the law so as to determine whether indeed the DPP has a prima facie case it is my finding that in the instant case the real issue in controversy between the parties being whether or not the funds in the Kenya Urban Support Programme account were fungible is best left to the trial court. I am of the view that the trial court would be the proper tribunal to determine that issue upon hearing and evaluating the evidence from both sides. It is instructive that in this petition other than asserting that the charges do not disclose an offence the petitioners have not proved that the charges against them are actuated by an ulterior motive or by a motive other than that of the public interest. Unlike in the case of **Diamond Hasham Lalji & Another v The Attorney General and Another [supra]** they have not placed any evidence before this court that would lead it to conclude that there was improper motive in charging them or that they were victimized or discriminated against whether in the process of the investigations or in the prosecution. In other words I find no evidence of mala fides in bringing the

charges against them that would warrant me to interfere with the 2nd Respondents decision to charge. For the same reasons I am also not persuaded that their prosecution is an abuse of the court process. The petitioners shall have an opportunity to adduce the evidence/facts and issues of law which they raised in this court at the trial court and should they be convicted and they feel aggrieved they have recourse to this court on appeal.

33. Having arrived at the above conclusion in respect of the first issue I find no need to delve into issue No. (ii) save to conclude that I have found no merit in this petition and the same is therefore dismissed.

Issue iii.

Who shall bear the costs of this petition.

34. Costs follow the event and accordingly the costs of this petition shall be to the respondents.

35. It is so ordered.

SIGNED, DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 27TH DAY OF JANUARY, 2022.

E.N. MAINA

JUDGE