



**Tom v Director of Public Prosecutions & 2 others; Kenya National
Highways Authority & another (Interested Parties) (Petition
E021 of 2021) [2022] KEHC 151 (KLR) (28 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E021 OF 2021
JM MATIVO, J
FEBRUARY 28, 2022**

BETWEEN

CHAVANGI AZIZ TOM PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

CHIEF MAGISTRATE'S COURT (MILIMANI) 2ND RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION 3RD RESPONDENT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

An accounting officer in a public entity cannot cede his statutorily ordained functions

In April 2019, a former accounting officer for the National Land Commission (NLC) was arrested and charged with various offences in relation to payments for compulsory land acquisition for road construction. He sought to stop the criminal proceedings. His explanation was that in the circumstances he was simply a glorified clerk who implemented NLC's Land Acquisition and Compensation Committee decision which approved and authorized a payment schedule of the project affected persons. The court held that it was the accounting officer that was responsible for managing a public entity's finances and such an officer could not under any circumstances cede his statutory functions to a committee or any person. The court explained that its role in determining whether to grant a stay of prosecution did not include weighing the evidence on criminal culpability as that was a matter to be considered at the criminal trial.

Reported by Kakai Toili

Constitutional Law – public finance – accounting authority in a public entity – role of an accounting authority in a public entity – whether an accounting officer in a public entity could cede his statutorily ordained functions



to a committee or another person – Constitution of Kenya, 2010, articles 201, 225 and 226; Public Finance Management Act, 2012, sections 6, 67(1) and (2) and 68; National Land Commission Act, 2012 section 20(3).

Statutes – interpretation of statutes – canons of statutory construction or interpretation – what were the factors to consider in statutory interpretation.

Jurisdiction – jurisdiction of the High Court – jurisdiction of the High Court as a constitutional court – jurisdiction to determine the veracity or weigh the strength of evidence or accused persons’ defence in a petition seeking to quash criminal proceedings – whether a constitutional court could determine the veracity or weigh the strength of evidence or accused persons’ defence in a petition seeking to quash criminal proceedings – what were the circumstances in which an abuse of process which justified stay of a prosecution could arise.

Brief facts

The petitioner’s case was that in 2017, the 1st interested party, (Kenya National Highways Authority (KENHA), notified the 2nd interested party (National Land Commission (NLC) that it desired to compulsorily acquire certain parcels of land for purposes of constructing a road network at Port Reitz area. The petitioner averred that the NLC, through its surveyors and planners, identified and acquired the land but in April 2019, he was arrested by the 3rd respondent (Ethics and Anti-Corruption Commission (EACC) and was charged with various offences relating to payments made by the NLC relating to the compensation.

The petitioner contended that the process of identifying the project affected persons was not only left to KENHA, but it was also done in conjunction with the process established by the National Land Commission Act (NLC Act). The petitioner further contended that his role was simply to implement NLC’s Land Acquisition and Compensation Committee decision which approved and authorized a payment schedule of the project affected persons. He averred that his role was administrative only since as the Chief Executive Officer he was presented with a technical report and minutes of the committee having approved the payment schedule. He argued that his role was principally a glorified clerk.

The petitioner prayed for among other orders a declaration that the proceedings instituted *vide* ACEC Case No. 6 of 2019 against him by the 1st and 3rd respondents (the Director of Public Prosecutions (DPP) and the EACC respectively) were wrong, improper, and amounted to abuse of the court process; a declaration that the failure of by the EACC to seek the requisite authority and directions from the DPP to charge him was a violation of article 157 of the Constitution of Kenya, 2010 (Constitution) and section 5(1)(a) and 5(b)(i) of the Office of the Director of Public Prosecutions Act and that such charges were unconstitutional and an order of judicial review by way of *certiorari* quashing the decision of the DPP and EACC to charge the petitioner, with the ACEC Case No. 6 of 2019.

Issues

- i. Whether an accounting officer in a public entity could cede his statutorily ordained functions to a committee or another person.
- ii. What were the factors to consider in statutory interpretation?
- iii. What was the role of an accounting authority in a public entity?
- iv. Whether a constitutional court could determine the veracity or weigh the strength of evidence or accused persons’ defence in a petition seeking to quash criminal proceedings.
- v. What were the circumstances in which an abuse of process which justified stay of a prosecution could arise?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 226 – Accounts and audit of public entities

(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.



Public Finance and Management Act, 2012

Section 68 - Responsibilities of accounting officers for national government entities, Parliament and the Judiciary

(1) An accounting officer for a national government entity, Parliamentary Service Commission and the Judiciary shall be accountable to the National Assembly for ensuring that the resources of the respective entity for which he or she is the accounting officer are used in a way that is—

(a) lawful and authorised; and

(b) effective, efficient, economical and transparent.

(2) In the performance of a function under subsection (1), an accounting officer shall—

(a) ensure that all expenditure made by the entity complies with subsection (1);

(b) ensure that the entity keeps financial and accounting records that comply with this Act;

(c) ensure that all financial and accounting records the entity keeps in any form, including in electronic form are adequately protected and backed up;

(d) ensure that all contracts entered into by the entity are lawful and are complied with;

(e) ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services and that, in the case of goods, adequate arrangements are made for their custody, safeguarding and maintenance;

(f) bring any matter to the attention of the Cabinet Secretary responsible for the entity, or the Chief Justice or the Speaker of the National Assembly if, in the accounting officer's opinion, a decision or policy or proposed decision or policy of the entity may result in resources being used in a way that is contrary to subsection (1);

(g) prepare a strategic plan for the entity in conformity with the medium term fiscal framework and fiscal policy objectives of the national government;

(h) prepare estimates of expenditure and revenues of the entity in conformity with the strategic plan referred to in paragraph (g);

(i) submit the estimates of the public entity which is not a state corporation to the Cabinet Secretary;

(j) submit the estimates of a public entity which is a state corporation to the Cabinet Secretary responsible for that state corporation who, after approving it, shall forward it to the Cabinet Secretary;

(k) prepare annual financial statements for each financial year within three months after the end of the financial year, and submit them to the Controller of Budget and the Auditor-General for audit, and in the case of a national government entity, forward a copy to the National Treasury;

(l) take appropriate measures to resolve any issues arising from audit which may remain outstanding;

(m) provide information on any fraud, losses, or any violation of subsection (1) and explanation for the actions taken to prevent a similar problem in future;

(n) provide the National Treasury and any other office, where relevant, with any information it may require to fulfil its functions under this Act; and

(o) in case of a national government entity, carry out such other functions as may be specified by the Cabinet Secretary.

Held

1. Statutory interpretation was the objective process of attributing meaning to words used in legislation, a process which entailed a synchronized consideration of: -

1. the language used in the light of the ordinary rules of grammar and syntax;
2. the context in which the provision appeared; and
3. the apparent purpose to which it was directed.



2. A fundamental tenet of statutory interpretation was that the words in a statute had to be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There were three important interrelated riders to that general principle, namely:-

1. that statutory provisions should always be interpreted purposively;
2. the relevant statutory provision had to be properly contextualized; and
3. all statutes had to be construed consistently with the Constitution, that was, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. That proviso to the general principle was closely related to the purposive approach referred to in (a.)

Where a provision was ambiguous, its possible meanings had to be weighed against each other given those factors.

3. The object of the Public Finance Management Act (PFMA) was articulated in section 3 of PFMA, which was to ensure; public finances were managed at both the National and the County levels of Government in accordance with the principles set out in the Constitution; and public officers who were given responsibility for managing the finances were accountable to the public for the management of those finances through Parliament and County Assemblies.

4. The petitioner and the NLC placed heavy reliance on the provisions of sections 16(1), 20(b) and 25 of the NLC Act. However, the petitioner was the accounting officer of the NLC and therefore he was subject to the provisions of the PFMA. Section 6 of the PFMA provided that the Act would prevail in the case of any inconsistency between the Act and any other legislation, on the following matters; raising of revenue and making of expenditures. The payments which were the subject of the criminal case were expenditures as contemplated under that provision.

5. It was an elementary canon of constitutional construction that no one provision of the Constitution was to be segregated from the others and to be considered alone, but all the provisions bearing upon a particular subject were to be brought into view and interpreted as to effectuate the greater purpose of the instrument.

6. The attempt to hoist high the provisions of article 250(9) of the Constitution and ignore or disregard articles 201, 225(2), 226(5) of the Constitution ignored the cannon of constitutional construction which required provisions of the Constitution on the same subject to be construed together so as to get the real intention of the charter. Article 226(1)(b) designated an accounting officer in every public entity at the national and county level. To accentuate the importance, seriousness and high calling of the office of an accounting officer, the drafters of the Constitution at article 226(5) imposed personal liability couched in no nonsense words.

7. The operative word in article 226(5) of the Constitution was “contrary to law”. The general rule was thus that the accounting authority approved and oversaw finances. The accounting authority was in charge of a public entity’s general expenditure and finances. The long title of the PFMA provided that it sought to ensure that all revenue, expenditure, assets and liabilities of those governments were managed efficiently and effectively. That was in accordance with article 225 of the Constitution, which envisaged national legislation establishing a national treasury and prescribing measures to ensure that both transparency and expenditure control in each sphere of Government were attained.

8. While enacting the provisions of article 250(9) of the Constitution, the drafters of the Constitution were not writing on a clean slate in the sense of taking an unprecedented step. On the contrary, they had before them several cognate articles governing public finance, management and expenditure. Those were articles 201, 225 and 226 of the Constitution which dealt with principles of public finance, financial control and personal liability on the part of an accounting officer if he approved the use of public funds contrary to law or instructions respectively.

9. The drafters of the Constitution had before them article 232 of the Constitution which prescribed the values and principles of public service which included efficient, effective and economic use of resources, accountability for administrative acts and transparency and provision to the public of timely, accurate information. The drafters of the Constitution meticulously provided for enactment of legislation to



operationalize the constitutional edicts. In interpreting the statutory provisions cited, the court was required to bear in mind that the provisions had to be construed in a manner which promoted those constitutional values and purposes.

10. There was no other legislation providing that committees or a commissioner of independent commissions or any other person would be responsible for managing finances of a Government entity. The only person statutorily ordained to manage the finances of a Government entity was the accounting officer. The attempt to find refuge in section 20(3) of the NLC Act could not by any stretch of imagination be construed to mean that the accounting officer could under any circumstances cede his statutory functions to a committee or any person. Had Parliament desired that to be the case, it would have said so in clear terms.

11. Unless a statute expressly stated otherwise, the accounting officer was the person responsible for managing the finances of a public entity. That was the clear language of section 67(1) and (2) of the PFMA. Section 20(3) of the NLC Act or the sections cited by the petitioner did not mention finances. Even if the sections stated otherwise (which they did not) such a defense had to surmount the barrier created by section 6 of the PFMA. Section 68 of the PFMA provided for the responsibilities of accounting officers for National Government entities, Parliament and the Judiciary.

12. Parliament in its wisdom deployed the word shall in section 68 of the PFMA which connoted a mandatory prescription. The constitutional provisions and the provisions of the PFMA cited left no doubt that an accounting officer of a public body was not a glorified clerk. It was a high office established by the Constitution to further the purposes and principles public finance engrossed in article 201 of the Constitution and the PFMA. Those provisions were to be read together with article 232 of the Constitution and Chapter 6 of the Constitution.

13. The Constitution deliberately hoisted the position of an accounting officer to a high pedestal and stipulated the manner in which public finance was to be managed. So serious was that constitutional edict that under article 226(5) of the Constitution, if the holder of a public office, including a political office, directed, or approved the use of funds contrary to the law or instructions, the person was liable for any loss arising from that use and would make good the loss, whether the person remained the holder of the office or not. Additionally, the PFMA created offences under Part V11 of the Act at sections 196 to 199.

14. Article 250(9) of the Constitution provided that a member of a commission, or the holder of an independent office was not liable for anything done in good faith in the performance of a function of office. From a reading of article 250(9), a member of a commission only enjoyed immunity for actions performed in good faith. Article 250(9) insulated members of the NLC against court action for actions done in the performance of their duties provided they acted in good faith. Whether or not the petitioner acted in good faith was a matter of evidence to be evaluated by the trial court trying the criminal charges not the High Court.

15. The Constitution spoke its values and commands to a variety of public officials and to the public at large. One thing was clear; the Constitution was a carefully balanced document. It was designed to provide for a public service sufficiently strong and flexible to meet the needs of the Republic, yet sufficiently limited and accountable to the Constitution and the people of Kenya. In fact, a common thread in the entire Constitution was the emphasis on accountability for all actions done or omitted to be done by public officers while in office. The Constitution also in an uncompromising manner hoisted high the requirements for integrity.

16. The drafters of the Constitution were careful to balance between the society's needs to be provided with efficient services by authorizing expenditure where lawfully required but at the same time emphasizing on prudent use of Government resources and the requirement for value for money to curb wastage and misuse of public funds.

17. The vast jurisdiction vested in the court by the Constitution derived from its authority to invalidate laws, decisions, actions or omissions which in the court's considered judgment, conflicted with the Constitution. That power of judicial review had given the court a crucial responsibility in assuring individual rights, as well



as in maintaining a living Constitution whose broad provisions were continually applied even to complicated new situations.

18. In retrospect, constitutional interpretation and application were made necessary by the very nature of the Constitution. The drafters of the Constitution wisely worded the document in rather general terms leaving it open to future elaboration to meet changing conditions. The petitioner's argument that the charges premised under the PFMA lacked legal foundation or basis was shallow, legally frail and unsustainable. Viewed from those constitutional precepts, the attempt to assault the constitutional validity of the charges under the PFMA could not succeed.

19. The definition proffered for the offence of conspiracy to defraud and the ingredients of the offence was attractive. But that was how far it went. The law was that it was not for the court to determine the veracity or to weigh the strength of the evidence or accused persons' defence or whether the facts disclosed the ingredients of the offence. That was a function for the trial court hearing the criminal trial. The court could only intervene if there were cogent and proven allegations of violation of the Constitution or constitutional rights or threat to violation of the rights or in clear circumstances where it was evident that the accused would not be afforded a fair trial or the right to a fair trial had been infringed or threatened or where the prosecution was commenced without a factual basis.

20. The detailed version tendered before the court by the petitioner trying to explain their innocence and defining the elements of the offence of conspiracy was misdirected. It was an invitation to the court to perform the functions of the trial court but it declined to do so.

21. The power to quash criminal proceedings had to be exercised sparingly and with circumspection and in the rarest of cases. The court could not be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations were so patently absurd and inherently improbable so that no prudent person could ever reach such a conclusion. The extraordinary and inherent powers of the court did not confer an arbitrary jurisdiction on the court to act according to its whims or caprice.

22. The petitioner was not a party in Petition Number 32 of 2019. The orders issued in that case like guided missiles were specific. They applied only to the petitioners in that case. The petitioner faced charges under the PFMA by virtue of having been the Chief Executive Officer/ accounting officer of the NLC. His position was unique and distinct from the petitioners in Petition Number 32 of 2019. The argument that the charges offended article 27 of the Constitution was misguided considering his unique position owing to the position he held. The judgment was not a judgment *in rem*.

23. While it was admitted that the EACC lacked prosecutorial powers and had to forward all cases it had investigated to the DPP for prosecution, there was no tangible material before the court to suggest that that requirement was not complied with. There was nothing to suggest that the decision to prosecute was made without the approval of the DPP. Those factual allegations were not backed by evidence.

24. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process was to be exercised only in exceptional circumstances. The essential focus of the doctrine was to prevent unfairness at trial through which the accused was prejudiced in the presentation of his or her case or where there was clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there was anything in the proceedings to prevent a fair trial and if there was, then the court ought to stop the prosecution.

25. The High Court would only prohibit or quash prosecutions in cases where it would be impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process because it offended the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

26. The High Court's inherent powers, both in civil and criminal matters were designed to achieve a salutary public purpose which was that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rested and the like would justify the High Court to quash the proceedings in the interests of justice.



27. An abuse of process justifying the stay of a prosecution could arise in the following circumstances;

1. where it would be impossible to give the accused a fair trial; or;
2. where it would amount to a misuse/manipulation of process because it offended the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

The above categories were not mutually exclusive and the facts of a particular case could support an application for stay involving more than one alleged form of abuse. A stay of proceedings was a discretionary remedy and each case would depend on its set of facts and circumstances.

28. The grounds upon which a stay would be granted could be classified under three categories;

1. when the continuation of the proceedings would constitute an abuse of process;
2. when any resultant trial would be unfair to the accused, and
3. when the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

29. Criminal proceedings commenced to advance other gains other than promotion of public good were vexatious and ought not to be allowed to stand. The word vexatious meant harassment by the process of law, lacking justification or with intention to harass. It signified an action not having sufficient grounds, and which therefore, only sought to annoy the adversary. The hallmark of a vexatious proceeding was that it had no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding was, its only effect was to subject the other party to inconvenience, harassment and expense, which was so great, that it was disproportionate to any gain likely to accrue to the claimant and that it involved an abuse of process of the court.

30. It was in public interest that prosecutions be mounted to uphold law and order and justice for the victims of crime. The enquiry was whether there had been an irregularity or an illegality that was a departure from the formalities, rules and principles of procedure according to which the law required a criminal trial to be initiated or conducted.

31. A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would open the door to an unfair trial. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as *certiorari*, prohibition, *mandamus* or permanent stay of proceedings were a device to advance justice and not to frustrate it. In the exercise of that wholesome power, the High Court was entitled to quash proceedings if it came to the conclusion that allowing the proceedings to continue would be an abuse of the court or that the ends of justice required the proceedings to be quashed. The petitioner had not demonstrated that the prosecution lacked factual basis or was an abuse of court process.

Petition dismissed with no orders as to costs.

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); (1976-1980) KLR 1272; [1979] KLR 154 - (Explained)
2. *D' Costa, Peter George Antony v Attorney General & another* Petition 83 of 2010; [2013] KEHC 5198 (KLR) - (Explained)
3. *Director of Public Prosecutions v Martin Maina & 4 others* Civil Appeal 270 of 2015; [2017] KECA 93 (KLR) - (Explained)
4. *Gachukia, Reuben Njuguna & another v Inspector General of the National Police Service & 4 others* Constitutional Petition 436 of 2017; [2019] KEHC 7830 (KLR) - (Applied)
5. *Kalaveri, Boniface Katana v Ethics and Anti-Corruption Commission & another* Civil Appeal 27 of 2014; [2015] KECA 530 (KLR) - (Explained)
6. *Mburu, John Mbau v County Government of Mombasa; Robinson Malombo (Interested Party)* Petition 4 of 2017; [2018] KEHC 408 (KLR) - (Explained)



7. *Musyoka, Patrick Saidi v Republic* Criminal Appeal 58 of 2015; [2017] e KLR - (Explained)
8. *Mwangi, Reuben v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* Constitutional Petition E216 of 2020; [2021] KEHC 13194 (KLR) - (Explained)
9. *Nabutola, Rebecca Mwikali & 2 others v Republic* Criminal Appeal 232 of 2012; [2016] KEHC 7776 (KLR) - (Explained)
10. *National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)* (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 (KLR) - (Applied)
11. *Raget, Pauline Adhiambo v Director of Public Prosecutions and 5 others* Petition 446 of 2015; [2016] KEHC 7138 (KLR) - (Explained)
12. *Republic v Director of Public Prosecutions; Victor Maina Ngunjiri & 4 others (Interested Parties) ex parte Victory Welding Works Limited & another* Miscellaneous Civil Application 249 of 2012; [2013] KEHC 5794 (KLR) - (Explained)
13. *Republic v Attorney General & another Ex-Parte Kipng'eno Arap Ng'eny* Miscellaneous Application 406 of 2001; [2001] KEHC 746 (KLR) - (Explained)
14. *Republic v Chuka University Ex-Parte Kennedy Omondi Waringa & 16 others* Judicial Review 113 of 2017; [2018] KEHC 8078 (KLR) - (Explained)
15. *Republic v Director of Public Prosecution & another ex parte Chamanlal Vrajlal Kamani & 2 others* Judicial Review Application 78 of 2015; [2015] KEHC 7666 (KLR) - (Explained)
16. *Republic v Director of Public Prosecutions & 2 others ex-parte Praxidis Namoni Saisi* Miscellaneous Civil Application 502 of 2015; [2016] KEHC 5698 (KLR) - (Explained)

South Africa

Shabalala & 5 others vs A.G of Transvaal & Another (CCT23/94) [1995] ZACC 12; 1995 (12) BCLR 1593; 1996 (1) SA 725 - (Applied)

United Kingdom

1. *R v Horseferry Road Magistrates' Court and another ex parte Bennett* [1993] 3 All ER 138; [1994] 1 AC 42 - (Mentioned)
2. *R v Methyr Tydfil Magistrates' Court and Day ex parte Chief Constable of Dyfed-Powys Police* [1989] Crim L R 148 - (Mentioned)

India

1. *C Gurusamy Konar v State of Madras* 1959 10 STC 553 Mad - (Explained)
2. *G Suri & another v State of Uttar Pradesh and others* AIR 2000 SC 754 - (Mentioned)
3. *Pepsi Foods Ltd & Another v Special Judicial Magistrate & Others* [1998] 5 SCC 749 - (Mentioned)
4. *State of West Bengal & Others v Swapan Kumar Guba & Others* 1982 AIR 949; 1982 SCR (3) 121 - (Mentioned)

United States

1. *McCulloch v Maryland* 17 US 316 (1819) - (Explained)
2. *South Dakota v North Carolina* 192 US 268 (1940) - (Explained)

Canada

Mackeigan v Hickman [1989] 2 SCR 796 - (Explained)

Australia

Williams v Spautz [1992] 66 NSWLR 585; (1992) 174 CLR 509 - (Explained)

Texts

1. Corns, C., (1977), *Chris Corns Judicial Termination of Defective Criminal Prosecutions: Stay Applications* 76 University of Tasmania Law Review, Vol 16 No. 1
2. Garner, BA., Black, HC., (Eds) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn



3. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn p 351
4. Richardson, PJ., (Ed) (2009), *Archbold: Criminal Pleading, Evidence and Practice 2010* London: Sweet & Maxwell pp 3025, 3026

Statutes

Kenya

1. Anti-Corruption and Economic Crimes Act (cap 65) sections 11(1)(d); 35; 47A(3); 48- (Interpreted)
2. Constitution of Kenya articles 27(1)(2); 28; 47; 50(1)(2)(4); 67(2)(3); 79; 157(6)(a)(10)(11); 201; 225(2); 226(1)(b)(5); 232; 249(2); 250(9)(12); Chapter six- (Interpreted)
3. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rules 10(2)(b)(c)(d)- (Interpreted)
4. Criminal Procedure Code Act (cap 75) In general- (Cited)
5. Ethics and Anti-Corruption Commission Act (cap 7H) section 3 - (Interpreted)
6. Fair Administrative Action Act (cap 7L) section 7(2)(a)(i)(ii)(iii)- (Interpreted)
7. Kenya Roads Act (cap 408) sections 3, 4- (Interpreted)
8. Land Act (cap 280) sections 107(5)(7); 112(1)(3); 113(2)(a); 122(4) - (Interpreted)
9. National Land Commission Act (cap 281) sections 16(1); 20(3)(a)(b)(c)(4)(a)(b)(c)(12); 25; 107(5); 35(b)(c); 133- (Interpreted)
10. Office of the Director of Public Prosecutions Act (cap 6B) sections 4(a)(b)(d)(e)(i); 5(1)(a)(b)(i) - (Interpreted)
11. Penal Code (cap 63) section 21- (Interpreted)
12. Public Finance Management Act (cap 412A) sections 6, 67(1)(2); 68; 79; 196; 197(1)(h); 198; 199 - (Interpreted)

Advocates

None mentioned

JUDGMENT

The Petitioner's Case

1. The petitioner's case as I can glean it from the Petition and the arguments presented in court is that sometimes in 2017, the 1st interested party, (the Kenya National Highways Authority (KENHA), a body corporate established under section 3 of the *Kenya Roads Act*¹ mandated under section 4 of the Act to manage, develop, rehabilitate and maintain national roads) notified the 2nd interested party (the National Land Commission (the NLC), a constitutional commission established under article 67 of the *Constitution* whose functions are listed in article 67(2) & (3)) that it desired to compulsorily acquire certain parcels of land for purposes of constructing a road network at Port Reitz area. He avers that the NLC, through its surveyors and planners, identified and acquired the land but sometimes in April 2019, he was arrested by the 3rd respondent (the Ethics and Anti-Corruption Commission (EACC), a commission established under section 3 of the *Ethics and Anti-Corruption Commission Act*² (the EACC Act). He was charged with others at the Chief Magistrate's Court (the 2nd respondent) with various offences relating to payments made by the NLC relating to the said compensation. He contends that the process of identifying the project affected persons was not only left to KENHA, but it is also done in conjunction with the process established by the NLC.

¹ Act No. 2 of 2007.

² Act No. 22 of 2011.



2. He contends that his role was simply to implement NLC's Land Acquisition and Compensation Committee decision which approved and authorized a payment schedule of the project affected persons. He avers that the said schedule was done after due diligence by NLC's technical officers, namely, surveyors, land economists and land valuers. He states that his role was administrative only since as the Chief Executive Officer he was presented with a technical report and minutes of the said Committee having approved the payment schedule. He argues that his role was principally "a glorified clerk." Additionally, he avers that he is the Secretary and the Chief Executive Officer of the NLC, an office established under article 250 (12) of the Constitution as read together with section 20 of the NLC Act, so decision to charge him violates his rights.
3. He avers that the NLC comprised of the Chairman, 8 Commissioners and co-opted persons whose knowledge and skills are necessary for the performance of its functions under section 16 of the NLC Act.³ Further, its decisions/policies are implemented by the Chief Executive Officer/the Secretary with no voting powers. He avers that section 16(1) of the NLC Act is the background of NLC's decision-making processes since it provides that, the Commission, shall have all the powers necessary for the execution of its functions under the Constitution, the Act and any other written law. He also cited section 20 (3) of the NLC Act which provides that the Secretary shall- (b) serve on such terms and conditions as the Commission may determine. It is the Petitioner's case that all the technical decisions were to be done through these committees and any implementation was to be done subject only to the decision reached in those committees, thus reducing him to "a glorified clerk."
4. He avers that the NLC's valuer went to the site and established that only a portion the land valued at Ksh 34,501,110/= was to be acquired, but the affected person argued that partial acquisition would render the rest of the land valueless prompting a revaluation which returned a value of Ksh 75, 268,253/=. He states that on 8th of September 2017 the Land Acquisition & Compensation Committee approved a block payment of Kshs 109,769,363/= and after due diligence by the committee minutes were developed by the Director of Valuation & Taxation, which were confirmed by the chairperson of the Land Acquisition & Compensation committee (a commissioner) and the Secretary (the Director Valuation and Taxation) who raise a memo to the office of the Chief Executive Officer (the petitioner) stating that due diligence has been done as per the minutes and resolutions of the Land Acquisition & Compensation Committee. He avers that the Chief Executive Officer (the petitioner) is obligated to implement that decision of the approved payments without question.
5. He also states that once he implements the decision of the Land Acquisition & Compensation Committee by approving the payments, it goes back to the Director of Valuation & Taxation, who refers the matter to the Director of Finance & Administration to pay. Further, that the Director of Finance & Administration, then marks the memo to the Deputy Director Finance & Administration, who verifies and checks the authenticity of the documents and information presented and prepares the payments. He also avers that after the Deputy Director Finance & Administration verifies, checks and prepares payment vouchers, the same goes back to the three signatories to append their signatures. He states that from the above, his role was more of "a glorified clerk" whose powers were basically administrative, so, he could only implement the decisions of the Land Adjudication and Compensation Committee on an already approved payment schedules without any alteration or input whatsoever, nor does he have capacity to question the process undertaken by the NLC in exercise of its Constitutional mandate.
6. The petitioner avers that section 20 (3) (b) of the NLC Act claws back the powers of the Chief Executive Officer, so, he cannot be held accountable for decisions made in a management system legally set-up

³ Act No 5 of 2012.



- and deliberately designed to sideline his office. He contends that the foregoing can be viewed from the fact that he approved a block figure of Ksh. 109,769,363/= as per the Land Adjudication Committee minutes, and, in any event, no money was paid to him.
7. In addition, he avers that he was charged with conspiracy to commit an offence of corruption contrary to section 47 A (3) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*⁴ (ACECA) and Financial Misconduct contrary to section 197 (1) (h) as read with Section 199 of the *Public Finance Management Act*⁵ (PFMA). He avers that the said charges are a violation of section 157(11) of the Constitution as read with section 20 of the *NLC Act* and that the said charges are unnecessary and superfluous because an offence of conspiracy to defraud must be supported by evidence of a common intention by deceit to obtain the money for purposes of defrauding, and a single unconnected and lawful act at the tail end of an act does not constitute an element of the offence of conspiracy to defraud, and to prove such an offence, there must be evidence that the accused persons indeed had a meeting and he mooted the idea and agreed to commit the offence.
 8. He contends that the facts underlying the criminal case are incapable of supporting the proposition that he conspired or participated in any conspiracy. He avers that he performed his duties in good faith as per section 20(3)(b) of the NLC Act. He also states that section 25 of the NLC Act protects him from any form of criminal or civil liability provided he acts in good faith.
 9. Additionally, the petitioner states that the conspiracy charge will collapse because the substratum of the case has been determined by a court of Concurrent Jurisdiction in High Court constitutional Petition Number 32 of 2019 in which the court quashed the charges and issued a perpetual injunction restraining the 1st, 2nd and 3rd respondents from arresting, charging, or prosecuting the petitioners in respect of the attempted compulsory acquisition of LR. No. MN/VI/3801. The court also prohibited the Anti-Corruption Court in Milimani Commercial Courts from hearing Anti-Corruption Case No. 6 of 2019 as relates to the petitioners in the said Petition and quashed the decision by the 2nd respondent (the DPP) to charge the 3rd petitioner. As a consequence, he avers that the charge of conspiracy to defraud is brought in abuse of court process.
 10. Regarding the charge on financial misconduct, he averred that the offence lies if he acted without lawful authority. He averred that he acted lawfully and pursuant to instructions, hence the charge violates his constitutional rights and it is abuse of article 157 (11) of the *Constitution*. As a consequence, he prays for: -
 - a) A declaration that the proceedings instituted vide ACEC Case No 6 of 2019 against him by the 1st and 3rd respondents are wrong, improper, and amount to abuse of the court process contrary to article 157(10) and (11) of the *Constitution* and section 5(1) (a) and 5(b) (i) of the *Office of the Director of Public Prosecutions Act* and that the same violate the Constitution.
 - b) A declaration that the failure of by the 3rd respondent to seek the requisite authority and directions from the 1st respondent to charge the petitioner is a violation of article 157 and section 5(1) (a) and 5(b) (i) of the *Office of the Director of Public Prosecutions Act* and such charges are unconstitutional, illegal, null and void.
 - c) A declaration that the petitioner's rights as enshrined under article 27 (1) and (2) were violated by the 1st and 3rd respondents by failing to afford him the equal protection of the law and equal enjoyment

⁴ Act No. 3 of 2003.

⁵ Act No. 18 of 2012.



- of all the rights and fundamental freedoms as enshrined under article 28, article 47, and article 50 (1), (2) and (4) of the Constitution.
- d) A declaration that the petitioner's rights as guaranteed under article 28 have been violated by the 1st and 3rd Respondents by subjecting the petitioner to an unlawful and malicious process devoid of meeting the constitutional threshold as enshrined under article 157 of the Constitution.
 - e) A declaration that the petitioner's rights as guaranteed under article 47 have been violated by the 1st and 3rd respondents by failing to subject him to an administrative process that is lawful, reasonable and procedurally fair as enshrined under article 157 of the Constitution.
 - f) A declaration that the Petitioner's rights as guaranteed under article 50 (4) have been violated by the 1st and 3rd respondents as well by selectively trying to secure a conviction against the petitioner by ensuring that certain individuals implicated in the transactions are shielded from prosecution and hence the said strategy constitutes unfair trial, is discriminatory and injudiciously.
 - g) A declaration that the ACEC Case No. 6 of 2019 instituted, by the 1st and 3rd respondents as against the petitioner was not instituted in good faith and for public interest and that the same violates article 157 (10), (11) of the Constitution and the fundamental principles enshrined under section 4(a) (d) (e) and (i) of the Office of the Director of Public Prosecutions Act.
 - h) A declaration that the commencement of the charges against the petitioner by the 3rd respondent with complacency of the 1st respondent, undermines and violates the independence of the 1st respondent's office, and the independence principles fundamentally enshrined under section 4(b) Office of the Director of Public Prosecutions Act.
 - i) A declaration that the institution of charges against the petitioner without conducting proper and factual investigations by the 1st and 3rd respondents is a manifestation of malice and ulterior motives.
 - j) A declaration that the petitioner's legitimate expectations to be afforded equal protection of the law have been violated by the respondents.
 - k) A declaration that the petitioner is entitled to an order of Certiorari to remove to the High Court and quash the 1st and 3rd respondents decision to charge the petitioner in ACEC Case No. 6 of 2019.
 - l) An order of Judicial Review by way of Certiorari to remove to the High Court and quash the decision of the 1st and 3rd respondents to charge the petitioner, with the ACEC Case No. 6 of 2019.
 - m) An order of judicial Review by way of an order of prohibition directed to the 1st and 3rd respondents, jointly and severally, and or directed to any other person, restraining the 1st and 3rd respondents jointly and severally, or any other person, from hearing and prosecuting the petitioner in AC.EC Case No. 6 OF 2019 as against the petitioner.
 - n) A declaration that the petitioner is entitled to an order of compensation for the violations listed.
 - o) Costs of and incidental to this Petition; and
 - p) Any other order that this court deems fit and just to grant in the circumstances.

The 1st respondent's response

11. The DPP filed grounds dated June 18, 2021 stating: - that the Petition does not raise constitutional issues; that the DPP independently and impartially reviewed the investigations; a director of the payee denied signing a letter acknowledging the payment; that the said letter was forged by some NLC officials including the petitioner to corruptly facilitate an illicit payment.



12. Further, the DPP states that the petitioner committed other offences which were investigated and a reasoned decision to charge was made; that the DPP's powers under article 157 of the Constitution and section 5 of the Office of the Director of Public Prosecutions Act⁶ (ODPP Act) cannot be donated; that the evidence against the Petitioner is overwhelming; that the issues cited in this case are matters of evidence to be addressed by the trial court, and, lastly, the Petition is incompetent, fatally defective and ought to be dismissed.

The second respondent

13. The 2nd respondent did not file any response to the application nor did it participate in these proceedings.

The 3rd respondent's replying affidavit

14. The substance of EACC's case as I glean it from the replying affidavit of Catherine Ngari dated June 8, 2021 is that this Petition is premised on generalities, conjectures and suppositions, it is misguided, misconceived and utter abuse of court process, and the orders sought are legally untenable. The EACC contends that its investigations into alleged fraudulent acquisition and irregular compensation of land compulsorily acquired by the Government through the NLC for various Government projects including the Standard Gauge Railway, expansion of roads and construction of by-passes established that at all material times the Petitioner was the Chief Executive Officer of the NLC appointed under article 250 (12) of the Constitution as read with section 20 of the NLC Act. Further, that the investigations established that Tornado Carriers Ltd is the registered owner of LR No. MN/VI/3801 measuring approximately 0.2262 hectares and vide letters dated February 16, 2015 and September 4, 2015, the KENHA requested the NLC to acquire various properties for the purposes of construction of Port Reitz/Moi International Airport Road.
15. The EACC also states that the NLC vide Gazette Notice Number 1642 dated March 13, 2015 gazetted various properties detailing the specific acreages for acquisition as directed by the KENHA and in respect of the above property which was erroneously gazetted as LR No 3301, the NLC gazetted 0.075 hectares for acquisition. It is EACC's case that in compliance with section 108 of the Land Act,⁷ Jacinta Mutua valued the property at Kshs. 34,501,100/= but on May 5, 2018 a representative of Tornado Carriers Limited raised questioned the said valuation arguing that the acquisition would render the remainder of the land uneconomical. NLC vide a letter dated September 15, 2015 forwarded the compensation schedule to the KENHA and advised it to deposit funds into individual accounts of the project affected persons who included Tornado Carriers Limited whose land was shown as 0.0750 hectares and the award is Kshs. 34,501,100/= which award was issued by the NLC to the said company.
16. However, upon receiving the said award, Tornado Carriers Limited vide a letter dated October 20, 2015 rejected the award and reiterated the contents of its previous communication to the NLC and it implored the NLC to review the award and acquire both parcels at Kshs. 180,000,000/=. Vide a letter dated 11th January 2017, the NLC requested the KENHA to facilitate its officers to undertake site inspection so as to address emerging issues touching on the acquisitions of various parcels including LR No. MN/VI/3801 and LR No. MN/VI/2364 belonging to Tornado Carriers Limited and upon re-valuing LR No. MN/VI/3801, it was valued at Kshs. 109,769.363/=.
17. It is the EACC's case that the NLC vide a letter dated March 15, 2017 advised the KENHA that the acquisition of the Port Reitz/Moi International Airport Road was affecting developments that had not

⁶ Act No. 2 of 2013.

⁷ Act No. 6 of 2012.



been considered in the previous valuation and while attaching the schedule of the revised valuations, NLC requested the KENHA to remit the enhanced amounts to it for further disbursements to the respective land owners. The NLC issued an award dated September 16, 2017 to Tornado Carriers Limited for Kshs. 75,268,253/= but it did not indicate the area of land to be acquired, but the award indicated that the amount of Kshs. 75,268,253/= was for the value of improvements thereon and 15% disturbance fee.

18. Additionally, EACC avers that Tornado Carriers accepted the award of Kshs. 75,268,253/= and a one Sheikh Ahmed Khan, its director, director recorded a written Statement with the EACC indicating that he acknowledged acceptance on the copy of the award by signing and affixing its stamp. However, in spite of Tornado Carriers Ltd being issued an award of Kshs. 75,268,253/=, the second valuation returned a value of Kshs. 109,769,363/= described in the schedule as the previously awarded amount of Kshs. 34,501,100/= and an additional value of Kshs. 75,262,253/=.
19. Further, the EACC states that its search at the NLC offices yielded a letter dated October 30, 2017 purportedly signed by N.A Khan a Director of Tornado Carriers Ltd addressed to the NLC acknowledging the award of Kshs. 109,769,363/= and authorizing the NLC on how to remit the payment. It states that Mr. Nazir Ahmed Matabkhan denied acknowledging the amount of Kshs. 109,769,363/= or instructing the NLC to disburse the payments as indicated in the said letter. As a consequence of the foregoing, the EACC concluded that the said letter from Tornado Carriers Ltd was fraudulently introduced to execute the kickbacks to officials of NLC among them the Petitioner who was found to be criminally culpable.
20. EACC's case is that acting on the purported instructions, on November 3, 2017, the NLC paid Kshs. 109,769,363/= in two tranches into two bank accounts, namely, Kshs. 55,269,363/= paid to Tornado Carriers Limited's bank account No. 0060000207 held at SBM Bank (K) Ltd which amount was on 6th December 2017 moved to two bank accounts at the NIC Bank, namely, account number 1003802357 in the name of Asia Akhtar Nazir Ahmed and account number 1003868059 in the name of Tarah Begun Khan. The second tranche of Kshs. 54,500,000/= was deposited account No. 00101072831810, I & M Bank in the name of C.W. Chege Advocates' which amount was subsequently distributed as tabulated in paragraph 8 (s) (ii) of the 3rd respondent's affidavit.
21. Additionally, it is the EACC's position that part of the amount credited in the account of CW Chege advocates was disbursed to agents and or associates, relatives and companies of senior officials of the NLC as follows- Kshs. 900,000/= to Sostech Ogero Taracha the spouse to Dr. Salome Ludenyi Munubi; Kshs. 7,000,000/= to Sunside Guest House, account No. 1130273955818 at Equity Bank. The directors of the said company are Kevin Oindo and Jane Wanjiku Gachigi who are son and spouse of Mr. Joash Oindo. Further, Kshs. 7,000,000/= to Lorgis Logistics- account No. 008215001004371 at ABC Bank and its directors are Bernard Cherutich, the Senior Accountant and Mercy Wahome his spouse. Further, Kshs. 1,770,000/= was paid to Michael George Oloo, a spouse to Luilian Kaverige who prepared the payment schedule. The 3rd respondent also avers that Kshs. 1,250,000/= was disbursed to a one John Kamau's account No. 08001620070979, Equity Bank for the purchase of a house/plot situated in uhuru estate by the said Lilian Kaverenge, so, the petitioner corruptly facilitated illicit payments in favour of Tornado Carriers Limited.
22. Further, EACC faults the that the NLC for:- abdicating its duty of securing a good title to KENHA by failing to carry out an official search at the lands registry to ascertain the current status of the property which had an encumbrance and if at all it undertook a search, it failed to safeguard the public interest; it failed to deliver the Gazette Notice to the Registrar of Lands contrary to section 107 (5) of the *Land Act*, so no entry was made in the register; it failed to undertake a mandatory requirement under section



- 112 (1) of the Land Act which requires service of notice upon the Imperial Bank inviting it to make representations on the loan facilities over the said land owing to the existing charge in its favour.
23. It contends that between January 11, 2017 and December 5, 2017 =, the Petitioner corruptly conspired with other officials of NLC to commit an offense of corruption over payments of Kshs. 109,769,363/= for purported compulsory acquisition of the aforesaid land, and because of his corrupt misconduct, on November 3, 2017 the directors of Tornado Carriers Limited fraudulently received Kshs. 55,269,363 / = from public funds for the purported compulsory acquisition of the said land.
 24. Also, EACC states it discovered that the said land was charged to imperial Bank Ltd for Kshs. 9,500,000/= and it was a term of the debenture that Tornado Carriers Ltd charged its rights, title, estate and its other interests in all immovable properties now and or in future registered in the name of the said company whether under leasehold or freehold title; that as per the charge instrument there was no restriction on the right of the charge to consolidate the mortgage securities and if any part of the Property is sold or disposed or compulsorily acquired, then the chargee would be entitled to make a written demand and the same would become due and payable. Lastly, as at December 31, 2018, Tornado Carriers Ltd was indebted to Imperial Bank to the tune of Kshs. 137,271,828.71, so, the Petitioner corruptly failed to ensure that the land had no encumbrances or restrictions.
 25. Also, it states that an award under section 113 (2) (a) of the Land Act⁸ is final and conclusive evidence of the size and value of the land to be acquired; that section 113 (1) of the said act is couched in mandatory terms that an award shall be prepared only after the conclusion of an inquiry; that an award once issued, the NLC lacks authority to re-open an inquiry or cancel and or issue another award and that an aggrieved person has recourse in court under section 27(5) of the Land promulgated Regulations, 2017.⁹
 26. The EACC states that in conformity with section 113 of the NLC Act, NLC's discretion under section 112(3) to acquire the whole parcel where partial acquisition will render the remainder uneconomical can only be exercised before an award is prepared and issued, so the NLC ignored the said provision and it misled KENHA to believe that the enhancement of the compensation to Kshs. 109,769,363/= from Kshs. 34,501,100/= was for affected developments which were not considered in the 1st valuation.
 27. Additionally, it states that there is no document to show that the property was acquired by the NLC, and contrary to section 107(5), NLC failed to publish in the Kenya Gazette a notice of change of acreage to be acquired to indicate the whole parcel of land up from the original portion acquired thereby exposing the Government to possible future litigation contrary to section 122(4) of the Land Act. Also, he failed to comply with sections 107(5) and (7) of the Land Act.
 28. It is the EACC's case that the petitioner has not demonstrated infringement of his constitutional rights or violation provisions of the Constitution. Further, after its investigations, it made recommendations to the DPP in public interest pursuant to section 35 of the ACECA as read with section 157 of the Constitution.
 29. Additionally, EACC states that pursuant to section 11 (1) (d) of the ACECA it established that the Petitioner breached section 197 (1) (h) of the Public Finance Management Act (the PFMA) as read with section 199 of the Act in the process of acquisition and compensation for the said land. It states that the Petitioner being the Chief Executive Officer of the NLC, he unlawfully incurred expenditure on behalf of KENHA by authorizing payment of Kshs. 109,811,694/= in favour of Tornado Carriers

⁸ Act No. 6 of 2012.

⁹ Promulgated by the NLC pursuant to sections 133 of the Land Act.



Ltd as compensation for compulsory acquisition of land which was not available for compensation because it had been charged to a bank.

30. EACC states that the DPP's decision to charge the petitioner is within his legal mandate under article 157 (6) (a) of the Constitution and section 5 (1) of the ODPP Act and the Criminal Procedure Code,¹⁰ so, this Petition is an abuse of court process. Further, that the petitioner is among the corrupt officials mentioned at paragraph 32 of the judgment in Mombasa Petition No. 32 of 2019- *Shaikh Ahmed Khan & 2 others v Ethics & Anti-corruption Commission & 6 others* and as such the protection under section 25 of the Act is not available to him; that being the Chief Executive Office, he unlawfully incurred expenditure on behalf of KENHA by authorizing payment of Kshs. 109,811,694/= in favour of Tornado Carriers Ltd as compensation for the land which was already charged to Imperial Bank Ltd, hence, it was unavailable for compensation. Further, that he acted corruptly and in bad faith by facilitating an illicit payment which was already charged to a bank and by facilitating a payment based on a forged letter. Also, the Petitioner has not demonstrated good faith and he is acting in breach of Chapter 6 of the Constitution by seeking courts protection. Also, he failed to discharge his duties under sections 20 (3) (a) (4)(a) (b) (c) and 35 (b) (c) of the NCL Act.
31. Additionally, EACC contends that the Petition contravenes rule 10 (2) (b) (c) & (d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; that he is bound by article 10 of the Constitution; that the orders sought are against public interest and an affront to the respondent's constitutional mandate nor has he demonstrated that he will not be afforded a fair trial in the criminal case. Lastly, it is for the criminal court to determine the culpability of the petitioner.

The 1st Interested Party

32. On April 26, 2021, the petitioner's counsel filed a notice of withdrawal dated April 22, 2021 withdrawing the case against the KENHA.

The 2nd Interested Party

33. On September 27, 2021, the NLC filed grounds of opposition dated September 23, 2021 in support of the Petition. It will add no value to rehash the contends here since it wholly agrees with the contents of the Petition.

The petitioner's further affidavit

34. The petitioner filed a further affidavit dated August 25, 2021 in reply to the 3rd respondent's replying affidavit largely reiterating the earlier affidavit whose highlights are: - the petitioner cannot be blamed considering the structure and operating procedures at the NLC; that the alleged kickbacks are speculative; that Logistics returned Kshs. 700,000/= to the NLC and the DPP opted not to prosecute its directors; no money is linked to him, blaming him lacks foundation; this court is being invited engage in guesswork; and that the prosecution is premised on malice.
35. The petitioner also states that it was not his role to undertake due diligence on the land nor did he sit in the land acquisition committee or approve the payment nor has it been shown that he incurred unlawful expenditure or he acted corruptly nor did the witnesses implicate him. He states that the DPP acted under external pressure and that the prosecutorial discretion donated to the DPP by Article 157(10) of the Constitution and section 6 of the ODPP Act is intended to promote the principles and values enshrined in Article 10 as well as the fair trial guarantees at article 50(2) (b) and (c) of the Constitution, so the power must not be used to settle personal scores or for achieving malicious ends.

¹⁰ Cap 75, Laws of Kenya.



The 3rd respondent's further affidavit

36. The 3rd respondent filed a further affidavit dated October 12, 2021 sworn by M/s Ngari essentially reiterating the contents of her earlier affidavit.

The petitioner's further affidavit

37. The petitioner filed the further affidavit dated October 26, 2021 basically replicating the earlier affidavits and stating that the decision in Petition 32 of 2019 still stands; that criminal liability is personal and must be attributed to an individual; that one cannot be condemned merely because he holds an office without cogent proof that by virtue of that office he committed an offence punishable by law; and, being a Chief Executive Officer or a Principal Secretary or an Accounting Officer in the absence of evidence of culpability does not give the EACC the carte blanche to harass state officers in their service to the public.

Analysis and Determination

38. First, I will address what is evidently the nub of the petitioner's case which is whether he has demonstrated all-encompassing grounds for this court to quash or prohibit the charges founded on the alleged breach of provisions of the PFMA. In support of this ground, the petitioner's counsel cited section 20(3) (b) of the NLC Act which provides that the secretary shall serve on such terms and conditions as the Commission may determine. He argued that the NLC establishes committees to operationalize its functions and so it established the Land Acquisition and Compensation Committee to which the petitioner was not a member. He argued that the petitioner is subject to the terms and conditions laid down by the Commission and he was not authorized to sit in the Land Acquisition and Compensation Committee that undertook the process of acquisition of the property. He argued that the decision and approvals to pay emanated from the Land Acquisition and Compensation Committee, and the petitioner only implemented the decision in accordance with the processes and procedures of the NLC. He argued that the petitioner was not the Accounting Officer of the NLC, so, the charge is the result of misunderstanding and or misinformation of the process of compulsory acquisition and the internal working mechanisms of the NLC.
39. Heavy reliance was placed on section 16 of the NLC Act which establishes committees. He argued that it was the committee that undertook all the processes, and that the Petitioner performed no role at all in the acquisition and compensation process, so he cannot be liable. To fortify his argument, he cited section 20 (3) (b) of the NLC Act which provides that the secretary to the Commission shall serve on such terms and conditions as the Commission may determine. To further buttress the argument, he cited section 25 of the NLC Act which provides for protection from personal liability. Lastly, counsel relied on Article 250 (9) of the Constitution which provides that a member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office.
40. The 2nd interested party's advocate supported the Petition and the submissions made by the Petitioner's advocate. He underscored the independence of the NLC under article 249 (2) of the Constitution, a position he submitted was accentuated by the Supreme Court *In the Matter of the National Land Commission*.¹¹ He argued that the operations of the NLC is provided in section 16(1) of the *NLC Act* which provides that the Commission may establish committees for the better carrying out of its functions. He argued that pursuant to the said section, the NLC established committees as its decision-making organs. He also cited section 20 (b) of the NLC Act which he argued inter alia requires the secretary to serve on such terms and conditions as the Commission may determine. Buttressed

¹¹ [2015] eKLR.



by this provision, he argued that the Chief Executive Officer performs his functions on such terms and conditions as determined by the Commission, and whereas he sits in full commission meetings, he was not mandated by the commission to sit in any of the decision-making committees established under section 16 of the NLC Act. He submitted that the Land Acquisition Committee is chaired by a Commissioner and the Director, Valuation and Taxation sits as its secretary, so, the Chief Executive Officer was not mandated to sit as a member of the said committee.

41. Regarding the payments, he argued that the NLC has 3 signatories, namely, the Chief Executive Officer, the Director, Finance and Director of Valuation and any of the 2 could sign cheques/payments. Additionally, he argued that article 250(9) of the *Constitution* insulates commissions and holders of independent offices from personal liability for actions and decisions taken in good faith in the course of their functions. Additionally, he argued that section 25 of the *NLC Act* protects officers of the NLC from personal liability. He argued that the petitioner received a schedule of payment duly approved by the Land Acquisition and Compensation Committee accompanied by duly signed minutes of the committee for his implementation and he approved the payments as presented by the secretary to the said committee. To buttress his argument, he cited the Indian case of *C. Gurusamy Konar v The State of Madras* in which the court held that if the officer charged with the execution of the duty honestly intends to put the law in motion, and really and not unreasonably believes in the existence of facts which, if existent, would justify his acting and acts accordingly, his conduct will be in pursuance of the law and he will be protected.
42. The facts surrounding the issue at hand are deceptively straightforward, yet concealing the complexity and obscurity of the underlying legal issue which requires resolution. Regrettably, none of the parties suitably discerned and addressed the crucial legal issues in this case. Central to the issue at hand is the proper interpretation of sections 6, 67, 68 79, 197 and 198 of the *PFMA*. At the heart of the dispute is the ambit and scope of the said provisions and their interplay with sections 16, 20 (3) (c) and 25 of the *NLC Act* on one hand. The unavoidable fundamental constitutional question as we construe the above statutory provisions is the significance of articles 201, 226 (5), 250 (9), 232 of the *Constitution* and Chapter 6 of the Constitution and their relationship with the said statutory provisions.
43. Resolving the issue at hand requires a faithful interpretation of the above provisions so as to understand their meaning, purport and effect. The principles of statutory interpretation are by well-settled. Statutory interpretation is the objective process of attributing meaning to words used in legislation, a process which entails a synchronized consideration of— (a) the language used in the light of the ordinary rules of grammar and syntax; (b) the context in which the provision appears; and (c) the apparent purpose to which it is directed.
44. A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely: (a) that statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualized; and (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a.)
45. Where a provision is ambiguous, its possible meanings must be weighed against each other given these factors. For example, a meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred. Neither is one that unduly strains the ordinary, clear meaning of words. That text, context and purpose must always be considered at the same time when interpreting legislation. Courts must also interpret legislation to promote the spirit, purport and object



of the Bill of Rights. Again, courts should not unduly strain the reasonable meaning of words when doing so.

46. The PFMA was enacted to provide for the effective management of public finances by the national and county governments; the oversight responsibility of Parliament and county assemblies; the different responsibilities of government entities and other bodies, and for connected purposes. Simply put, the PFMA was enacted to regulate financial management in the national government and county governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those entities; and to provide for matters connected therewith. It is important to recall that the PFMA is the legislation contemplated under article 225 of the Constitution. To this end, the legislation seeks to give effect to, amongst others, the values underpinning article 201 of the Constitution.
47. The object of the Act is articulated in section 3, which is to ensure- (a) public finances are managed at both the national and the county levels of government in accordance with the principles set out in the Constitution; and (b) public officers who are given responsibility for managing the finances are accountable to the public for the management of those finances through Parliament and County Assemblies.
48. The petitioner and the NLC placed heavy reliance on the provisions of sections 16(1), 20 (b) and 25 of the NLC Act. However, they overlooked the fact that the petitioner was the Accounting Officer of the NLC and therefore he was subject to the provisions of the PFMA. More important, they said nothing about section 6 of the PFMA which provides that the Act shall prevail in the case of any inconsistency between the Act and any other legislation, on the following matters— (d) raising of revenue and making of expenditures. The payments which are the subject of the criminal case are expenditures as contemplated under the said provision.
49. Additionally, the Petitioner and the NLC heavily relied on article 250 (9) of the Constitution. However, they said nothing about articles 201, 225(2), 226 (5) of the Constitution. It is an elementary canon of constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone, but all the provisions bearing upon a particular subject are to be brought into view and interpreted as to effectuate the greater purpose of the instrument.¹² In this regard, the attempt by the Petitioner to heavily hide behind the shield created by article 250 (9) ignores this established constitutional dictate. It ignores the clear provisions of Articles 201 which provides the principles of public finance. The argument also ignores article 225 (2) which provides for the enactment of a legislation to ensure both expenditure control and transparency in all governments and establish mechanisms to ensure their implementation. By now it is clear the PFMA enjoys a constitutional underpinning. The attempt by the Petitioner to elevate sections 16(1), 20 (12) and 25 of the NLC Act over the clear provisions of the PFMA cannot surmount the hurdle created by section 6 of the PFMA which provides that in the event of conflict, the provisions of the PFMA prevail.
50. Additionally, the attempt to hoist high the provisions of article 250(9) of the Constitution and ignore or disregard articles 201, 225(2), 226(5) of the Constitution ignores the cannon of constitutional construction which requires provisions of the Constitution on the same subject to be construed together so as to get the real intention of the charter. Article 226 (1) (b) of the Constitution designates an accounting officer in every public entity at the national county level. As if to accentuate the importance, seriousness and high calling of the office of an Accounting Officer, the drafters of the Constitution at article 226 (5) imposed personal liability couched in no nonsense words as follows: - "If the holder of a

¹² *Smith Dakota v North Carolina, 192 US 268(1940)*.



public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not."

51. The operative word in the above provision is "contrary to law." The general rule is thus that the accounting authority approves and oversees finances. The accounting authority is in charge of a public entity's general expenditure and finances. The long title of the PFMA provides that it seeks to "ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively." This is in accordance with article 225 of the Constitution, which envisages national legislation establishing a National Treasury and prescribing measures to ensure that both transparency and expenditure control in each sphere of government are attained.
52. In any event, while enacting the provisions of article 250 (9) of the Constitution, the drafters of the Constitution were not writing on a clean slate in the sense of taking an unprecedented step. On the contrary, they had before them several cognate articles governing public finance, management and expenditure. These are articles 201, 225 and 226 which deal with Principles of Public Finance, Financial Control and personal liability on the part of an accounting officer if he approves the use of public funds contrary to law or instructions respectively. The drafters of the Constitution also had before them Article 232 which prescribes the Values and Principles of Public Service which include efficient, effective and economic use of resources, accountability for administrative acts and transparency and provision to the public of timely, accurate information. The drafters of the Constitution meticulously provided for enactment of legislation to operationalize these constitutional edicts. So, in interpreting the statutory provisions cited above, we are required to bear in mind that the said provisions must be construed in a manner which promotes these constitutional values and purposes.
53. The PFMA enjoys a constitutional underpinning and by creating offences under the Act, Parliament was performing its duty of legislating to implement the desired constitutional dogma to govern public finance and management. Viewed from this constitutional imperative and purposive interpretation of the constitution and the governing statutes, it becomes clear that the Petitioner's argument that he was a "glorified clerk" whose role was simply to implement decisions of a committee is a serious joke which should never find its way into a court room. Additionally, the Petitioner's argument that he was reduced to a "glorified" clerk because of the manner in which decisions were made at the NLC flies on the face of section 67 of the PFMA which provides: -
 67. Designation of accounting officers for national government
 - (1) The Cabinet Secretary, except as otherwise provided by law, shall in writing designate accounting officers to be responsible for the proper management of the finances of the different national government entities as may be specified in the different designations.
 - (2) Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office.
54. To my mind, there is no other legislation providing that committees or a commissioner of independent commissions or any other person shall be responsible for managing finances of a government entity. The only person statutorily ordained to manage the finances of a government entity is the Accounting Officer. The attempt to find refuge in section 20 (3) of the NLC Act cannot by any stretch of imagination be construed to mean that the accounting officer can under any circumstances cede his statutory ordained functions to a committee or any person. Had Parliament desired that to be the case, it would have said so in clear terms. Unless a statute expressly states otherwise, the Accounting Officer is



the person responsible for managing the finances of a public entity. This is the clear language of section 67 (1) & (2) of the PFMA. Section 20(3) of the *NLC Act* or the sections cited by the Petitioner do not mention finances. Even if the said sections stated otherwise (which they do not) such a defense must surmount the barrier created by section 6 of the PFMA which expressly states that the provisions of the PFMA prevail in the event of conflict with other statutes.

55. Also relevant is section 68 of the PFMA which provides for the Responsibilities of accounting officers for national government entities, Parliament and the Judiciary as follows: -
- (1) An accounting officer for a national government entity, Parliamentary Service Commission and the Judiciary shall be accountable to the National Assembly for ensuring that the resources of the respective entity for which he or she is the accounting officer are used in a way that is— (a) lawful and authorized; and (b) effective, efficient, economical and transparent.
56. The above section at subsection (2) provides that in the performance of a function under subsection (1), an accounting officer shall— (a) ensure that all expenditure made by the entity complies with subsection (1). The provision also requires the accounting officer to-
- (d) ensure that all contracts entered into by the entity are lawful and are complied with;
 - (e) ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services and that, in the case of goods, adequate arrangements are made for their custody, safeguarding and maintenance;
 - (f) bring any matter to the attention of the Cabinet Secretary responsible for the entity, or the Chief Justice or the Speaker of the National Assembly if, in the accounting officer's opinion, a decision or policy or proposed decision or policy of the entity may result in resources being used in a way that is contrary to subsection (1);
 - (m) provide information on any fraud, losses, or any violation of subsection (1) and explanation for the actions taken to prevent a similar problem in future;
 - (n) provide the National Treasury and any other office, where relevant, with any information it may require to fulfil its functions under this Act;
57. Parliament in its wisdom deployed the word shall in the above provision which connotes a mandatory prescription. The constitutional provisions and the provisions off the PFMA cited above leave no doubt that an Accounting Officer of a public body is not a glorified clerk as the Petitioner suggests. It is a high office established by the Constitution to further the purposes and principles public finance engrossed in article 201 of the Constitution and the PFMA. These provisions are to be read together with the provisions of article 232 of the Constitution and Chapter 6 of the Constitution.
58. The Constitution deliberately hoisted position of an Accounting Officer to a high pedestal and stipulated the manner in which public finance shall be managed. So serious is this constitutional edict that under article 226(5), if the holder of a public office, including a political office, directs, or approves the use of funds contrary to the law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not. As if this is not enough the PFMA created offences under Part V11 of the Act at sections 196 to 199.
59. I am alive to fact that article 250(9) provides that a member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office. A reading of this article leaves no doubt that a member of a Commission only enjoys immunity for actions performed in good faith. The above Article insulates members of the NLC against court



action for actions done in the performance of their duties provided they acted in good faith. Whether or not the Petitioner acted in good faith is a matter of evidence to be evaluated by the trial court trying the criminal charges not the High Court.

60. The Constitution speaks its values and commands to a variety of public officials and to the public at large. One thing is clear. The Constitution of the Kenya is a carefully balanced document. It is designed to provide for a public service sufficiently strong and flexible to meet the needs of the Republic, yet sufficiently limited and accountable to the Constitution and the people of Kenya. In fact, a common thread in the entire Constitution is the emphasis on accountability for all actions done or omitted to be done by public officers while in office. The Constitution also in an uncompromising manner hoists high the requirements for integrity. The drafters were careful to balance between the society's needs to be provided with efficient services by authorizing expenditure where lawfully required but at the same time emphasizing on prudent use of government resources and the requirement for value for money to curb wastage and misuse of public funds. As Chief Justice Marshall said in *McCulloch v Maryland*¹³ while speaking on the role of a court, "we must never forget that it is a constitution we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."
61. The vast jurisdiction vested in this court by the Constitution derives from its authority to invalidate laws, decisions, actions or omissions which in the court's considered judgment, conflict with the Constitution. This power of "judicial review" has given the court a crucial responsibility in assuring individual rights, as well as in maintaining a "living Constitution" whose broad provisions are continually applied even to and complicated new situations. As Chief Justice John Marshall in *Marbury v Madison* said, "it is emphatically the province of the judicial department to say what the law is."
62. In retrospect, it is evident that constitutional interpretation and application were made necessary by the very nature of the Constitution. The drafters of the Constitution wisely worded the document in rather general terms leaving it open to future elaboration to meet changing conditions. As Chief Justice Marshall noted in *McCulloch v Maryland*,¹⁴ a constitution that attempted to detail every aspect of its own application "would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." By now it's evident that the Petitioner's argument that the charges premised under the PFMA lack legal foundation or basis is shallow, legally frail and unsustainable. Viewed from these constitutional precepts, it is evident that the attempt to assault the constitutional validity of the charges under the PFMA cannot succeed.
63. I now transit to the second issue urged by the Petitioner, which is that the charge of conspiracy cannot stand without evidence of the essential ingredient of common intention. To buttress his argument, the Petitioner's counsel cited the definition of conspiracy in *Black's Law Dictionary*¹⁵ which is "an agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement's motive, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose." He argued that the Petitioner faces an offence of conspiracy under section 47A (3) as read with Section 48 of the *ACECA* which provides: - "A person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence."

¹³ 17 U.S. 4 Wheat. 316 316 (1819).

¹⁴ 1819.

¹⁵ 9th Edition at page 351.



64. He cited a paragraph in *Archibold's Criminal Pleadings, Evidence and Practice 2010*¹⁶ thus: -

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons... so long as a design rests in intention only, it is not indictable; there must be agreement...

The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”

65. Buttressed by the above excerpt, counsel argued that in order to prove an offence of conspiracy, the elements to be proved are the existence of an agreement and a common intention. This requires that a common purpose between or among the subject parties is proved. He submitted that under section 21 of the *Penal Code*,¹⁷ Common intention is described as follows: -

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

66. Additionally, counsel relied on *Rebecca Mwikali Nabutola & 2 others v Republic*¹⁸ which held that in order to prove an offence of conspiracy to defraud, the elements to be proved are the existence of an agreement and the intention to defraud the public. He argued that the petitioner did not participate in the acquisition of the property, neither did he sit in the Land Acquisition and Compensation Committee which approved the payments nor did he prepare any payment schedules or append his signature on the payments approved and no payment has been traced to his account. He relied on *Patrick Saidi Musyoka v Republic*¹⁹ in support of the proposition that the Prosecution failed to link the appellant with a common intention with his co-accused to fraudulently account for the monies in question.

67. Counsel for the EACC submitted that the matters raised by the petitioner qualify as his defence before the trial court.

68. In addressing the issue at hand, it is important to appreciate the function of a constitutional court hearing a Petition seeking to quash or prohibit a criminal prosecution. For starters, the definition proffered for the offence of conspiracy to defraud and the ingredients of the offence is attractive. But that is how far it goes. The law is that it is not for this court to determine the veracity or to weigh the strength of the evidence or accused persons' defence or whether the facts disclose the ingredients of the offence. That is a function for the trial court hearing the criminal trial. This court can only intervene if there are cogent and proven allegations of violation of the Constitution or constitutional Rights or threat to violation of the Rights or in clear circumstances where it is evident that the accused will not be afforded a fair trial or the right to a fair trial has been infringed or threatened or where the prosecution is commenced without a factual basis. The detailed version tendered before this court by the petitioner

¹⁶ *Sweet & Maxwell, at pages 3025 and 3026,*

¹⁷ Cap 63, Laws of Kenya.

¹⁸ [2016] eKLR.

¹⁹ [2017] eKLR.



- trying to explain their innocence and defining the elements of the offence of conspiracy is misdirected. It is an invitation to this court to perform the functions of the trial court. I decline the invitation to do so.
69. The power to quash criminal proceedings has to be exercised sparingly and with circumspection and in the rarest of rare cases. This court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the court do not confer an arbitrary jurisdiction on the court to act according to its whims or caprice.
70. Next is the argument that the charge of conspiracy will collapse against the petitioner because the substratum of the case has been determined by a court of concurrent jurisdiction in Petition Number 32 of 2019 in which the court quashed the Charge sheet in Anti-corruption Case No. 6 of 2019 in so far as it relates to the petitioners. The court also quashed the decision to investigate, arrest and charge the 1st and 2nd petitioners in the said case. The court also issued a perpetual injunction restraining the respondents in the said case from arresting, charging or prosecuting the 1st and 2nd petitioners in respect of the attempted compulsory acquisition of L.R No. MN/VI/3801. It also prohibited the Anti-Corruption Court in Milimani Commercial Courts from hearing the said case. Lastly, the court quashed the decision to charge the 3rd petitioner in the said case.
71. The other parties did not address this issue. However, the above argument collapses not on one, not on two, but on five fronts. One, as shown by the documents presented in this court, the petitioner was not a party in the said case. Two, the orders issued in the said case like guided missiles are specific. They apply only to the petitioners in the said case. Three, the Petitioner faces charges under the PFMA by virtue of having been the Chief Executive Officer/ accounting officer of the NLC. His position is unique and distinct from the Petitioners in the said case. Four, the argument that the charges offend article 27 of the Constitution is misguided considering his unique position owing to the Position he held. Five, the said judgment was not a judgment in rem.
72. The other ground upon which the petitioner seeks to upset the criminal prosecution is the alleged absence of a recommendation by the DPP for the petitioner to be charged with the offence. To buttress this argument, the petitioner's counsel submitted that in absence of such consent, there is no proper charge in court or against the petitioner. He cited article 157 (10) (11) of the *Constitution* and argued that the DPP is subject to the authority of the Constitution. He submitted that institution of criminal proceedings against the petitioner is a direct affront to the letter and spirit of the article 157. He submitted that the decision to charge the petitioner was arrived at by the EACC in the exclusion of the DPP which is a mockery of the office of the ODPP and its independence. He submitted that the institution of the Criminal proceedings against the petitioner offends section 6 of the *ODPP Act* which guarantees the independent and impartiality of the DPP. He argued that the criminal case is an abuse of the court process and a breach of article 27 of the *Constitution*.
73. Additionally, the petitioner's counsel submitted that the EACC is required to undertake investigations, and forward its findings to the DPP who makes the decision based on the report by the EACC to charge. He argued that before the Petitioner was arrested, the DPP issued a press release which alleged the commission of offence and the reasons for charging the suspects but the name of the petitioner was not among the suspects. However, the petitioner's name was included in a list issued on April 18, 2021. From the foregoing, he submitted that the process culminating into the charging of the petitioner was illegal.



74. In addition, the petitioner's counsel submitted that a person to whom powers or duties are delegated cannot delegate his powers and that the power to delegate can only arise where it is within the scope of the primary delegate's authority. To underscore his argument, he cited *Republic v Chuka University ex parte Kennedy Omondi Waringa & 16 others*.²⁰ Also, he cited section 7(2)(a)(i)(ii) and (iii) of the *Fair Administrative Action Act*²¹ which he submitted enjoins courts and tribunals to review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; or acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.
75. The DPP's counsel submitted that the petitioner faces a charge of financial misconduct contrary to section 197 (1) (h) as read with section 199 of the *PFMA*. She argued that the DPP is mandated to prosecute criminal cases as provided under article 157(6) of the *Constitution*. She submitted that the DPP does not require approval or permission from any person to institute criminal proceedings. She relied on *Republic v The DPP, ex parte Victory Welding Works Limited and another*²² and argued that the DPP is guided by the evidentiary and the public interest tests. She cited *Pauline Adhiambo Raget v Director of Public Prosecutions and 5 others*²³ in support of the proposition that it is not for this court to sieve through the evidence and determine whether or not the petitioner ought to be prosecuted.
76. EACC's counsel did not directly address this ground.
77. From the scanty material before me, the argument that the charges were instituted without the approval of the DPP is founded on the reasoning that a press statement was issued by the EACC did not contain the name of the petitioner. Also, in an affidavit filed in court in Petition 32 of 2006 did implicate the Petitioner. As was held by the Court of Appeal in *Boniface Katana Kalaveri v Ethics and Anti-Corruption Commission & another*,²⁴ that EACC's mandate was greatly enhanced by the 2010 Constitution and by the enactment of an Act of Parliament by dint of article 79 of the *Constitution*. Article 252 of the *Constitution* grants EACC power to conduct investigations either on its own initiative or on a complaint made by a member of the public. article 79 of the *Constitution* provides that 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 15, for purposes of ensuring compliance with, and enforcement of, the provisions of the Chapter. Pursuant to the said provision, Parliament enacted the EACC Act.²⁵ The Act enumerates certain functions, in addition to the roles that the Constitution has already accorded the commission.
78. Additional functions of the commission under the Act are: -²⁶ (d) Investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under the Act or any other law enacted pursuant to chapter six of the *Constitution*. The EACC is mandated under section 11(1)(d) of the ACECA to investigate

²⁰ [2018] eKLR.

²¹ Act No. 4 of 2015.

²² NBI High Court Misc App No 249 of 2012.

²³ [2016] eKLR.

²⁴ [2015] eKLR

²⁵ *Supra*

²⁶ Section 11 of the Act



and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to chapter 6 of the Constitution. Further, under the provisions of section 35 of ACECA as read with the provisions of section 11(1) (d) of EACC Act, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not.

79. While it is admitted that the EACC lacks prosecutorial powers and has to forward all cases it has investigated to the DPP for prosecution, there is no tangible material before me to suggest that this requirement was not complied with. I find nothing to suggest that the decision to prosecute was instituted without the approval of the DPP. These factual allegations are not backed by evidence.
80. I now turn to the Petitioner's contention that the criminal charges are an clear abuse of public office and authority and a violation of the principals of Fair Administration. He cited *Mackeigan v Hickman*²⁷ in support of the proposition that courts are the protectors of the Constitution and the fundamental values embedded in it, that is; the rule of law, fundamental justice and preservation of the democratic process. He argued that the very essence of Economic Crimes as enshrined in the ACECA is to safeguard public interest by protecting public funds and subsequently imposing criminal liability on the persons culpable. He submitted that article 157(11) requires the DPP to act in public interest while discharging his duties. To buttress his argument, he cited the definition of public interest in the *Black's Law Dictionary*²⁸ and *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)*²⁹ in which the court emphasized the importance of upholding the rule of law and basis of public interest.
81. Additionally, he submitted that the charge lacks factual foundation. He relied on *Republic v Director of Public Prosecution & another ex parte Kamani*³⁰ which cited *R v Attorney general ex Kipngeno Arap Ngeny*³¹ in support of the proposition that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. He cited *Peter George Antony Costa v Attorney General & another*³² which held that court processes ought to be used fairly honestly and in good faith.
82. Also, counsel relied on *Director of Public Prosecutions v Martin Maina & 4 Others*³³ in which the court cited decided cases which enumerated the grounds which constitute abuse of court process. He submitted that allowing the criminal trial to proceed is tantamount to subjecting the petitioner to harassment. He cited *Williams v Spautz*³⁴ (quoted in *Republic v Director of Public Prosecutions & 2 others Ex-parte Praxidis Namoni Saisi*³⁵ in support of the holding that if the proceedings obviously

²⁷ [1989] SCR 796.

²⁸ 10th Edition (page 1425).

²⁹ [2021] eKLR.

³⁰ Nairobi Judicial Review Application No. 78 of 2015.

³¹ High Court Civil Application No. 406 of 2001.

³² [2013] eKLR.

³³ [2017] eKLR

³⁴ [1992] 66 NSWLR 585, at 600.

³⁵ [2016] eKLR.



lack any proper foundation in the sense that there is no evidence capable of sustaining a committal, they will obviously be vexatious and oppressive. He argued that the respondents actions are aimed at misleading the court, that they are in bad faith by failing to disclose to this court that they did not make the recommendation to charge the petitioner. He urged the court to allow the Petition.

83. Counsel for the DPP submitted that the petitioner has failed to demonstrate how his constitutional rights have been violated nor did he list the provisions of the Constitution alleged to have been violated. He cited *Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others*³⁶ which citing the Supreme Court of India for a detailed enumeration of the circumstances under which the court can terminate criminal proceedings.
84. Counsel for the 3rd respondent argued that the mere fact that a constitutional Petition has been filed does not elevate the dispute into a constitutional matter. He submitted that the cases cited by the Petitioner are distinguishable from the instant Petition both in fact and circumstances.
85. He submitted that the Petition lacks merit, that the subject property was corruptly acquired. He argued that the petitioner facilitated the acquisition of the land but failed to undertake due diligence by approving an illicit payment. He submitted that the petitioner has failed the legal test in *Anarita Karimi Njeru v The Republic*³⁷ which underscored the requirement for a petitioner in a constitutional Petition to prove the provisions of the Constitution alleged to have been breached and the alleged breach. He argued that the provisions alleged to have been violated and the alleged breach remain hazy. Additionally, he relied on *John Mbau Mburu v County Government of Mombasa; Robinson Malombo (Interested Party)*³⁸ which held that for a constitutional Petition to succeed, there has to be a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement.
86. As useful starting point is to recall that the inherent jurisdiction of this court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.³⁹ The essential focus of the doctrine is to prevent unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution. The high court will only prohibit or quash prosecutions in cases where it would be impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.⁴⁰
87. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court to quash the proceedings in the interest of justice.

³⁶ {2019} eKLR.

³⁷ (1976-1980) KLR.

³⁸ 2019 eKLR.

³⁹ See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

⁴⁰ See *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R v Methyr Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.



88. The High Court's inherent powers to quash, stay or prohibit criminal proceedings are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India⁴¹ revisited the law on the issue and held that 'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.'
89. The Supreme Court of India delineated the law in the following terms:-“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings...The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”⁴²
90. The leading case on the application of abuse of process remains the often cited decision in *Bennet v Horseferry Magistrates Court & another*⁴³ in which the court held that an abuse of process justifying the stay of a prosecution could arise in the following circumstances: -
- i. Where it would be impossible to give the accused a fair trial; or;
 - ii. Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.
91. The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances. *Chris Corns*⁴⁴ argues that the grounds upon which a stay will be granted though variously can be classified under three categories:
- i. When the continuation of the proceedings would constitute an 'abuse of process,'
 - ii. When any resultant trial would be 'unfair' to the accused, and
 - iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.
92. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word “vexatious” means “harassment by the process of law,” “lacking justification” or with “intention to harass.” It signifies an action not having

⁴¹ See *Maharashtra vs Arun Gulab Gawali*.

⁴² See *State of West Bengal & Others vs Swapan Kumar Guba & Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128}} & *G. Ugar Suri & Ano vs State of U.P & Others*, AIR 2000 Sc 754.

⁴³ [1993] All E.R 138, 151, House of Lords.

⁴⁴ Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*, 76 University of Tasmania Law Review, Vol 16 No. 1, 1977.



sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court. It is in public interest that prosecutions be mounted to uphold law and order and justice for the victims of crime. The enquiry is whether there has been an irregularity or an illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.⁴⁵

93. A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as *certiorari*, prohibition, *mandamus* or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceedings ought to be quashed.
94. Applying the considerations discussed above to the facts and circumstances of this case, I find and hold that the petitioner has not demonstrated that the prosecution lacks factual basis or is an abuse of court process. The irresistible conclusion is that this Petition must fail. Accordingly, I dismiss this Petition with no orders as to costs.

Orders accordingly

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF FEBRUARY 2022

JOHN MATIVO

JUDGE

⁴⁵ Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94.

