



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**

**ACEC NO. 7 OF 2019**

JOASH OINDO.....1<sup>ST</sup> PETITIONER

SALOME L. MUNUBI.....2<sup>ND</sup> PETITIONER

**V E R S U S**

ETHICS AND ANTI-CORRUPTION COMMISSION...1<sup>ST</sup> RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT

NATIONAL LAND COMMISSION.....1<sup>ST</sup> INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> INTERESTED PARTY

**JUDGMENT**

**Background**

1. The Petitioners herein are officers of the National Land Commission (hereinafter the Interested Party) a constitutionally established body pursuant to Section 67 of the Constitution with the mandate to manage public land on behalf of the National and County Governments as whereas to review grants and dispositions of public land.

2. On the other hand, the 1<sup>st</sup> Respondent is a statutory body established pursuant to Article 79 of the Constitution whose responsibility is to enforce the Anti-Corruption and Economic Crimes Act (hereinafter the ACECA). The second Respondent is the Inspector General of Police who is in-charge of the National Police Service responsible for investigation and enforcement of the law in the Republic of Kenya including arresting and detaining suspects pending trial or appeal.

3. Through a Petition dated 29<sup>th</sup> March 2019 alleged to have been brought on the petitioner's own behalf and that of the officers and employees of the National Land Commission (interested party) and their families, the court was moved for grant of the following reliefs;

**a) A declaration that the acts of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, while investigating / in the guise of investigating the petitioners for compensation of Standard Gauge Railways, Port Reitz/Moi International Airport Access Road and for Mombasa Southern By -pass – Kipevu Road as complained of in this Petition, amount to harassment and abuse of power.**

**b) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' conduct and actions jointly and severally contravene the constitution and or are likely to contravene or infringe upon the petitioner's fundamental rights, freedoms and duties guaranteed under Articles 2, 3, 10, 27, 29, 43, 48, 50, 67 and 236 of the Constitution of Kenya, 2010.**

**c) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' conduct and actions jointly and severally contravene Section 25 of the National Land Commission Act.**

**d) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' conduct and actions which are complained of in this petition, jointly and or severally, singularly and or cumulatively against the petitioners are oppressive, unfair, unreasonable, irrational, illegal and an abuse of power and the criminal justice system and the process.**

e) A declaration that the recommendation to send the 1<sup>st</sup> petitioner on compulsory leave for alleged breach of Chapter six without an opportunity of being heard is contrary to Article 47 of the Constitution.

f) A declaration that invasive acts of the 1<sup>st</sup> respondent in relation to the National Land Commission and its operations undermines the independence and institutional autonomy of the National Land Commission.

g) A declaration that the statements of the petitioners, their colleagues and family members recorded/made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' officers at the EACC Police Station in respect of compensation to Standard Gauge Railways Port Reitz / Moi International Airport Access Road and for Mombasa Southern By-pass-Kipevu Road are illegally obtained evidence and inadmissible in any proceedings in which they are sought to be admitted as evidence.

h) General damages for violation of the petitioners' right to fair administrative action, dignity and security of the person.

i) The costs of this suit petition be borne by the respondents.

j) Any other / further relief that this honourable court may deem fit to grant.

4. Contemporaneously filed with the petition is a Notice of Motion of even date seeking conservatory orders as hereunder-

a) That this Honourable Court be pleased to certify this instant application and petition filed herewith as urgent and service thereof be dispensed with in the first instance;

b) That pending interparties hearing and determination of this application this court be pleased to issue CONSERVATORY ORDERS suspending both the directive of the 1<sup>st</sup> Respondent to the National Land Commission recommending that the 1<sup>st</sup> Petitioner should be sent on compulsory leave and the compulsory leave itself.

c) That pending the hearing and determination of this application interparties, this Honourable Court be pleased to issue CONSERVATORY ORDERS restraining the Respondents, either by themselves or their agents and/or staff or any person from issuing/continuing to issue demands, threats, summons, subpoenas and notices to the petitioners, their colleagues and family members or breaking into and taking or confiscating any property, files or documents or in any manner whatsoever interfering with the functioning of the interested party or its officers in the guise of conducting investigations.

d) That pending hearing and determination of this Petition this court be pleased to issue CONSERVATORY ORDERS suspending both the directive of the 1<sup>st</sup> Respondent to the National Land Commission recommending that the 1<sup>st</sup> Petitioner should be sent on compulsory leave and the compulsory leave itself.

e) That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue CONSERVATORY ORDERS restraining the Respondents, either by themselves or their agents and/or staff or any person from issuing demands, threats, summons, subpoenas and notices to the Petitioners, their colleagues and family members or breaking into and taking or confiscating any property, files or documents or in any manner whatsoever interfering with the functioning of the Interested Party or its officers in the guise of conducting investigations.

f) That this Honourable Court be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to supply the Petitioners and the Court with CCTV footages of the interviews between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents officers and the 1<sup>st</sup> Petitioner at the EACC Police Station for the purpose of confirming fatal non-compliance with the provisions of Section 52 of the National Police Service Act.

g) That this Honourable Court be pleased to order that all the documents demanded and taken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents belong to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner or the Interested Party be returned to them.

h) That an earlier date be set for the hearing of the Petition filed herewith.

i) That this Honourable Court do issue such orders as it may deem fit in the interest of justice.

j) That this Honourable Court be pleased to award costs of this application to the applicants.

5. The application was certified urgent on the same day it was filed and directions for service given. In response to the said petition and motion, the 1<sup>st</sup> respondent filed 11 grounds of opposition stating that-

i) Article 22 of the Constitution under the Bill of Rights does not extend to state organs but only to individuals.

ii) The Petitioners do not have the capacity to seek orders on behalf of the interested party and therefore the orders so sought cannot be granted.

iii) The prayers for conservatory orders to suspend the directive requiring the suspension of the Petitioners/Applicants is incapable of being enforced as the actions sought to be stayed have already been effected.

iv) The suspension of the 2<sup>nd</sup> petitioner by the 1<sup>st</sup> Respondent and the interested party were taken pursuant to Section 62 of the Anti-Corruption and Economic Crimes Act which makes it a statutory requirement to suspend the 2<sup>nd</sup> Petitioner who is facing charges before a court of law.

v) The issue of suspension under Section 62 of the Anti-Corruption and Economic Crimes Act has been litigated in several cases by this Honourable Court as well as the Employment and Labour Relations Court and upheld in the following cases;

a) Ethics and Anti-Corruption Commission –vs- The Attorney General Exparte Patrick Gichunge Mwambia & Another, Meru Judicial Review No. 25 of 2016.

b) Moses Muteithia & 5 Others v Jacob Muthomi Kirera & 4 Others [2017]eKLR.

c) Joshua Muindi Maingi v National Police Service Commission & 2 Others [2015]eKLR.

d) Republic v Director of Public Prosecution & 4 Others [2018]eKLR.

e) Alex Kyalo Mutuku & 7 Others v Ethics and Anti-Corruption Commission and 2 Others (2016) eKLR.

vi) Section 42(7) of the Leadership and Integrity Act, 2012, as read with the Leadership and Integrity Regulation No. 25 of 2015, provides for suspension of a person being investigated under the Act.

vii) The actions by the 1<sup>st</sup> Respondent and the Interested Party were taken pursuant to the said sections which makes it a statutory requirement to suspend the 1<sup>st</sup> Petitioner.

viii) The Petitioners/Applicants have not met the threshold for grant of conservatory orders sought.

ix) The Petition is fatally defective as it does not set out with reasonable precision, the particular provisions of the Constitution which have allegedly been contravened or infringed by EACC and the manner of their infringement as illustrated in the case of Anarita Karimi Njeru –vs- The Republic (No.1) [1976-80]1 KLR.

x) The orders sought cannot issue against the Commission as it is independent and is not subject to any control or direction.

xi) The application is fatally defective and lacks merit and therefore ought to be dismissed accordingly.

6. Besides filing grounds of opposition, the 1<sup>st</sup> respondent filed a replying affidavit sworn on 5<sup>th</sup> April 2019 by Catherine Ngari opposing both the Petition and Notice of Motion. Upon canvassing the application, Hon. Justice Mumbi delivered her Ruling on 30<sup>th</sup> April 2019 stating that the petitioners had not established a prima facie case to warrant grant of conservatory orders and directed that the substantive issues raised on the application be dealt with in the substantive petition.

7. Subsequently, on 17<sup>th</sup> April 2019, the petitioners filed a Chamber Summons of even date seeking several orders among them; leave to have the application heard urgently; an order enjoining the DPP as the 2<sup>nd</sup> Interested Party; pending hearing of the application, conservatory orders to issue restraining the DPP from prosecuting/ further prosecution of the petitioners and others being officers of the interested party in respect of matters under Judicial consideration in the instant matter and in **Mombasa ELC Petition No. 13/2019 Joash Oindo v. EACC.**

8. When the application came up for directions on 23<sup>rd</sup> April, the 1<sup>st</sup> respondent and the DPP sought leave to file their responses. However, the court made some directions to the effect that; the DPP be immediately enjoined as the 2<sup>nd</sup> Interested Party and the EACC and DPP granted leave to file a response to the application and substantive petition. Concerning the prayer for the court to stop the intended prosecution of the petitioners, the court held that, prosecution is a criminal process which cannot be stopped as it was not unlawful. The court generally declined to issue conservatory orders sought in the application dated 17<sup>th</sup> April 2019. The 1<sup>st</sup> defendant was also given seven (7) days to file their response to the application.

9. Consequently, the DPP filed his grounds of opposition dated 29<sup>th</sup> April 2019 and filed the same date challenging the application dated 17<sup>th</sup> April 2019 thus stating that; the application was mischievous, frivolous, vexatious and or amounted to an abuse of the court process; orders sought were not supported by pleadings in the entire petition and supporting documents ;petitioners had sought to introduce new facts without court's leave; application contains untruths, half-truths, conjecture, suggestions, misleading and lacks specificity; there were no live controversies between the petitioners and the 2<sup>nd</sup> interested party in the petition as currently filed; application did not disclose a prima facie case against the 2<sup>nd</sup> interested party and that Petition No. 13/2019 was mischievously filed in Mombasa on 4<sup>th</sup> April 2019 raising allegations on matters that arose from January 2014 while fully aware of the pendency of Petition No. 7 of 2019 before this court.

10. On their part, the 1<sup>st</sup> respondent filed their response on 30<sup>th</sup> April 2019 through a replying affidavit of Catherine Ngari sworn on the same day. When the application came up for hearing on 15<sup>th</sup> May 2019, parties recorded a consent whereby the petitioners withdrew their application dated 17<sup>th</sup> April 2019 and leave granted to the petitioners to amend their petition within 14 days and the respondents and interested parties to file their respective responses within 14 days. Parties also agreed to exchange submissions in disposition of the substantive petition and then appear for highlighting at a later date. Unfortunately, the petitioners did not amend their petition and instead filed their submissions on 5<sup>th</sup> May 2019 and the matter proceeded with highlighting on submissions for the original petition.

11. On their part, the DPP relied on submissions filed together with their grounds of opposition and the 1<sup>st</sup> respondent relied on their submissions filed on 8<sup>th</sup> April 2019 in response to the application and petition dated 29<sup>th</sup> March 2019.

### **Petitioner's Case**

12. The petitioner's case is based on the grounds stated on the face of it and an affidavit in support sworn by Joash Oindo on 29<sup>th</sup> March 2019 on his own behalf and with authority from the 2<sup>nd</sup> petitioner. The petitioners' case is anchored on the allegation that, the 1<sup>st</sup> respondent had through its officers with the help of the 2<sup>nd</sup> respondent commenced investigations relating to corrupt conduct against them which investigations were accompanied with intimidation, harassment, abuse of power and threats of criminal proceedings being instituted against them and their family members.

13. That despite the pendency of various suits filed against them over the same subject regarding SGR compensation of land on Port Reitz/Moi International Airport Access Road and Mombasa Southern by-Pass- Kipevu Road, the respondents had commenced further investigations thus prejudicing their procedural rights. They further averred that the impugned investigations led to the illegal search of the 2<sup>nd</sup> petitioner's house leading to the recovery of Kshs 1 million and 168,900 US Dollars from her house purporting the same to be unexplained assets which property the 1<sup>st</sup> defendant had previously sought its forfeiture under ACEC Case No. 16/2018. That the said investigations and searches amounted to violations of Articles 10, 31, 47 of the Constitution hence violation of duty by state agencies.

14. They contended that there was nothing irregular in compensating the aforesaid land and that any further investigation is intended to seal weaknesses on the 1<sup>st</sup> respondent's case (ACEC No. 16/18). That further investigations with a view to instituting criminal proceedings is likely to bring the administration of justice into disrepute particularly if the court finds in favour of the 2<sup>nd</sup> petitioner in ACEC No. 16/2018. It is the petitioners' averment that the search in the second petitioners' house on 8<sup>th</sup> March 2019 looking for information regarding the SGR compensation on the two projects and further summoning of her family members to record statements is in bad taste and in retaliation of her allegations that the officers had confiscated her Kshs. 600,000/- from her house but failed to disclose the same in the inventory.

15. According to the 1<sup>st</sup> petitioner, on 6<sup>th</sup> March 2019 at 8.30pm he was summoned vide a letter of the 1<sup>st</sup> respondent demanding for his appearance the following day on 7<sup>th</sup> March 2019 at 8.30am with instructions to give information regarding irregular compensation of SGR land which investigation was being conducted against him. That by being summoned at night, he was denied his constitutional right to consult a lawyer of his choice an act that violated Article 3 of the Constitution which requires every person to uphold and respect the Constitution as read together with Article 47 on fair administrative action. Further, he averred that he had not been warned that his statement was intended to be used against him in evidence. They further contended that the 1<sup>st</sup> respondent's actions were in violation of Article 236 of the Constitution which requires that public officers should not be victimised for performing their office functions.

16. It was further contended that in the course of their investigations, the respondents failed to appreciate that a valuation had been done in respect of the affected parcels of land for compensation and the valuation report relied on by the respondents was not the correct one as it had omitted other aspects of valuation like relevant costs, professional costs and other statutory incidentals.

17. In the petitioner's view, the investigations being conducted were in complete disregard of Section 52 of the National Police Act as read together with Article 43 of the Constitution and that the prayer for supply of their CCTV footage is intended to prove the respondent's non-compliance of the said provisions.

18. It was also alleged that the 1<sup>st</sup> respondent ignored the 1<sup>st</sup> interested party's mandate as provided under Article 67 of the Constitution which requires the NLC to carry out its functions relating to the management of public land on behalf of the National and County Governments thus interfering with the 1<sup>st</sup> interested party's mandate.

19. Further, that without affording the 1<sup>st</sup> Petitioner a hearing and contrary to Article 236 of the Constitution, the 1<sup>st</sup> respondent forced the 1<sup>st</sup> interested party to send the 1<sup>st</sup> petitioner on compulsory leave, effective 20<sup>th</sup> March 2019 for alleged violation of Chapter 6 of the Constitution thus prematurely triggering Section 62 of the ACECA. That despite several officers of the 1<sup>st</sup> interested party having recorded statements, none of them has been sent home hence an act of discrimination thus contravening Article 27 of the Constitution on the right against discrimination.

20. During the hearing, Mr. Okubasu reiterated grounds and averments contained in the affidavit in support of the application. Relying on his submissions filed on 5<sup>th</sup> November 2019, counsel submitted on four issues broken down as follows-

**a) whether the manner of conducting investigations into compensation for SGR Port Reitz / Moi International Airport Access Road and for Mombasa Southern By- Pass – Kipevu Road was unconstitutional.**

**b) whether the preference of criminal charges against the 1<sup>st</sup> petitioner on the basis of the impugned investigation is constitutional.**

**c) whether the 1<sup>st</sup> and 2<sup>nd</sup> respondent's acts of conducting investigations against the petitioners while the criminal prosecution of the petitioners and 3<sup>rd</sup> and 16<sup>th</sup> interested parties was ongoing is constitutional.**

**d) whether the recommendation for suspension of the 1<sup>st</sup> petitioner from the employment of the National Land Commission was unconstitutional.**

21. According to Mr. Okubasu, the 1<sup>st</sup> respondent's actions of investigation are administrative in nature hence subject to Article 47 of the Constitution and the Fair Administrative Action Act 2015 Section 3(1)(c). In support of this position, reliance was placed on the decision in **Civil Appeal No. 109/2016 Director of Public Prosecutions v Tom Ojienda t/a Prof. Tom Ojienda and Associates Advocates and 3 Others (2019)eKLR** where the court held that;

**“... therefore all the powers and functions given to EACC by the Constitution and the specific provisions contained in ACECA which give life to its parameters and controls are subject to being administered lawfully, reasonably and in a manner that is procedurally fair. It follows that the argument that investigations are not administrative actions has no feet to stand on and therefore falls.”**

22. In Mr. Okubasu's view, the manner in which the 1<sup>st</sup> petitioner was summoned at night and proceeded the following day for purposes of recording statements was contrary to the Constitution and the Fair Administrative Action Act as there was no adequate notice. Learned counsel asserted that the 1<sup>st</sup> petitioner ought to have been given sufficient information, materials and evidence that was relied upon in deciding to summon him.

23. In bolstering this proposition, counsel relied on the holding in the case of **Nairobi High Court Misc. Criminal Application No. 111/2018, Republic v Kenyatta University Exparte Martha Waihuini Ndungu (2019)eKLR** where the court held that;

**“There are five mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons. These are that the affected person must be given, before the decision is taken, Adequate notice of the nature and purpose of the proposed administrative action, A reasonable opportunity to make representations; After the decision is taken, A clear statement of the administrative action; Adequate notice of any right of review or internal appeal; and Adequate notice of the right to request reasons.” (39)**

24. Regarding the questioning of the 1<sup>st</sup> petitioner, Mr. Okubasu opined that the 1<sup>st</sup> petitioner was asked to write a statement on matters beyond his scope contrary to the Constitution and the Fair Administrative Action Act. That instead of being summoned to record a statement on SGR compensation on Mombasa related land, he was questioned on Ngong/Ngong/115559 hence an ambush of the 1<sup>st</sup> petitioner.

25. With regards to failure to warn or caution the 1<sup>st</sup> petitioner on the possible consequences on the statement he was due to record, Mr. Okubasu submitted that it was in contravention of Article 50(2) of the Constitution which protects a person from giving self-incriminating evidence against himself hence an act of entrapment. Counsel call for submission of the CCTV footage to prove that the 1<sup>st</sup> petitioner was not warned or cautioned in complete disregard of Section 52(4) of the National Police Service Act.

26. Concerning Summons of the 2<sup>nd</sup> petitioner's family members to record a statement, counsel contended that the same was unprocedural and in clear violation of Section 27 of the ACECA which requires service of notice to explain and verify ownership of any property or their possession. In support of this position, reference was again made to Prof. Tom Ojienda case quoted above.

27. Turning to the preference of criminal charges against the 1<sup>st</sup> petitioner as being unconstitutional, Mr. Okubasu argued that, the continuation of criminal charges in ACC 6/19 against the 1<sup>st</sup> petitioner based on tainted investigation is unconstitutional and that criminal charges in Nairobi Chief Magistrate's Court ACC No. 6/2019 is an abuse of the court process thus violating the importance of a fair trial in compliance with Article 50 as read with Article 25 which underscores the fact that a right to fair hearing cannot be limited. To buttress this argument, reliance was placed on the decision in the case of **Evans Odhiambo Kidero and 4 others v Ferdinard Ndungu Waititu and 4 others (2014)eKLR S. C. Petition No. 18 & 20/2014.**

28. In reference to the alleged illegal suspension of the 1<sup>st</sup> petitioner from employment on the recommendation of the 1<sup>st</sup> respondent, Mr. Okubasu submitted that, prior to the preferment of the criminal charges against the 1<sup>st</sup> petitioner, he had been suspended from his job an act he termed unprocedural and unlawful thus contravening Section 62 of the ACECA which recognises suspension of a public or a state officer if he or she has been charged in court.

### **1<sup>st</sup> Respondent's case**

29. In response to the petition, the 1<sup>st</sup> respondent relied on grounds of opposition filed on 5<sup>th</sup> April 2019 and an affidavit in support sworn by Catherine Ngari. It is the 1<sup>st</sup> respondent's contention that; the 1<sup>st</sup> petitioner has no capacity to seek orders on behalf of the interested party (National Land Commission); the suspension of the 1<sup>st</sup> petitioner was done in accordance with Section 62 of ACECA which makes suspension of the 1<sup>st</sup> petitioner mandatory in view of the fact that he is facing criminal charges in a court of law; Section 42(7) of the Leadership and Integrity Act, 2012 as read with the Leadership and Integrity Regulation No. 25, 2015 provides for suspension of persons under investigation and that, the petition is fatally defective as it has not set out with reasonable precision provisions of the Constitution which have been infringed by EACC and the nature of infringement.

30. In her aforesaid replying affidavit, Catherine Ngari an investigator working with EACC reaffirmed the commission's mandate in carrying out investigations relating to Anti-Corruption matters pursuant to Sections 11 of EACC Act and Section 23 of ACECA. She averred that issues touching on **ACEC Case No.16/2018** which is alive matter should be ventilated in that suit. That suits for forfeiture filed under Section 55 of ACECA are independent of any criminal proceedings.

31. She averred that due process in conducting investigations including obtaining search warrant to search the 2<sup>nd</sup> respondent's house under CMCC Misc. Cr. Appl. No. 4004/2017 was followed.

32. She further stated that upon analysing documents obtained from the petitioner's house, bank documents seized therefrom revealed illicit payment of Kshs. 7,000,000 million into her account which money was traced through paper trail to persons affected in the SGR compensation exercise along Port Reitz / Moi International Airport Road Project. That as a consequence, a new inquiry file was opened to further investigate allegations of bribery and corrupt conduct in relation to compensation claims or awards in respect of Kipevu By-pass and Moi International Airport By-Pass.

33. With regard to issuance of notice, M/s Ngari stated that it was in compliance with Section 27(3) of ACECA. As concerns issuance of a short notice, she averred that the petitioners did not seek extension of time to enable them make sufficient preparations.

34. Touching on statements recorded pursuant to Section 52(7) of the National Police Service Act, she stated that admissibility of any evidence recorded under that Section can only be challenged before the trial court.

35. Regarding suspension of the 1<sup>st</sup> petitioner from employment, she averred that Section 62 of the ACECA has been litigated upon by several courts including this court and Employment and Labour Relations inter alia **Ethics and Anti-corruption Commission v The Attorney General Ex-parte Patrick Gichunge Mwambia and Another, Meru J. R. No. 25/2016, Moses Muteithia and 5 Others v Jacob Muthomi Kirera and 4 others (2017)eKLR, Joshua Muindi Maingi v National Police Service Commission and 2 Others (2015)eKLR and Republic v Director of Public Prosecutions and 4 Others (2018)eKLR.**

36. During the hearing, M/s. Odipo appearing for the 1<sup>st</sup> respondent submitted restating the averments contained in the replying affidavit and grounds of opposition in response to the petition. Counsel submitted on five issues namely;

- a) **whether the National Land Commission enjoys human rights and fundamental freedoms and therefore capable of enforcing them for its own sake;**
- b) **whether the recommendation and directive to suspend the petitioners without a hearing was a breach of Article 47 of the Constitution.**
- c) **whether the commission ought to be stopped from investigating the National Land Commission and petitioners.**
- d) **whether the respondents have acted in contravention of the constitution and or are likely to contravene the applicants' fundamental rights, freedoms and duties guaranteed under Articles 2, 3, 10, 27, 29, 47, 48, 50, 67 and 236 of the Constitution.**
- e) **whether the general damages are available to the petitioners.**

37. It is M/s Odipo's submission that officers of the National Land Commission are insulated from culpability or liability under Section 25 of the National Land Commission Act only in situations where the actions or omissions complained of were done in good faith and it does not cover actions of a criminal nature. That the National Land Commission being a state organ cannot claim violation of its fundamental rights and or freedoms. To support this position, counsel relied on the finding in the case of the **County Government of Meru v EACC Petition 177/2014 Nairobi.**

38. As to claims of unlawful suspension from employment, counsel submitted that the 1<sup>st</sup> petitioner was suspended by the Commission under Section 42(7) of the Leadership and Integrity Act and Regulation 25 as well as Section 62 of ACECA. According to counsel, the commission acted after the 1<sup>st</sup> petitioner had been charged on ACC No. 33/18 hence Article 236 was fully complied with. That suspension having been executed, there is nothing to stop or stay. In support of this proposition, reliance was placed on the decision in the case of **Taib A. Taib v The Minister for Local Government and Others Mombasa HC CA No. 158 of 2006** Maraga J (as he then was) where the court held that:-

**“As an injunction is not available against the government and public officers, stay is a very important aspect of the Judicial Review jurisdiction in order that the applicant's application is not rendered nugatory by acts of the respondent during the pendency of the application and that therefore where the order is efficacious, the court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited.**

**The purpose of a stay order in Judicial Review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or Minister and the implementation of the decision of such a body if it has been taken.**

**It is however not appropriate to compel a public body to act. A stay order framed in such a way as to compel the respondents to reinstate the applicant before hearing the respondent cannot be granted.”**

39. As to whether the commission should be stopped from investigating the National Land Commission/petitioners, counsel submitted that the 1<sup>st</sup> petitioner was merely asked for information regarding claims of corrupt conduct. That due process under Section 52 of the Police Service Act was followed. That in any event the summons to record a statement were extended to 8<sup>th</sup> March 2019 and later to 12<sup>th</sup> March 2019 and then 14<sup>th</sup> March 2019 which means that the 1<sup>st</sup> petitioner had adequate time to prepare. She contended that, the entry and search of the petitioners' houses were sanctioned by court orders.

40. Referring to the submission that the respondents violated the constitution in particular Article 47, 48 and 50; M/S Odipo submitted that ACEC No. 16/18 was lawfully and independently initiated without reference to any criminal proceedings in Kajiado ELC No. 2/19 hence the petitioners have an opportunity to challenge them in their respective files.

## **2<sup>nd</sup> Interested Party's case**

41. The 2<sup>nd</sup> Interested Party responded through his grounds of opposition herein above stated. During the hearing, Mr. Kinyanjui relied on submissions filed in opposition of the petitioner's application dated 17<sup>th</sup> April 2019. In essence, counsel submitted that there is no evidence to warrant this court to stop prosecution of the petitioners. He urged the court to act with extreme caution before terminating prosecution of criminal proceedings. To support his argument, counsel relied on the finding in the case of Kipoki Oreu Tasur v Inspector General of Police and 5 Others (2014)eKLR and Attorney General vs IG, DPP exparte Thomas Nganga Munene (2014)eKLR and Republic v Royal Medial Services J.R Case No. 221/2013, Petition No. 160/2012 where the court held that;

**“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's right under the Constitution or violation of the Constitution itself.”**

42. Mr. Kinyanjui submitted that under the doctrine of separation of powers, courts should not cripple the exercise of constitutional mandate of the executive, independent offices, or other state organs unless there is proof of danger or violation of one's rights. To fortify this argument, counsel relied on the decision in the case of Republic v DPP and three Others Exparte Bedan Mwangi Nduati and Another (2015)eKLR.

## **Analysis and Determination**

43. I have considered the petition herein and parties' respective responses and submissions. Issues that crystallise for determination are;

- a) whether the 1<sup>st</sup> interested party is properly enjoined in the suit and therefore entitled to the reliefs sought.
- b) whether the investigations conducted or being conducted by the 1<sup>st</sup> respondent against the 1<sup>st</sup> interested party and the petitioners is unconstitutional.
- c) whether the respondents have violated any of the petitioners' rights.
- d) whether the 1<sup>st</sup> petitioner's suspension from employment was irregular and therefore unconstitutional.
- e) whether the prosecution of the 1<sup>st</sup> petitioner based on the impugned investigation is constitutional.

## **Whether the 1<sup>st</sup> Interested Party (NLC) is properly enjoined in the suit and therefore entitled to the reliefs sought**

44. From inception of the suit, the petitioners at paragraph 2 of the petition indicated that they had filed this suit on their own behalf as officers of the interested party (NLC), on behalf of other officers / employees of the commission and their family members. From this statement, the first question that renders itself for an answer is whether the petitioners had authority to institute this suit on behalf of the 1<sup>st</sup> interested party or its employees or their family members. The answer on the face of the record is that there was no authority filed to support the petitioners' assertion. It is no wonder that the 1<sup>st</sup> interested party did not file any response to the petition. On that ground alone, the joinder of the 1<sup>st</sup> interested party is untenable and unsubstantiated.

45. Concerning the reliefs sought, I do agree with M/s Odipo's submission that as a state organ, the 1<sup>st</sup> interested party cannot purport to seek a declaration on violation of its constitutional rights by the state to which its part of. See the case of County Government of Meru vs. EACC (supra) where the court held that;

**“Under Article 21 of the Constitution, the obligations regarding the implementation of fundamental rights and freedoms are cast on the State and every State organ ... I am doubtful, that the County government *qua* County government can lodge a claim under Article 22 of the Constitution against another State organ to enforce fundamental rights and freedoms as the County government is not a person for purposes of the Constitution and more particularly the Bill of Rights. I therefore find and hold that the petitioner cannot agitate a claim for violation of fundamental rights and freedoms against the Commission.”**

46. Having found that as a state organ the National Land Commission cannot seek reliefs of violation of its constitutional rights against another state organ (EACC), it is my holding that the joinder of the commission in this suit even when their authority was not sought is improper and an abuse of the court process and the reliefs sought can not apply to it.

## **Whether the investigations conducted or being conducted by the 1<sup>st</sup> respondent against the petitioners is unconstitutional and whether the petitioner's rights have been violated**

47. I wish to address issues No. 1 and 2 together since they are interlinked. The gravamen of this petition is anchored on alleged illegal and

unconstitutional investigations conducted and or ongoing investigations against the petitioners thus violating their constitutional rights.

48. According to the petitioners, the 1<sup>st</sup> respondent did initiate further investigations regarding alleged illegal compensation awards by the petitioners to various claimants whose land was affected by SGR projects at Port Reitz / Moi International Airport. They also alleged that since there were other pending suits filed by the 1<sup>st</sup> respondent against them over the same subject, it was prejudicial to subject them into further investigations thus jeopardising their defence in those other suits. They termed this further investigation as amounting to harassment, victimization and abuse of office.

49. On the other hand, the 1<sup>st</sup> respondent contended that they are executing their constitutional and statutory mandate of investigation. It is trite that, the 1<sup>st</sup> respondent which is a creature of Article 79 of the Constitution is bestowed with investigative powers on matters relating to corrupt conduct. Their powers are further solidified by Section 23 of ACECA.

50. Further, Section 11 of the EACC Act empowers the 1<sup>st</sup> respondent to investigate, to establish the extent of liability for the loss of, or damage to public property and to institute civil proceedings against any person for recovery or restitution and where appropriate freeze or confiscate proceeds arising out of corruption or the payment of compensation or take any other punitive action. This authority is realized under Section 55 of the ACECA where the 1<sup>st</sup> respondent can seek forfeiture of such property.

51. It therefore follows that; institution of civil proceedings is not dependent upon the existence of any other criminal proceedings or investigations with a view to instituting criminal proceedings. In the event of an existing similar civil proceedings, there are elaborate procedures and provisions under the Civil Procedure Rules providing for striking out a suit on grounds of either being *res judicata* or similar to an already existing suit hence an abuse of the court process.

52. Therefore, the existence of ACECC No. 16/18 and **Kajiado ELC Petition No. 2/19** does not and cannot hinder any investigations carried out during the pendency of the two suits with a view to instituting criminal or other unrelated civil suits. I do not see the relevance of the two pending suits in this case. The procedural aspect regarding amendments of pleadings in ACECC 16/18 is a matter to be dealt with under that particular file and necessary orders sought.

53. Is there anything wrong in the 1<sup>st</sup> respondent conducting further investigation where they deem it necessary? It is trite that, for a court to interfere with decisions of other independent organs of state or government departments, there must be clear proof of imminent danger or violation of one's rights or infringement of a person's fundamental freedom. See **Paul Nganga Nyaga and 2 others v Attorney General and 3 Others (2013)eKLR** where the court held that;

**“Having said so, I maintain therefore that this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they were acted in contravention of the Constitution.”**

54. The mere fact that there were other pending cases against the petitioners which is not denied does not automatically exonerate them from any other liability or culpability in a criminal case. I am in agreement with my sister Judge Mumbi Ngugi's holding in her ruling delivered on 30<sup>th</sup> April 2019 in this particular case, at paragraph 45 that;

**“However, I do not believe that a court can properly restrain a state investigative entity from carrying out its constitutional and legal mandate only because it is causing ‘inconvenience’ or ‘embarrassment’ to the applicants. The applicants must demonstrate that they are likely to suffer real prejudice, and I have been unable to see a demonstration of such prejudice in this case.”**

55. Indeed, the nature of harassment and embarrassment being referred to is the search in the petitioners' houses and summoning of their family members to record witness statements and preferment of several cases against them. There is nothing in law that limits the investigating agency from recording statements from potential witnesses including suspects' family members for purposes of ascertaining the truthfulness of the information gathered. I do not find the allegations sustainable.

56. In nutshell, I do not find any ground to warrant intervention in stopping or staying any investigations conducted or being conducted by the respondent. It is only fair that the court allows other state organs or government departments freedom to execute their mandate freely without undue interference. I do not find any prejudice suffered or likely to be suffered if the investigations continued as that is a lawful legal process bestowed upon EACC.

57. Concerning violation of the petitioner's rights, the 1<sup>st</sup> petitioner claimed that, he was summoned at 8.30pm on 6<sup>th</sup> March 2019 and asked to appear before EACC officers for interrogation the following day. According to the 1<sup>st</sup> petitioner, the notice was too short thus denying him sufficient time to consult his lawyer and to prepare his defence. That in any event, he was not cautioned of the consequences of his statement which was likely to be self-incriminating information thus contravening Articles 50 and 47 of the Constitution, Section 52(7) of the National Police Service and Section 3 of the Fair Administrative Actions Act.

58. From the response of the 1<sup>st</sup> respondent, it was admitted that the 1<sup>st</sup> petitioner was summoned as claimed but justified their action stating that there is no legal provision providing for the notice or how long a notice should take and that the 1<sup>st</sup> petitioner did not ask for extension of time which they would have given under Section 28 of ACECA. They further argued that the 1<sup>st</sup> petitioner admitted in his affidavit sworn on 22<sup>nd</sup> March 2019 that he was given extension of time from 7<sup>th</sup> March 2019 up-to 14<sup>th</sup> March 2019 implying that he had an opportunity to consult a lawyer.

59. I do agree with Mr. Okubasu that service of summons at 8.30pm demanding for the 1<sup>st</sup> petitioner to appear before EACC office the

following day at 8.00am was not sufficient notice in terms of the requirements under Section 28 of ACECA which the 1<sup>st</sup> respondent seems to rely on. This notice for all purposes cannot be said to be reasonable as envisaged under the Fair Administrative Actions Act Sections 3, 7 and 11.

60. However, as admitted by the 1<sup>st</sup> petitioner in his affidavit sworn on 29<sup>th</sup> March 2019, his summons was extended from 7<sup>th</sup> to 14<sup>th</sup> March 2019. It is my conviction that by extending the notice / summons requiring the appearance of the 1<sup>st</sup> petitioner before EACC for interrogation by one week, in my view it ameliorated the illegality of one day's notice. I believe the period of 7 days was sufficient for the 1<sup>st</sup> petitioner to consult his lawyer and prepare his evidence or response to the anticipated interrogation. To that extent the 1<sup>st</sup> petitioner cannot claim to have suffered prejudice.

61. The other issue the 1<sup>st</sup> petitioner raised with serious contestation is the manner in which he was interrogated without a caution thus contravening Section 52 of the National Police Service Act which provides that-

**(a) A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.**

**(b) A person who without reasonable excuse fails to comply with a requisition under subsection (1), or who, having complied, refuses or fails to give his correct name and address and to answer truthfully all questions that may be lawfully put to him commits an offence.**

**(c) A person shall not be required to answer any question under this section if the question tends to expose the person to a criminal charge, penalty or forfeiture.**

**(d) A police officer shall record any statement made to him by any such person, whether the person is suspected of having committed an offence or not, but, before recording any statement from a person to whom a charge is to be preferred or who has been charged with committing an offence, the police officer shall warn the person that any statement which may be recorded may be used in evidence.**

**(e) A statement taken in accordance with this section shall be recorded and signed by the person making it after it has been read out to him in a language which the person understands and the person has been invited to make any correction he may wish.**

**(f) Notwithstanding the other provisions of this section, the powers conferred by this section shall be exercised in accordance with the Criminal Procedure Code ([Cap. 75](#)), the Witness Protection Act ([Cap. 79](#)) or any other written law.**

**(g) The failure by a police officer to comply with a requirement of this section in relation to the making of a statement shall render the statement inadmissible in any proceedings in which it is sought to have the statement admitted in evidence.**

62. According to the above provision, a police officer is empowered to require any person he believes has information which will assist in the investigation of an offence to attend before him. Pursuant to Section 23 of ACECA, EACC officers are empowered to exercise powers of a police officer for purposes of conducting investigations. Sub-Section 2 insulates such person under investigation not to make or give any self-incriminating evidence. Sub-Section 7 provides a remedy for non-compliance with the guidelines set out on how a statement obtained from a person under investigation should be treated and that any violation thereof shall render such statement inadmissible in a court of law.

63. Both parties are in agreement that the petitioners have since been charged of criminal charges. It therefore follows that, the right forum to challenge admissibility of such evidence is the trial court where the statement obtained from the 1<sup>st</sup> petitioner will most likely be used. It will be premature at this stage to determine admissibility of statements.

64. The allegation that there is proof for non-compliance of Section 52 by the EACC officers through EACC CCTV footage is not an issue to be determined by this court. To do so will require witnesses' appearance or testimony, subject them to cross examination and then make a ruling on admissibility. All these will adequately be dealt with by the trial court.

65. If there is any violation of Article 50 regarding the 1<sup>st</sup> petitioner giving self- incriminating evidence, this is not the right forum. In other words, there is a remedy available through other legal processes hence it will not suffice to use a constitutional petition to circumvent other legal operations in other legally provided mechanisms in this case criminal proceedings against the petitioners. See **Four Farms Ltd v Agricultural Finance Corporation (2014) eKLR** which cited with approval the decision in **Damian Belfonte v Attorney General of Trinidad and Tobago** where it was held that;

***“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process.”***

66. Similar position was also held in the case of **Kenya Bus Services Ltd & 2 Others v The Attorney General (2005)KLR** where the court stated that the Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action.

67. The claim that the 1<sup>st</sup> petitioner gave self- incriminating evidence contrary to Section 50(2)(1) is not applicable at this stage as the 1<sup>st</sup>

petitioner has already been charged hence an opportunity before the trial court to challenge the legality of such evidence. It will be prejudicial to the trial court for this court to make a pronouncement under this forum.

68. The other issue relied on in support of the petition is that, the petitioners are facing several other related cases seeking almost similar reliefs among them, **ELC Petition No. 2/2019** and **ACECC 16/18** in respect of the 2<sup>nd</sup> petitioner hence duplicity of suits. I am a live to the fact that each case is determined on its own merits depending on the facts and circumstances. In my view, the petitioners already have a remedy in those courts to challenge the manner in which some documents recovered from their houses and statements recorded before EACC were used to prove cases against them.

69. Regarding the alleged illegal unconstitutional searches and seizure of certain documents from the petitioners' houses without notice in compliance with Prof. Tom Ojienda case above quoted, the same is not correct as search warrants were legally obtained from the Magistrate's court pursuant to section 118 of the CPC. In any event, the holding in Ojienda case has since been stayed vide the Supreme Court decision in **Ethics and Anti-Corruption Commission vs Tom Ojienda, SCT t/a Prof. Tom Ojienda and Associates Supreme Court Civil Application No. 21/2019** hence the requirement for notice is not applicable.

70. In my view, I do not find any clear violation of Article 50(2) nor Article 47 of the Constitution or the Fair Administrative Actions Act as the 1<sup>st</sup> petitioner was notified of the allegations levelled against him, given adequate time to prepare and then subsequently charged. The rest of the remaining process is for the trial court to determine.

### **Suspension from employment**

71. Mr. Okubasu heavily submitted on the legality or propriety of the petitioner's suspension from employment and more particularly the 1<sup>st</sup> petitioner upon instigation by the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent argued that the suspension was procedurally done pursuant to Sections 62 of the ACECA and 42(7) of the Leadership and Integrity Act as well as Regulation 25 of the Leadership and Integrity Regulations.

72. For avoidance of doubt, I wish to reproduce the three provisions as hereunder. Section 62(1) of ACECA provides;

**“A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case.”**

73. Section 42(7) of the Leadership and Integrity Act also provides;

**“Subject to the Constitution and any regulations for the enforcement of the Code made under this Act, a State officer may be suspended from office pending the investigation and determination of allegations made against that State officer where such suspension is considered necessary.”**

74. Regulation 25 of the Leadership and Integrity Regulations provides that an officer who is under investigation will be suspended by the public entity employing him or her or on recommendation of the EACC if seized of the investigations. M/s Odipo argued that having been charged, the petitioners are automatically suspended pursuant to the said provisions. There is no dispute that the petitioners have been charged. As public officers, Section 62 of the ACECA comes to play.

75. It is not unusual in the public service that once an officer has been subjected to investigations touching on his integrity and more particularly involvement in corrupt conduct while in service, the employer is entitled depending on the circumstances and level of investigation to suspend such officer to await completion of investigation or conclusion of criminal proceedings. The essence of such suspension is to protect and preserve evidence and witnesses who could otherwise be interfered with.

76. In view of the above provision, I do not find any wrong committed in the suspension from duty of the petitioners as it was done in accordance with the law. There is no proof of malice while enforcing the law. I do agree with my sister Wendo in her holding in the case of **Republic v Ethics and Anti-Corruption Commission and Hon. Attorney General Exparte Patrick Gachunge Mwambia and Francis Atanasio Kithure Meru, J.R No. 25/2016** where she stated that;

**“Would the public have faith in such officer, that he will serve them faithfully when such allegations hang on his head? Granting a stay order in such a case would be sending the wrong message to the public, that even if you are indicted for corruption and economic crimes, you can still sit put in your office and transact business as usual even when things are not normal. The applicants should be cleared first. Grant of the order of stay is a discretionary one and can be denied even if deserved. In this case, the order of stay would be against public interest.”**

77. The allegation that Article 236 of the Constitution was violated by the petitioners being victimized or discriminated against for performing their office functions is subject to other lawful actions. The suspension from office was in accordance with the statutory provisions which also amounts to due process. The petitioners have not been dismissed but suspended which is lawful and therefore not unconstitutional when read in context together with Chapter Six regarding good governance, honesty and public trust in execution of public duty.

78. Regarding the claim of discrimination contrary to Article 27 of the Constitution, Mr. Okubasu submitted that despite several employees from NLC having recorded statements, some of them were not charged or suspended. Recording statements is not synonymous to being liable or culpable. That is part of the legal or administrative process in ascertaining liability or culpability. This court has no proof of any other person who was found liable while acting in similar circumstances but was let free. In any event, it is within the mandate of the EACC to determine whom to sue or charge depending on the weight of evidence. This court cannot let the petitioners go free simply because some

of their colleagues who recorded statements were never sued or charged.

**Whether the prosecution of the petitioner based on the impugned investigation is constitutional**

79. As stated elsewhere in this judgment, the decision to charge or not to charge lies with the DPP under Article 157 of the Constitution. Unfortunately, the petitioners having not amended the petition, there is no prayer challenging the prosecution of the petitioner. Parties are bound by their pleadings. Although leave was granted to enjoin the DPP as a 2<sup>nd</sup> Interested Party, the petitioners did not amend the petition to that effect. Technically, the DPP was not even a party in these proceedings and there is no prayer affecting them.

80. However, I wish to reiterate that, the decision to charge or not to charge is a preserve of the DPP. Unless proved that the impugned prosecution is brought in bad faith, amounts to an abuse of the court process or is *ultra vires*, this court has no business stopping such prosecution. There is no prayer seeking a declaration that the prosecution of the petitioners be stayed, prohibited or quashed. For those reasons that prayer does not apply.

81. Regarding the award of damages, the same is not applicable considering that the petitioners have not proved their claim to the required degree.

**Conclusion**

82. Having found that the impugned investigations was done in accordance with the law and that there was no proof of any specific violation of the law or infringement of any fundamental freedom, and further, having found that the suspension of the petitioners from employment was procedurally and legally done, it is my holding that the petitioners have failed to prove their claim for a positive constitutional declaration remedy in their favour.

83. Accordingly, the petition herein dated 29<sup>th</sup> February 2019 is hereby dismissed with costs to the respondents.

**DATED, SIGNED and DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2020.**

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**J. N. ONYIEGO**

**JUDGE**