



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

PETITION NO. 32 OF 2019

WILLIAM BILL OMODING.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. On 9th September 2019, the Petitioner herein together with 25 others was arraigned before Milimani Chief Magistrate's Anti-Corruption Court facing three counts relating to corruption charges. In respect to Count 1, he is jointly charged with 24 others with the offence of conspiracy to defraud contrary to Section 317 of the Penal Code. From the attached copy of the charge sheet marked No-1, the part containing particulars of the charge was omitted.

2. With regard to Count 2, he is with 16 others charged with the offence of intentional failure to comply with the law relating to procurement contrary to Section 45 (2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003. Particulars are that between 18th December 2014 and 19th December 2014 in Kisumu County within the Republic of Kenya being members of the Lake Basin Development Authority Board of Directors and Managing Director respectively jointly and willfully failed to comply with the law relating to procurement to wit Section 47(a) of the Public Procurement and Disposal Act 2005 and regulation 10 (m) of the Public Procurement and Disposal Regulations, 2006 by irregularly approving the variation of the contract for the Lake Basin Development Authority, lower Kanyakwar Phase 1 Project.

3. Count 3, he is charged jointly with 16 others with the offence of abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003. Particulars are that, between December 18th and 19th December 2014 in Kisumu County within the Republic of Kenya being members of the Lake Basin Development Authority Board of Directors jointly improperly conferred a benefit of Kshs. 1,300,000,000/- to Erdemann Property Ltd by irregularly approving the renovation of the contract for the Lake Basin Development Authority, Lower Kanyakwar Phase 1 from Kshs. 2,451,035,643 to Kshs. 3,751,035,643.

4. Having entered a plea of not guilty, the matter was fixed for hearing. Aggrieved by the charges levelled against him on grounds that the recommended and preferred and ongoing prosecution violated his constitutional rights and fundamental freedoms, he moved to this court vide a Petition dated 25th October 2019 and filed on 30th October 2019 seeking the following reliefs;

1) A declaration that the investigations were in breach of the Petitioner's rights to fair administrative action and right to natural justice.

2) A declaration that the decision by the respondent to prefer charges against the petitioner was a breach of Article 157(11) of the Constitution.

3) A conservatory order to permanently stop the trial of the Petitioner herein with the aforementioned offences.

4) An order of Judicial Review by way of certiorari to remove into this court the decision of the respondent in Nairobi Chief Magistrate's (Anti-Corruption) Court Cr., Case No. ACC 26/2019 to prefer charges against the petitioner for the purposes of quashing on account of the circumstances and constitutional violations in the manner of treatment and decision so far to prefer the said charges.

5) An order of Judicial Review by way of prohibition to prohibit further trial of the petitioner by the respondent before the Chief Magistrate's Court in Nairobi Criminal Case No. ACC 26/2019 and or such further and or other proceedings that may be instituted in respect thereof.

6) General damages for the breach of the Petitioner's Constitutional Rights to Freedom from discrimination (Article 27), fair administrative action (Article 47) right to natural justice and right to fair hearing (Article 50).

7) Costs of the Petition.

8) Interests on (6) above at court's rates from the date of filing of the Petition until payment in full.

9) Any other orders that this Honourable Court deems fit and just to grant in the circumstances.

5. Contemporaneously filed with the Petition is a Notice of Motion of even date seeking a conservatory order by way of an injunction staying the proceedings in **Nairobi Chief Magistrate (Anti-Corruption) Criminal Case No. ACC 6 of the 2019.**

6. Having certified the application urgent on 31st October 2019, the court directed the applicant / petitioner to serve the respondent and hearing interpartes fixed for 22nd November 2019. When the matter came up for interpartes hearing, the DPP was not ready as they had not filed any response. However, Mr. Arwa appearing for the petitioner opted to abandon hearing of the Notice of Motion and instead urged that the DPP/respondent responds to the main Petition for the sake of fast tracking the main hearing.

7. By consent, parties compromised the hearing of the Notice of Motion for the main hearing (Petition). The respondent was directed to file his response to the Petition within seven (7) days. Further, parties agreed to file their submissions in disposition of the Petition which was then fixed for highlighting on 17th December 2019.

8. Consequently, on 16th December 2019, the respondent filed his replying affidavit sworn by Henry Kinyanjui prosecution counsel thus opposing the Petition contending that the ongoing prosecution against the petitioner was not unconstitutional. He also filed his submissions the same day. In his rejoinder, the petitioner filed a further affidavit sworn on 16th December 2019 together with his submissions.

Petitioner's Case

9. The Petition herein is premised upon grounds and facts set out on the face of it and further amplified by a supporting affidavit sworn by the Petitioner on 25th October 2019. It is the Petitioner's case that, the ongoing prosecution against him amounts to a violation and or threat to violation of his constitutional rights as the charge sheet does not disclose facts supporting any charge against him hence an abuse of the court process.

10. It was further stated that due process requires that the petitioner ought to have been informed of the investigations against him and afforded a chance to present his facts before the decision to charge and prosecute him could be made in compliance with Article 50 and 47 of the Constitution. Further, that Article 27 of the Constitution was violated as the rest of the suspects were notified of the charges while the Petitioner was not.

11. According to the averments contained in his affidavit in support of the petition, the petitioner contended that whereas the charges stipulated that the offences he was facing were committed by the Board of Directors of Lake Basin Development Authority (hereinafter LBDA), he had no connection or relationship with the said Board either as a Director, Member of Management team or otherwise.

12. He averred that he did not participate in any plan or scheme in connection with the alleged failure to comply with the law relating to procurement in whatever capacity. He further stated that, he was appointed as a Board Member of the LBDA for a period of three (3) years with effect from 18th March 2010 (see annexure No. 2 being copy of letter of appointment). That on 27th June 2013, he received a letter re-appointing him as a Board Member of the LBDA for a further contract period of three (3) years (seen annexure No. 3 – copy of letter of appointment).

13. He expressed disappointment regarding the manner in which investigations were conducted without informing him of any wrong doing.

14. He claimed that the procurement exercise upon which the charges are anchored was initiated and completed between April and May 2013. He gave a chronology of events as follows;

i) contract was signed on 8th April 2013.

ii) the Deed of assignment of rental income was signed on 8th April 2013.

iii) the Escrow Agreement was signed on 8th April 2013.

iv) the agreement for a loan to be secured by the exercise of a power of charging was signed on 8th April 2013.

v) the bill of quantities was signed on 8th April 2013 and request to Erdemann made on 22nd April 2013 (see annexure No. 4 and 5 being documents showing the above events).

15. From the above analysis, the Petitioner contended that during the material time, he was neither a Board Member nor Member of the Management team hence could not have actually participated or taken any lead role in the procurement process.

16. In conclusion, the Petitioner urged the court to find that; by the respondent approving and initiating his prosecution, he abused his powers, acted illegally, in bad faith, ultra-vires and unreasonably by failing to appreciate that; the power to prosecute is only available to people who have committed crime; that Public Procurement Process terminate upon signing of a contract by two parties hence a person appointed as a board member after the contract has been signed cannot be accused of any public procurement impropriety; it was wrong to charge him with breaching Regulation 10(m) of the Public Procurement and Disposals Regulations which does not exist and lastly, it was wrong to charge him with an offence of irregularly approving a variation of contract which does not exist in law.

Respondent's Case

17. On their part, the respondent relied on the aforesaid Henry Kinyanjui's replying affidavit stating that the DPP properly acted on the evidence on record and recommended prosecution without abuse of his powers. It was Mr. Kinyanjui's contention that the procurement period in question as per the charge sheet is between 18th December 2014 and 19th December 2014 which period the petitioner was a Board Member when the board irregularly conferred a benefit of Kshs. 1,300,000/- to Enderman Property Ltd by illegally side stepping the tender committee and approving the variation of the contract for LBDA from Kshs. 2,451,035,643 to Kshs. 3,751,035,643.

18. Mr. Kinyanjui further contended that the petitioner having been re-appointed as a Board Member on 19th March 2013 for a period of three (3) years as per Gazette Notice No. 7914 was properly a Board Member when the impugned contract variation exercise was irregularly done without including the Tender Committee for approval of the said variation. That the petitioner does not deny having sat in the Board Committee that approved the illegal variation and that he received a sitting allowance for that purpose after signing the attendance register.

Rejoinder by the Petitioner

19. In his rejoinder, the petitioner filed a further affidavit sworn on 16th December 2019 confirming that, he sat the board meeting of LBDA in December 2014 when the management of LBDA presented a request to the Board to approve the increase in the gross area of Lake Basin mall from 35,700 square metres to 58,000 square metres at a cost of Kshs. 620,000,000 and construction of show room, tyre centre and a three-star hotel at a cost of Kshs. 650,000,000/-.

20. That the board approved the increase but subject to the consultants providing approved designs and Bill of Quantities. That the approved designs were never provided, nor were the Bills of Quantities furnished hence no amended contract was drawn. In his view, the board never approved the increase as the conditions for procurement were not met. The petitioner shifted the blame to the management of the LBDA and specifically the procuring unit for not following the conditions stated before the approved variation could be effected and additional works done. According to him, members of the procurement entity should be held liable pursuant to Section 27(3) of the LBDA.

21. That the approval was conditional. He contended that conditional approval of a requirement to vary the contract does not constitute a Conferment of Benefit under the PPDA and that in any event, a person giving approval does not become a participant in the Public Procurement Process breach of which will attract criminal charges.

Petitioner's Submissions

22. In his oral submissions, Mr. Arwa representing the petitioner relied on the averments contained in the supporting affidavit and further affidavit in reply to the petition, submissions filed on 18th December 2019 and several authorities attached thereto. Counsel contended that, by the Board giving conditional approval towards additional works and therefore variation of work subject to fulfilling certain conditions does not make him liable under Section 47 of the PPDA hence no offence disclosed. That Section 27(2) of the PPDA vest compliance with the procurement unit and accounting officer.

23. Learned counsel further submitted that failure to call or advertise for a fresh contract by the management for the additional works cannot be the board's failure to warrant institution of false prosecution against them. He opined that the board did not direct the Tender Committee to award the contract to Erdemann Co. Ltd. That mere approval of the additional works does not confer a benefit on anybody.

24. It was further contended that nobody should be charged of a crime where no actus reus nor mensrea is disclosed. Counsel reiterated the averment that under Section 5(2) of the PPDA mere approval of a proposal to procure certain works or to incur expenditure does not amount to participating in the procurement process and that under Section 27(2) & (3) of the PPDA only the procurement unit and accounting officer are liable to prosecution for flouting procurement law/s. To support this position, counsel referred the court to the decision in the case of **Njuguna S. Ndungu vs. Ethics and Anti-Corruption Commission and 3 others (2018)eKLR.**

25. Concerning abuse of office by the DPP in preferring the charges against the petitioner, counsel asserted that, the DPP acted illegally thereby abusing his prosecutorial powers by ignoring clear provisions of the law; failed to comply with Article 47 of the Constitution and Fair Administrative Action Act 2015; failed to consider evidence on record demonstrating that no crime was disclosed against the accused person and lastly, failure to take into account public interest. In answering these elements, counsel made reference to the Court of Appeal holding in the case of **Diamond Hasham Lalji and Another v. The Attorney General and Others (2018)eKLR** where the court held that non-compliance with the aforesaid elements amounted to abuse of prosecutorial powers by the DPP.

26. According to counsel, once the court is satisfied that the DPP did abuse his powers, it has powers to intervene and quash the charges. In support of this proposition, counsel made reference to the decision in the case of **George Joshua Okungu and Another v. The Chief Magistrate's Court (Anti-Corruption Court) at Nairobi (2014)eKLR** as well as **Githunguri v Republic (1985)KLR 91.**

27. It was counsel's submission that they had established abuse of prosecutorial powers by the DPP hence the burden shifts to the DPP to justify his actions in compliance with the Court of Appeal's decision in the case of **Diamond Hasham Lalji and Another v The Attorney General** (supra).

Respondent's Submissions

28. Mr. Kinyanjui prosecution counsel for the respondent relied on his brief submissions filed on 16th December 2019. He submitted that the Petitioner was a Board Member of LBDA when the contract variation was approved by the board instead of the Tender Committee contrary to Section 47(a) of PPDA. He contended that there is sufficient evidence upon which the impugned prosecution of the petitioner was preferred and the merits and demerits of such evidence is for the trial court to determine and not the constitutional court.

Analysis and Determination

29. I have considered the petition herein, supporting affidavits and the relevant annexures thereof, response by the respondent and submissions by both counsel. Issues that arise for determination are;

- a) **Whether the petitioner's rights were violated by the DPP in recommending the petitioner's prosecution.**
- b) **Whether the DPP abused his prosecutorial powers in preferring and commencing prosecution against the petitioner.**
- c) **whether the facts and charges preferred do not disclose an offence.**
- d) **Whether the reliefs sought can issue.**
- e) **Who bears the costs of the suit.**

30. Considering the facts contained in the pleadings, I will determine issues No. 1 and 2 together as they are interlinked. It is the petitioner's contention that his prosecution is unconstitutional, ill informed, without factual basis and amounts to an abuse of the court process by the DPP's office. Further, that the charges do not disclose any offence committed considering that the impugned contract commenced and concluded before he joined the board.

31. There is no dispute that the petitioner is facing three (3) counts relating to conspiracy to defraud, abuse of office and failure to comply with the law relating to procurement. It is also clear that upon receipt of the investigation file and recommendations from the EACC, the DPP concurred and commenced criminal proceedings.

32. It is trite and indisputable that the power to recommend and commence criminal proceedings is a preserve of the DPP pursuant to Article 157 of the Constitution which provides that-

"Sub-Article (6) – the Director of Public Prosecutions shall exercise state powers of prosecution and may-

(a) 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."

33. However, it is also trite that the power to commence criminal proceedings by the DPP is discretionary and subject to certain legal parameters as stipulated under Article 157(10) which provides-

"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."

34. This provision is reproduced under Section 6 of the office of the Director of Public Prosecutions Act No. 2 of 2013. In the case of Stanley Munga Githunguri v Republic (1985)KLR 91 the court under the old constitutional regime observed that;

"The Attorney-General in Kenya by section 26 of the Constitution is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do."...this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy."

35. As stated in Thuita Mwangi and 2 Others v Ethics and Anti-Corruption Commission and 3 Others (2013)eKLR H.C. Petition No. 369/13, discretionary powers vested in the DPP is not an open cheque and such discretion must be exercised within the four confines of the constitution. The court went further to state;

"...It must be exercised reasonably, within the law and to promote the policies and objects of the law which are set out in section 4 of the Office of the Director of Public Prosecutions Act. These objects are as follows; the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism."

36. However, where the court is convinced that the criminal proceedings in question are tainted with abuse of office, the court will not hesitate to intervene and give the appropriate legal remedy. See Vincent Kibiego Saina v Attorney General High Court Misc. Criminal Application No. 839 of 1999 (UR) and George Joshua Okungu and Another v The Chief Magistrate's Court (Anti-Corruption Court)

at Nairobi (supra).

37. It therefore follows that, it is incumbent upon the DPP to prove that he has a prima facie case or a reasonably prosecutable case free from abuse or malice worth prosecuting before a court of law (see **Diamond Hasham Lalji and Another v The Attorney General (supra)** where the court while citing the case of **Ramahngam Ravinthram v Attonrey General (2012)SGCA court of Appeal Singapore** stated that;

“However, once the offender shows on the evidence before the court, that there is a prima facie breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under Article 35(8) of the Constitution without more, as a justification for its prosecutorial decision to the court.”

38. What is in contention before me is that the DPP relied on insufficient evidence to prefer prosecution of the petitioner. On their part, the prosecution’s case is hinged on the claim that the petitioner was a Director and therefore a member of the Board LBDA when the approval for variation of additional work for the construction of LBDA mall was approved by the board contrary to the procurement laws.

39. In his affidavit in support of the petition, the petitioner contended that the period between April and May 2013 when the contract was initiated he was not a board member. However, the respondent countered this assertion by stating that, what is in contention is not the propriety or legality of the original contract but rather the subsequent contract on additional works which exceeded the allowable variation percentage for an existing contract. The respondent confirmed through a copy of gazette notice NO. 7914 of 14th June 2013 (Ex.1) that the petitioner was indeed appointed as a member of the LBDA for a period of three (3) years with effect from the date of gazette ment thereto.

40. In his response to the respondent’s reply, the petitioner admitted that he was indeed a board member when a request for approval for additional works worth 1.3 billion was presented subject to certain conditions. According to the respondent, it is on the basis of the board’s approval subject to preparation of design works and bills of quantity that the Tender Committee acted by awarding Erdamann Co. Ltd additional work which exceeded the limit of the allowable percentage instead of advertising for a fresh contract.

41. According to the petitioner, if there is any irregularity committed, it was by the procurement entity and the Tender Committee and therefore the people to be held responsible. The question which then arises is, could approval for additional works precede fulfillment of attached conditions? The petitioner does not deny that the value of the additional works exceeded the legally allowable variation percentage. He only shifts the burden to the procurement department. However, from his further affidavit, he attached an investigation report by the Ministry of Environment (Ex. No. 002) which established that the Bills of Quantities were approved.

42. As to why the said Board approved what the DPP considers an illegality before the conditions cited by the board could be met is the subject and a question to be determined before the trial court where witnesses will be subjected to cross examination. Without delving into the merits of the evidence on record which may prejudice the trial court’s decision, I will hold that the merits and demerits of the evidence on record is for the trial court to determine. On a prima facie basis, it is clear that the DPP had reasonable ground to hold the board members answerable subject to proof beyond reasonable doubt before the trial court.

43. In arriving at the above decision, I am guided by the decision in the case of **Thuita Mwangi and two others (supra)** and **Meixner and Another v The Attorney General (2005)IKR 189** where the court held that;

“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

Similar position was held in the case of **Beatrice Ngonyo Kamau and 2 Others v Commissioner of Police and the Director of Criminal Investigations Department and Another Petition No. 251/2012 (2013)eKLR.**

44. Having held as above, I do not find any evidence that the DPP abused his office thus abusing Articles 10 and 157 of the Constitution. As to whether the petitioner was informed of the charges before being arraigned in court, it is not clear from the court how the petitioner came to know of the charges before court. Both parties did not give elaborate information as to the process leading to the appearance in court. I will only assume that the petitioner must have been informed of the allegations facing him before appearance in court.

45. As to whether the Board should be exonerated and the management held responsible for the impugned actions, that is the responsibility of the investigative agency and the trial court.

46. Touching on the issue whether the charges preferred do not disclose a reasonable offence, the petitioner contended that, as a board member he had no role in awarding any contract hence cannot be accused of conferring a benefit. A constitutional petition is charged with establishment of a violation, infringement or a threat to violation of constitutional right or breach of a fundamental freedom and not the defects on a charge sheet in a criminal case. In case of such allegations, there are sufficient mechanisms and legal provisions under the relevant statutory provisions among them the CPC to address such challenges. see **William S. K. Ruto and Another v Attorney General Nairobi HCC NO. 1192 of 2005 (2010)eKLR** where the court held;

“The petitioners have questioned the competence of the charges that they face. In our view, it is not for this court to determine whether or not the charges as framed disclose an offence...The applicants only need to move the trial magistrate to strike out the charge for being incompetent or the prosecution can seek to substitute the charges. The fact that a charge is defective incompetent does not raise a Constitutional issue”

47. Accordingly, it is my finding that it will be premature to determine the sufficiency in content of the charge before this forum. For those reasons that ground fails.

48. Turning on to the issue of whether the reliefs sought can be granted, the same is subject to the finding already made herein above. Having held that the respondent had a legal basis to commence criminal proceedings against the petitioner, the administrative decision taken by the EACC and DPP can only be quashed, or set aside or stopped by way of certiorari or prohibition if the petitioner proves that the impugned decision was made without jurisdiction or in consequence of an error hence proof of illegality, irrationality or impropriety, abuse of office or breach of rules of natural justice (see **George Joshua Okungu and Another (supra)**).

49. Having held that the DPP properly acted on the evidence submitted by EACC, and further having said that the DPP acted within his constitutional mandate, it follows that the petitioner has not proven any of the elements which must exist or be established before judicial review orders can issue or a constitutional declaration on violation of one's rights, threat to violation of such rights or breach of his fundamental freedom. In other words, the petitioner has not established with precision the constitutional provision infringed and the extent of infringement. See **Anarita karimi Njeru v Republic (No.1)(1979)**. To that extent the prayer for certiorari and prohibition cannot apply.

50. As to grant of costs, the same is a matter of discretion bestowed upon the trial court. Unless the matter is extremely hopeless or purely malicious on either side which is not in this case, courts will act with restraint to order for costs in matters of this nature. Accordingly, each party shall bear own costs.

DATED, SIGNED AND DELIVERED BY EMAIL AT NAIROBI THIS 29TH DAY OF APRIL, 2020.

J. N. ONYIEGO

JUDGE