Kiprotich v Director of Public Prosecution (DPP) & another (Judicial Review 25 of 2020) [2022] KEHC 11968 (KLR) (Anti-Corruption and Economic Crimes) (24 March 2022) (Judgment)

Neutral citation: [2022] KEHC 11968 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

JUDICIAL REVIEW 25 OF 2020

EN MAINA, J

MARCH 24, 2022

BETWEEN

HENRY KIPLAGAT KIPROTICH ..... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION (DPP) ..... 1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSIONS (EACC) .. 2ND RESPONDENT

JUDGMENT

Procedural history

1. By a Notice of Motion dated 21st December 2020 filed pursuant to leave granted by this court on 19th December, 2020 the Ex parte Applicant seeks Judicial Review orders as follows:-

> " a) THAT the charges in the charge sheet filed against the applicants in ACC Case No. 20/2019 by the respondent in Republic v Henry Kiplagat Rotich & others is hereby removed to the High Court and quashed forthwith.
>
> b. THAT the respondents be prohibited and are hereby prohibited from bringing similar charges against Henry Kiplagat Rotich based on the same provisions of the law over the same facts involving Kimwarer and Arror multi-purpose dams."

2. In opposition to the application the 1st Respondent filed a Replying Affidavit dated 1st February 2021 and a Supplementary replying affidavit dated 31st March 2021 both sworn by Chief Inspector Gilbert Kitalia. The 1st Respondent also filed written submissions dated 15th April 2021 and supplementary

written submissions dated 14th June 2021. On its part, the 2nd Respondent opposed the application through Grounds of Opposition dated 24th March 2021 and Written Submissions dated 6th April 2021.

3. The Applicant subsequently filed a Further Supporting Affidavit sworn on 26th February 2021, a Response to the 2nd Respondent's Notice of Opposition, written submissions dated 16th March 2021 and Notice of Objection to the 1st Respondent's Supplementary Submissions dated 21st June 2021.

4. It is noteworthy that during the pendency of these proceedings, the 1st Respondent filed an application seeking that this suit be referred to the Honourable Chief Justice for empanelment of an uneven number of Judges to hear and determine the suit, which application was considered and dismissed vide Ruling dated 3rd November 2021.

Background

5. The Applicant is the immediate former Cabinet Secretary for the National Treasury. He has been charged with 20 counts of corruption related offences before the Chief Magistrates Court Anti-Corruption Case No. 20 of 2019; *Republic v Henry Rotich and 26 others*. The charges arise from the procurement of the Arror Multipurpose Project Tender No. KVDA/RFP/36/2014-2015 awarded at price USD 292,538,926.4 and the Kimwarer Multipurpose Project Tender No. KVDA/RFP/39/2014-2015 awarded at price USD 236,663,372.86 for the construction of the Arror and Kimwarer Dams respectively in Elgeyo Marakwet County by the Kerio Valley Development Authority (KVDA) and the ensuing Facilities Agreement entered into by the Government of Kenya which allegedly resulted into a loss of Kshs. 21 billion of public funds to date and counting.

The Applicant's case

6. The Application is based on the sixty-six (66) grounds stated on the face of the Application and the affidavits sworn by the Applicant.

7. In summary the Ex-parte Applicant's case is that sometimes in April, 2017, in his role as the Cabinet Secretary of the National Treasury, he signed on behalf of the Government of Kenya the Facilities Agreement for Loan Agreement for financing of the Development of Arror and Kimwarer Multi-Purpose Dam Projects in accordance with Section 49, 52 (1) and 53 (A) (2) of the *Public Finance Management Act*, 2012 (Revised 2014, 2016). This followed a letter from the Ministry of Environment, Natural Resources and Regional Development Authority Ref. No. MRD/KVDA/8/7/1 Vol. III /(68) dated 14th March, 2016 (annexed marked HKR 1) signed by the then Cabinet Secretary Prof. Judi. W. Wakhungu requesting the National Treasury to borrow funds to finance the two projects.

8. That in the said letter, the Cabinet Secretary of the responsible Ministry Prof. Wakhungu forwarded the projects summary report which included the proposed financing that was identified during the procurement process and requested the National Treasury to borrow funds for the projects on behalf of KVDA.

9. That upon receiving the request, the Public Debt Management Office of the National Treasury, in their role set out in Section 62 -65 of the Public Finance Management (PFM) Act of 2021, reviewed, negotiated and sought legal clearance from the Attorney General of the Republic of Kenya (which was issued on 10th March, 2016, before recommending to the Ex-parte applicant to sign the Facilities Agreement whose terms and conditions for the loan were set out in writing in compliance with section 49 (1) of the PFM Act. The terms and conditions included among others, the SACE insurance premium as set out in Clause 13 of the signed Facilities Agreements for both projects. (Annexed is the Facilities Agreement marked HKR2).

10. He stated that the 1st Respondent has charged him with a plethora of charges and that the charge sheets mirror each other with respect to alleged crimes committed for the two projects/dams.

11. That on the face of it, the charges relate to alleged failure to comply with the Public Private Partnership (PPP) Act (count 1) allegedly engaging in a project without prior planning (4 and 21); alleged failure to comply with procurement law with respect to raising the loan (the Facilities Agreement) together with its terms and conditions therein (SACE insurance premium) (counts 2, 3 and 18) alleged failure to comply with applicable law relating to management of public funds (counts 7, 13, 17, 19, 20, 24 and 30); alleged offence of financial misconduct (counts 14 and 32) alleged abuse of office (counts 5, 6, 22 and 23); and placing Kenya business other than re-insurance business with an insurer not registered under the *Insurance Act* without the prior approval of the Commissioner of Insurance (count 31). He contends that the charges are a gross misapprehension of the law applicable to the transactions described in the charge sheet. He contends that his role as cabinet secretary of the National Treasury was to review and negotiate the proposed financing proposal and if acceptable proceed to execute the loan facilities agreement in accordance with the *Public Finance Management Act*. He contends that the Respondents ignored exculpatory information in the Auditor General's Report and further that the National Treasury's role was to ensure that the terms and conditions of the loan agreement complied with the requirements of the National Treasury.

The Applicant's Case.

12. The Application is based on the sixty-six (66) grounds stated on the face of the Application and the affidavits sworn by the Applicant. That the charges preferred against him in ACC No. 19 of 2020 are motivated by the Respondents' misapprehension of the applicable laws and a biased prosecution and as such the charges are in breach of *the Constitution*; That the Respondents misunderstood and mischaracterized the intention of the parties to enter into an Engineering Procurement Construction + Financing mode of Agreement (EPC+F) an agreement for specialized large turnkey constructions such as the ones on the charge sheet; That they instead interpreted the project as Public Private Partnerships under the *Public Private Partnerships Act* (PPP), 2013. The Petitioner contends that a Public Private Partnership contract must have an element of operation and maintenance over a defined concession period of the project which element is lacking in the EPC+F contracts; That the Respondents have also misinterpreted the laws relating to the statutory authority and responsibilities of the Cabinet Secretary to the National Treasury, the segregation of responsibilities with respect to procurement, management of public funds and what constitutes insurance business and as such, all the counts 1, 2, 3, 4, 5, 6, 7, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24, 30, 31 and 32 brought against him Applicant cannot stand the test of legality. He has set out the division of the responsibilities of the various government agencies at paragraph 32 of the supporting affidavit.

13. The Applicant also contends the following:- that the Respondents misapprehended the law on national government borrowing such as the Facilities Agreement; that Section 103 of the Public Procurement and Assets Disposal Act is not applicable to borrowings for the national government projects such as the Arror and Kimwarer dams; that procurement law does not contemplate a loan to be procurement; that no reasonable prosecutorial authority would apply Section 103 of the Public Procurement and Assets Disposal Act on borrowing as was done in Count 2; that he has been charged with directly procuring loan facilities from the financiers BNP Parbas Forties SA/NV Intesa Sapalo SPA, Unicredit SPA and UniCredit Bank AG for the development of the two dams contrary to the Public Procurement and Assets Disposal Act and that the aforesaid charge is unconstitutional as it fails to take into account his roles and powers as the Cabinet Secretary Treasury in implementing the

mandate under Section 49 of the *Public Finance Management Act* and that similarly, counts 5,13,22 and 30 relating to the legality of the Facilities Agreement must suffer the same fate as Count 2.

14. The Applicant also contends that in Counts 3 and 18, he was charged with irregularly procuring an insurance policy with SACE contrary to Section 104 of the Public Procurement & Assets Disposal Act. That this is absurd as the Respondents have failed to comprehend that the legal functions of the Cabinet Secretary for Treasury in a Facilities Agreement are governed by the Public Financial Management Act and in this case the Treasury's duty cannot be to procure the loan insurance but only to review and negotiate identified financing proposals and if acceptable enter into a loan contract within the *Public Finance Management Act*. He contends that in Counts 1 and 20, the Respondents failed to comprehend the amendments to Sections 2 and 50(7) of the *Public Finance Management Act* No. 6 of 2014 which prescribe the definition of government-to-government loans and which allows for direct disbursements of loan proceeds to suppliers. As such that the SACE being an Italian intermediary facilitating export financing by means of credit insurance is covered by this law and qualifies for direct disbursement.

15. Further that in Counts 4 and 21, the Respondents misapprehended the law by charging him for failing to engage in a project which had no prior planning contrary to Section 26(3) (a) of the Public Procurement and Assets Disposal Act, 2005. It is his case that this is irrational as this law applies to the procuring entity and not the National Treasury or the Applicant. He contends that he was not the accounting officer or an official of the Kerio Valley Development Authority which was the procuring entity and that he did not have authority over Kerio Valley Development Authority or its procurement matters and any involvement in the procurement processes of that entity would amount to micromanagement.

16. In regard to Counts 6,14,23 and 32 it is the applicant's case that the Respondents failed to correctly apply the law by charging him for the alleged unlawful payment of insurance premiums and other fees pursuant to the Facilities Agreement yet those were contractual payments made under the conditions of the loan and cannot therefore be illegal payments.

17. The Applicant asserts that the Respondents have violated his right to a fair trial and continue to inflict pretrial prejudice against him, including loss of dignity, loss of opportunity to economic activity including employment and consultancy hence curtailing his socio-economic rights. He asserts that the 1st Respondent's prosecutorial powers are not absolute and Article 157(11) requires them to take into account the matters raised in this application. He asserts that it is unfair to keep the case hanging over him yet it involves matters of law that can be resolved by the High Court.

18. It is his contention that the fact that the Cabinet Secretary in charge of KVDA (who wrote to the National Treasury to borrow funds), the Attorney General (who provided legal opinion) and members of the Board of Directors of procuring entity KVDA (who were responsible for approving the entity's projects and procurement plans as per the law) are not charged, is an indication of selective prosecution that cannot stand the test of objectivity and fair administrative action.

19. It is also his contention that section 2 of the *Public Finance Management Act* did not apply to him not apply to him but to accounting officers such as he would designate under section 67 of the PFM Act.

20. Finally, the applicant contends that he has met the threshold for the grant of the orders sought and the Respondents are not likely to suffer any prejudice if the reliefs sought are granted.

The 1st Respondent's case

21. The 1st Respondent opposed the Application through the replying affidavit and supplementary replying affidavit sworn by IP Gilbert Kitalia, the lead investigating officer in ACC No. 20 of 2019 where he deposes that on 18th September 2018, the DCI received complaints that there were governance and operational challenges in the procurement process, award and construction of the Kimwarer and Arror dam projects; That the Directorate of Criminal Investigations conducted investigations and forwarded the inquiry file to the 1st Respondent for review and consideration; That the 1st Respondent conducted an independent review of the material facts and arrived at a decision to charge the Applicant alongside others in ACC No. 20 of 2019. IP Gilbert Kitalia contends that the Applicant's application and affidavit in support were not pleaded with precision as required in pleadings alleging breach of constitutional provisions in line with the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR and Anarita Karimi Njeru v Republic [1976-1980] KLR 1272. He asserts that the Applicant's disagreement with the 1st Respondent's reasoning and the exercise of discretion in its decision to charge is not enough reason to label the decision as erroneous, unlawful, illegal or unconstitutional and that accused persons ordinarily enter plea of not guilty and consequently a trial is held to test the charges and the evidence. It is also the 1st Respondent's contention that the Applicant as Cabinet Secretary of Finance and the other accused persons participated in the grand theft of more than Kshs.80 billion of public funds and that the 1st Respondent has evidence to prove that the Applicant acted outside the law and in breach of his oath of office by sourcing substantial funds for a project that was irredeemably flawed. It is the 1st Respondents contention that the Applicant was obligated under section 2 of the *Public Finance Management Act* and the Facilities Agreement to ensure that the law was followed in the transactions but that he instead irregularly, unlawfully and fraudulently oversaw the securing of funds and award of tender to CMC Di Ravenna and Itinera SPA of Italy Joint Venture, a third party that was neither an original bidder nor grantee of the letter of acceptance nor the entity contracted to undertake the projects. Further that the Applicant breached Clauses 21 and 22 of the Facilities Agreement in that no invitation was sent out for expression of interest, the land for the projects was yet to be acquired and the owners compensated and that the recipient of the Contract CMC Di Ravenna Itenera had not made the designs for the two projects hence the commercial contracts, the Facilities Agreement, the loans, the drawdowns and payment of funds were premature, unnecessary and illegal. It is also the 1st Respondent's case that the Applicant acting on his own, irregularly and unlawfully sourced, secured, received and paid out funds for Arror and Kimwarer Dams, a project that was neither approved by Cabinet nor in respect of which any loans were authorized; That he single sourced the loans from four commercial banks under the cover of dealing with SACE and masquerading as government-to-government loans which was false; That he single sourced and secured the SACE Insurance Policy valued at Kshs. 11 billion, which amount was paid in advance out of the proceeds of the loan, contrary to the provisions of the Public Procurement and Assets Disposal Act. That the default procurement method for the insurance policy under Section 103(1) of the Public Procurement and Assets Disposal Act was required to be open competitive bidding and not single sourcing as irregularly done by the Applicant. The 1st Respondent states that the Applicant acted unlawfully and recklessly in the negotiations leading to the binding Facilities Agreement whose terms were draconian and unconscionable and against the interests of the Republic of Kenya. Further, that the Applicant approved the loan facility contrary to the provisions of Sections 50 and 51 of the *Public Finance Management Act* 2012 as the approved expenditure estimates of the financial year 2016/2017 did not provide for budgetary allocations for Arror and Kimwarer projects against which the borrowings were based and neither were there allocations for loans approved by Parliament. That as a result billions of public funds were disbursed and paid out for a project that

is incapable of commencing and to date the contractor cannot move on site as there is no land hence no site and even if they did they cannot perform as they are bankrupt.

22. The 1st Respondent avers that the Applicant's assertion that the procurement was an EPC +F and not a Public Private Partnership was false and fraudulent; that the mode of procurement was indeed Public Private Partnership as evidenced by the public notice issued by the Principal Secretary to the National Treasury in December 2012 and the request proposal tender documents numbers KVDA/RFP/36/2014-2015 and KVDA/RFP/39/2014-2015; that public contracts are processed in accordance with the public procurement laws; that the Applicant has failed to show the procurement documents for the EPC+F procurement as alluded to and which ought to have included the tender documents, the advertisement, bid documents, opening and evaluation report and the contract entered. Further that there were no international contracts awarded to CMC di Ravenna-Itinera JV or any other company for supply of goods and services and neither were there any such tenders advertised to justify the Applicant's invocation of the provisions of the *Public Finance Management Act* on government-to-government loans. The 1st Respondent asserts that contrary to the provisions of Article 206(1) of *the Constitution*, the loans were not credited to the Consolidated Fund and that accordingly, the same did not qualify as public debt and therefore the structuring and arrangement fee, commitment fee, interest and agency fee were illegal payments.

23. Referring to a statement by Maurice Juma MBS, Director General Public Procurement & Regulatory Authority dated 20th May 2019 and a Special Audit Report on the Financial and Procurement Operations for Arror and Kimwarer Dams by the Auditor General dated July 2019, the 1st Respondent avers further that the Kerio Valley Development Authority breached the provisions of Section 27 of the Public Procurement and Assets Disposal Act 2005 in respect of the procurement involving the two dams. That it is therefore clear that the 1st Respondent's decision to charge each of the accused persons including the Applicant was made based on evidence and public interest in the matter and not extraneous factors as alleged; That the 1st Respondent being an independent office is not directed by any societal or political divides; That the judicial review orders sought by the Applicant are blanket, generic, untenable and detrimental to public interest and the rule of law as the Applicant did not particularize how his rights under the *Fair Administrative Action Act* were violated and further that the issues raised in the application are a preserve of the trial court and the applicant's right to a fair trial is guaranteed under *the Constitution* and before the trial court. The 1st Respondent avers that the principle of separation of powers and the need to maintain the independence of the office of the Director of Public Prosecutions enjoin this court to resist the invitation to do what amounts to a "merit review" of the Directorate of Public Prosecution decision to charge. The 1st Respondent states that the rationality test must not be applied in a manner that is antithetical to the doctrine of the separation of powers or in a manner that violates the fundamental principles of due process, justice and fairness and has urged this court to dismiss this Application with costs.

The 2nd Respondent's case

24. The 2nd Respondent opposed the application on grounds that the investigations on the matters raised in the Application were carried out by the Directorate of Criminal Investigations; that the applicant does not demonstrate that the 2nd Respondent acted in excess of its jurisdiction, or abused its powers and that the Application does not meet the threshold for grant of the judicial review orders of certiorari and prohibition. The 2nd Respondent also argues that an order of prohibition is ineffectual against a decision that has already been made such as in the present case; that judicial review does not deal with the innocence or otherwise of a person but with the process of arriving at a decision; that no material has been placed before this court to demonstrate any illegality or that the conduct of the Ethics

& Anti-Corruption Commission was unreasonable, irrational or procedurally unfair and neither has the Applicant demonstrated that his right to a fair hearing is threatened. Finally, that the applicant is attempting to try the criminal case against him in this Application instead of in the trial court where the sufficiency of evidence will be tested and that the Applicant's ultimate objective is to stop the Respondents from undertaking their constitutional mandate of investigation and prosecution against serious allegations of corruption and economic crimes against him.

Submissions by the Applicant

25. The application was canvassed by way of written submissions. Learned Counsel for the ex-parte Applicant submitted that the Applicants's case is that the Respondents misapprehended the law and charged the exparte applicant with non-existent offences; That the charges preferred against the Applicant are also motivated by probable bias; That the Arror and Kimwarer dams are flagship projects under the Kenya Vision 2030 and their construction is within the mandate of the Kerio Valley Development Authority (KVDA) which falls under the Ministry of Environment Natural Resources & Regional Development. As such, Kerio Valley Development Authority (KVDA) had the power to enter into development contracts as it did in this case.

26. Counsel submitted that the Ministry of Environment and Natural Resources, the parent Ministry of KVDA moved the National Treasury and requested for borrowing of funds on behalf of Kerio Valley Development Authority and in his capacity as Cabinet Secretary for Treasury, the Applicant acting under Sections 49 and 50 of the Public Financial Management Act executed the loan contracts on 18th April, 2017. Counsel stated that those loans were cleared by the Attorney General who gave legal opinions to the partners and certified that all laws had been followed and the contracts were binding. Counsel asserted therefore that the 1st Respondent charged the Applicant without due regard to the legal frame work governing such investment projects and that the Respondents were irrational and biased in charging him while exempting the Cabinet Secretary for the Ministry of Environment & Natural Resources from the charges as the projects were under her Ministry. Counsel cited the decision in the case of Republic v Anti-counterfeit Agency ex parte Caroline Managala t/a Hairworks Saloon [2019] eKLR in support of that submission.

27. Counsel further submitted that the architecture of the charges brought against the Applicant is that the first cluster concerns entering into projects without planning, the second cluster concerns financing matters, third cluster concerns procurement of insurance, fourth cluster concerns payment of funds, fifth cluster on the competitiveness of loan funds and approval of the borrowing by the national government and finally the sixth cluster concerns conspiracy. Counsel asserted that all the matters contained in Counts 1, 4, 15,17 and 18 in the initial charge sheet have nothing to do with the office of the Cabinet Secretary because under the Public Procurement and Assets Disposal Act these are functions of the procuring entity, the Kerio Valley Development Authority and the person liable is the accounting officer of the Kerio Valley Development Authority.

28. Counsel also submitted that under Article 23 (1) and 165 of *the Constitution* this court has jurisdiction to hear and determine this application and that the rights of the Applicant under Article 27, 28, 47 & 50 have been infringed and the court has jurisdiction to hear applications of such violation. Counsel asserted that the 1st Respondent acted in bad faith in charging the Applicant, That the misdirection on the law, lumping duties and responsibilities on the Applicant and using the language that the Applicant "ought to have known" shows that the 1st Respondent's actions are in bad faith and an abuse of power. Counsel cited the decision in Macmillan Bloedel Ltd V Galiano Island Trust Committee to support the aforegoing submission and stated that the 1st Respondent has oppressed the applicant unfairly and unreasonably. Counsel also submitted that the Respondents failed to correctly interpret Section 2(1),

Section 6 and Section 49 as read with Section 53 A (2) of the *Public Finance Management Act* of 2012 as amended hence erroneously charging the Applicant. Counsel stated that the loan in issue was not procured under Section 103 of the Public Procurement & Assets Disposal Act but rather Section 49 of the *Public Finance Management Act*. Counsel stated that the 1st Respondent failed to understand Section 6 and 49 of the *Public Finance Management Act* in construing that SACE Insurance policy was a loan condition in the Facilities Agreements is a subject of the procurement proceedings as contemplated in Section 103 of the Public Procurement and Assets Disposal Act of 2015. Counsel submitted that in any event, the loan agreement was okayed by the Attorney General. Counsel argued that the 1st Respondent misunderstood Section 50(7) of the *Public Finance Management Act* of 2012; The Cabinet Secretary Treasury has power to disburse funds directly to the supplier and therefore to charge the Applicant for that is a violation of his rights and further that as the Applicant was not an accounting officer in any of the entities charging him is an infringement of his rights. Counsel contended that accordingly, the 1st Respondent erred in applying Sections 2, 67 and 68 of the *Public Finance Management Act* of 2012 as the Applicant was not an accounting officer.

29. Finally, Counsel for the Applicant reiterated the submission that the 1st Respondent abused its discretion in charging the applicant on four fronts: gross misapprehension of various laws, selective bias, probable malicious prosecution, overstepping its mandate by conducting investigation and acting in bad faith. Counsel argued that the Respondents misapprehended Sections 2,3,16 and 17 of the *Public Private Partnerships Act* 2013, Sections 26,49,53A, 49,50,50(7),62,65, 67 and 68 of the *Public Finance Management Act*, 2012 Sections 26 and 27 of the Public Procurement and Assets Disposal Act, 2005 and Sections 2 and 20(1) of the *Insurance Act* Cap 487. Counsel urged this court to find that the prosecution is based on a complete misapprehension of the facts and the law and therefore it is not in the public interest or in the interests of the administration of justice. For this Counsel relied on the case of Wilfred Masinge Wanyonyi v Director of Public Prosecution & Others [2015] eKLR.

30. In Reply to the Respondent's submissions, Counsel submitted that the Respondents did not address the issues raised in the Application but instead they engaged in political talk. Counsel stated that where there exist breaches of Article 157(6) of *the Constitution*, this court ought to grant orders of judicial review. Counsel cited the case of Republic v Director of Public Prosecutions ex parte Patrick Ogola Onyango & 8 others [2016] eKLR and implored this court to look at the spirit and substance of the charges and proceed to quash them as the Respondents have exposed the Applicant to ridicule and indignity when all he did was to carry out his duties. Counsel contended that the Respondent's amendment of the charges was only to correct errors and that the new charges contain elements of the old charges hence the new charges ought to be quashed by this Court. Counsel reiterated that the charges against the Applicant are premised on misapprehension of the law and finally that this is a public interest matter that is of great national importance hence the ex-parte applicant should not be condemned to pay costs.

Submissions of the 1st Respondent

31. Counsel for the 1st Respondent submitted that the submissions of the Applicant that the Amended charges should be quashed if they are a replica of the initial charges makes this application a non-starter; that the substituted charges shifted the ground and character of the prosecution and the Applicant ought to have amended or withdrawn the application and filed a new application on account of the new charges and that on this ground alone, the court should dismiss the Notice of Motion ab initio. Counsel for the 1st Respondent's submitted that given the prayers sought and in particular the order of certiorari it was incumbent upon the Ex-parte Applicant to prove that the Director of Public Prosecution's decision to charge does not meet the threshold and the Ex-parte Applicant must also prove that the prosecution is irrational, disproportionate or ultra vires.

32. Counsel for the 1st Respondent submitted that the competency or otherwise of the charges and whether the charge sheet is defective are issues for the trial court and that as no complaint was raised during the time of plea taking with regard to the competency of the charges the Applicant acquiesced to the trial.

33. Counsel submitted that save for Article 50, the Ex-parte Applicant has not specified which of his rights have been violated and even if Article 50 is alluded to, no evidence has been placed before this court to prove its violation. Counsel stated that the Applicant violated the Public Procurement and Assets Disposal Act with impunity in that what began as a Public Private Partnership Project mutated into a purely public affair. Counsel asserted that the issues in this application are issues that go to the merit of the case before the trial court and they should properly be argued before that court. Counsel stated that the issues present two arguments which would result in a mini-trial and that no issue has been raised by the Ex-parte Applicant that cannot be argued before the trial court. Counsel asserted that judicial review is concerned with the process of decision making but not the merits of the decision. Counsel asserted that the submission that the decision to charge the 1st Respondent was selective or unfair is not true. Counsel stated that the decision was made on analysis of the evidence considering both the evidential test and the public interest test under Article 157 (ii) of *the Constitution*. Counsel pointed out that although a Constitutional petition under Article 23 is available to any litigant this court must guard against abuse of the court process. Counsel stated that there is an avalanche of applications that are unmerited such as this one that are finding their way into the High Court simply intended to delay the hearing of cases in corruption and economic crimes. Counsel contended that this application is similar and related to Petition No. E33 of 2021 and that the Applicant has abused the court process and should be made liable to pay costs.

Submissions of the 2nd Respondent

34. Relying on the 2nd Respondent's Grounds of Opposition and written submissions Learned Counsel for the 2nd Respondent submitted that the 2nd Respondent ought not to have been a party to these proceedings as it was not involved in the investigations which gave rise to these proceedings and also to ACC No. 20 of 2019; That the orders sought cannot be enforced against the 2nd Respondent but only against the Directorate of Criminal Investigations who made the recommendations to the 1st Respondent and that granting the orders sought would amount to interfering with the powers conferred on the 2nd Respondent under Article 149 and 167 of *the Constitution* and Section 28 of the *Ethics and Anti-Corruption Commission Act*. Counsel stated that the Applicant has not filed any authorities challenging the mandate of the Directorate of Criminal Investigations to investigate cases; That the Directorate of Criminal Investigations has the mandate to investigate any type of case and it is wrong for the applicant to state that the 2nd Respondent failed in not investigating this case. Counsel stated that the Applicant has not demonstrated any breach or violation of *the Constitution* or law by the 2nd Respondent to warrant the grant of the order of certiorari; That those orders can only be granted where an action has been taken without jurisdiction, or in excess of jurisdiction or where it is demonstrated that the rules of natural justice were not compiled with. Counsel submitted that none of the above has been demonstrated in regard to the 2nd Respondent. Counsel stated that the issues brought in this Application are issues of evidence which can only be tested by the trial court. For this Counsel cited the case of Republic v National Employment Authority & 3 others ex parte Middle East Consultancy Services Limited [2018] eKLR. Counsel further stated that the effect of prohibition and certiorari if granted would cloth the Applicant with investigative and prosecutorial immunity which ought not to be granted to him. Counsel urged this court to dismiss the application with costs to the

2nd Respondent noting that despite being notified that the 2nd Respondent was improperly joined to these proceedings the applicant took no steps to remove them from the proceedings.

Issues for determination

35. The following issues arise for determination:

    a. Whether the Applicant has made out a good case to warrant this court to grant him the judicial review orders sought.

    b. Whether the criminal proceedings in ACC No. 20 of 2019 are a violation of the Applicant's constitutional rights.

    c. Costs

Analysis and Determination

Issue I: Whether the Applicant has made out a good case to warrant this court to grant him the Judicial Review Orders sought.

36. The 1st Respondent is an independent constitutional body established under Article 157 of *the Constitution* which is mandated to Institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed.

37. It is trite that the 1st Respondent's decision to charge is vested in that office by Article 157(10) of *the Constitution* and codified in Section 6 of the *Office of the Director of Public Prosecutions Act* No. 2 of 2013. It is trite that in the exercise of that power the 1st Respondent does not act under the direction and control of any person or authority. Article 157(10) of *the Constitution* states that:

> " The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

38. Similarly, section 6 of the *Office of the Director of Public Prosecutions Act* No. 2 of 2013 states that:

> " Pursuant to Article 157(10) of *the Constitution*, the Director shall:
>
> a. Not require the consent of any person or authority for the commencement of criminal proceedings.
>
> b. Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under *the Constitution*, this Act or any other Written law; and
>
> c. Be subject only to *the Constitution* and the Law."

39. The 1st Respondent's decision to charge is therefore discretionary and is expected to be independent from influence from any person or office. In the case of Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR the court stated:-

> " 36. In my view, the mere fact that the Directorate of Criminal Investigations has conducted its own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to

prosecute simply because the DCI has formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution."

40. The 1st Respondents have cited the National Prosecution Policy which provides that the applicable test on the 1st Respondent's decision to charge is premised on the evidential test and the public interest test. The policy provides that the standard of evidence required under the evidentiary test is less than proof "beyond reasonable doubt". The public interest test is however entirely dependent on the satisfaction of the evidentiary test such that if the Director of Public Prosecution is not satisfied that there exists sufficient evidence to sustain a conviction, the charge cannot stand even if the public interest demands that it does. It is noteworthy that this process is discretionary and the Director of Public Prosecutions cannot be accused of having breached a complainant's or accused person's legitimate expectation if he chooses to or not to institute criminal proceedings. The Court of Appeal considered the aforestated test in the case of Communications Commission of Kenya v Office of the Director of Public Prosecutions 7 another [2018] eKLR and held:-

> " In exercising the prosecution mandate the DPP is constitutionally bound to have due regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This provision applies equally to the DPP and officers acting on his or her behalf. This requirement is generally accepted as an international best practice whose origins are in common law.

The decision to prosecute as a concept envisages two basic components, namely, that the evidence available is admissible and sufficient and that public interest requires a prosecution be conducted. This is what is commonly referred to as the Two-Stage Test in making the decision to prosecute.

Each aspect of the tests must be separately considered and satisfied before the decision to charge is made The Evidential Test must be satisfied before the Public Interest Test is considered."

41. Be that as it may it is trite that the Directorate of Public Prosecutions decision to charge is not unfettered as it is subject to review by the High Court. In the case of Peter Ngunjiri Maina v Director of Public Prosecutions and 2 others [2017] eKLR the court held and I agree with it:-

> " The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the court to review the decisions of the DPP are untrammeled, they are not to be exercised whimsically. While the court can review the DPP's decision for rationality and procedural infirmities it cannot review them on merit.
>
> In the case of Kuria & 3 others versus Attorney General (2002) 2KLR 69 the court of Appeal stated:-
>
> "The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score settling or vilification or issue not pertaining to that which the system was formed to perform...

A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious....

It is through this mandate of the court to guard its process form being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the court's) independence and impartiality....

In the same case it was held that: -

"It would be a travesty of justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter....".

42. The Ex-parte applicant therefore properly approached this court for the orders of certiorari and prohibition and this court is under a duty to determine his application. In the case of Commissioner of Police & another versus Kenya Commercial Bank Limited and 4 others (2013) eKLR the Court of Appeal was emphatic that where it comes to the attention of the court that there has been a serious abuse of power the court must express its disapproval by stopping it in order to secure the ends of justice and restrain abuse of power that may lead to harassment or persecution.

In the case of Municipal Council of Mombasa v Republic Exparte Umoja Consultants Ltd [2002] eKLR the Court of Appeal held that in Judicial Review: -

> " The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at?... In making the decision did the decision maker take into account relevant matters or did they take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as a Court of Appeal over the decider would involve going into the merits of the decisions itself – such as whether this was or there was no sufficient evidence to support the decision and that as we have said is not the province of judicial review.

However, in the case of Republic versus Attorney General Ex-parte Kipngeno Arap Ngeny the court observed that:

> " It is an affront to our sense of justice as a society to allow the prosecution on flimsy grounds. Although in this application we cannot ask the Attorney General to prove the charge against the accused, there must be shown some reasonable grounds for mounting a criminal prosecution against an individual. There must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the individual and put him to unnecessary expense and agony. The court may, in a proper case, scrutinize the material before it and if it is determined that no offence has been disclosed, issue a prohibition halting the prosecution.

43. The above position was maintained by the Court of Appeal in the case of Njuguna S. Ndung'u versus Ethics & Anti-Corruption Commission (EACC) & 3 others (2018) eKLR where in a majority decision the court stated:

> " 24. The charges against the appellant were largely dependent on documentary evidence and most of the facts were not in controversy. The High Court was

called upon to find out whether or not the omissions allegedly committed by the appellant prima facie constituted the alleged criminal offences under the procurement law. A decision on that issue could have been made without embarking on a trial by scrutinizing the documents and upon consideration of the circumstances of the case and the law.

In my respectful view, the High Court erred in law by failing to scrutinize the charges, the relevant documents including the decisions of Evaluation Committee, Tender Committee, Review Board and the High Court Proceedings and reach a conclusive and objective decision on whether or not the charges had any legal or factual foundation and also a realistic prospect of conviction. For reasons stated in paragraphs 20, 21 and 22 above, I am satisfied that the charges had no legal or factual foundation and thus there was no realistic prospect of conviction.

I am further satisfied that intended prosecution is oppressive and violates the appellants constitutional right as pleaded particularly the right to a fair administrative decision that is lawful, reasonable and procedurally fair...."

44. Applying the above principles to this case it is my finding that the Applicant's case does not meet the parameters of judicial review in that firstly what he is asking this court to do is to determine the merits of the 1st Respondent's decision to charge him. He has done this by production of several documents to prove that he did not commit the offences with which he is charged. It is my finding that doing so amounts to asking this court to go into the merits of the charges facing him a jurisdiction which is the province of the trial court. Although he alleges but that the charges against him were motivated by ulterior motives and hence an abuse of the court process he has not convinced this court that that is so. In the case of Republic v Attorney General and 4 others Ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR it was held that:-

> " Where the applicant brings judicial review proceedings with a view to determining contested matters of fact and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review with a view to having the court determine his innocence or otherwise....."

Secondly even upon a review of the documents exhibited by the applicant as well as the law cited as was held by the Court of Appeal both in the Arap Ngeny and in the Njuguna S. Ndungu case, I am unable to agree with the applicant that the charges against him are flimsy or frivolous. The 1st Respondent's contention against him is that he exceeded the powers of his office and oversaw contracts that led to colossal loss of public funds. In my view whether or not that is the positon is a matter left to the trial court.

45. It is evident that the Applicant herein is drawing this Court to determine his innocence or otherwise which is not the province of this court and accordingly his petition must fail.

On the allegation of violation of rights, it is my finding that the Applicant has also not proved violation of his rights with evidence. It is my finding that the issues he has raised ought to be raised in the trial court. He has not demonstrated to this court that his prosecution is motivated by ulterior motives. He

has not demonstrated that such ulterior motives exist. It is instructive that *the constitution* has sufficient provisions that act as a safeguard to his right to fair trial. The trial court too has a duty to see to it that his rights under Article 50 are observed. This ground must therefore inevitably fail.

Issue III: Costs

46. The Applicant has urged this court not to condemn him to the costs of these proceedings. It is trite law that costs follow the event, under Section 27 of the *Civil Procedure Act*.

47. The Applicant argues that this is a public interest matter and he should not be condemned to pay costs should his claim fail but on their part, the Respondents collectively argue that the Applicant should be liable to pay costs on the grounds that he has filed a similar case (Petition E033 of 2021) on the same facts and accordingly abused the court process and that they have had to defend this case which entails bulky documentation and complex legal concepts and are therefore entitled to costs. The practice of the courts has been not to award costs in constitutional petitions. However, before costs are waived a basis must be laid. See the case of Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested parties) (Petition 206 of 2020) [2021]. Looked at in the prism of what public interest litigation entails it is clear that this case is not such a case. This is a case brought by the Applicant for his own individual benefit. Accordingly, the Applicant has not provided sufficient reason why the general rule that the losing party pays costs should not apply to him. Accordingly, I would dismiss these proceedings with costs to the Respondents.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MARCH, 2022.

E.N. MAINA

JUDGE

In the Presence of:-

Mr. Ngarua & Jemima Collins for the Ex-parte Applicant

Miss Murugi for EACC/2nd Respondent

Miss Thuguri holding brief for Mr. Muteti for the DPP/1st Respondent.

Potishoi – Court Assistant