



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

CONSTITUTIONAL PETITION NO. 26 OF 2019

ROSE ESTHER MUTHONI WAMUIYA.....PETITIONER

VERSUS

THE GOVERNOR COUNTY GOVERNMENT OF NYANDARUA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYANDARUA.....2ND RESPONDENT

THE ETHICS AND ANTI CORRUPTION COMMISSION.....INTERESTED PARTY

JUDGMENT

1. In her petition dated 30th September 2019, the petitioner challenges the constitutionality of investigations carried out against her by the Interested Party, the Ethics and Anti-Corruption Commission (EACC). She contends that the EACC is targeting her singularly instead of investigating the entire County Executive Committee (CEC) of the County Government of Nyandarua, the 2nd respondent. She alleges that she is being made to carry individual responsibility for the collective decisions of the CEC, which she terms discriminatory and in violation of her constitutional rights under Article 27 of the Constitution.

2. The petitioner describes herself as the CEC member in charge of the Department of Industrialization, Trade and Cooperatives in the 2nd respondent. She was appointed pursuant to section 32(3) of the County Governments Act, 2012. She has brought the petition against the Governor of the County Government of Nyandarua as well as the County. She has also joined EACC, a body established under section 3 (1) of the Ethics and Anti-Corruption Commission Act, 2011 with the mandate to combat and prevent corruption, economic crime and unethical conduct in Kenya through law enforcement, prevention, public education, promotion of standards and practices of integrity, ethics and anti-corruption, as an Interested Party.

3. The petitioner asks the court to grant her the following orders:

1. That a declaration is issued that the Petitioner as an individual member of the County Executive Committee of the County Government of Nyandarua cannot be found to carry personal liability for collective decisions of the County Executive Committee on account of article 10 and 27 of the Constitution of Kenya, 2010.

2. That an order be issued barring the Interested Party from any would be singularly targeted investigation and prosecution that discriminatorily isolates the Petitioner as an individual as opposed to the entire County Executive Committee of the entire County Government of Nyandarua.

3. That the 1st and 2nd Respondents be ordered to clear the air on the Investors Conference and show cause why there would be any attributable liability targeting the Petitioner singularly as opposed to the entire County Executive Committee of the County Government of Nyandarua vide the collective responsibility doctrine.

4. That a declaration be issued that the Petitioner in exercise of her functions did not authorize or endorse any procurement of goods and services and the attendant payments of the suppliers in connection with the proposed investment conference or at all.

5. Costs of the Petition.

The Petitioner's Case

4. The petitioner sets out the background to the petition in her petition and affidavit in support, which are essentially in the same terms, beginning with her appointment to the 2nd respondent as CEC member. She was properly vetted by the County Assembly of the 2nd respondent and found eligible for her post. The County Assembly established that she is a distinguished career Advocate with a Master's Degree in International Trade Law, is a practicing Advocate and a shrewd investor with huge stakes in different companies and has vast wealth in leadership, administration and development. As an Advocate, she is required to conduct herself in a manner that does not degrade or put the image of the profession to disrepute. She had, at all material times during the pendency of her employment, discharged her duties diligently and to the best of her ability.

5. According to the petitioner, the 1st respondent had, in his manifesto, outlined a vision to have an investors' conference organized and conducted during his first year of assumption of office as Governor. The conference had been mooted and postponed several times. However, the entire CEC of the 2nd respondent resolved that the conference be held without fail in July 2018. The conference was approved by the CEC on 3rd May 2018 and recorded vide minute number 148/5/18. Thereafter, a Committee of the whole CEC, chaired by the 1st respondent, was set up to make the requisite arrangements. A letter by the County Secretary to the Deputy Governor asked her to proceed and initiate action along the lines of the CEC resolution. The conference was marked as a priority by the CEC due to the County Integrated Development Plan programmes that would cost the County Government up to Kenya Shillings Two Hundred Billion (Kshs 200,000,000,000/=).

6. The petitioner states that several expressions of interests had been received by the County Government towards the preparation and participation in the event. The interest was also sparked by the publicity that the conference had attracted when the 1st respondent had publicized the conference in his manifesto and in his inaugural speech at the County Assembly on 14th September, 2017. The County Assembly had apportioned Kenya Shillings Two Hundred Billion (Kshs 200,000,000,000/=) in the supplementary budget for 2017/2018 financial year for the investment conference.

7. At around the same time as the CEC approved the holding of the conference, it also resolved that all departments contrive to absorb their budgets so that funds are not returned to the National Treasury as the end of the financial year was fast approaching. The County Secretary of the 2nd respondent wrote an Internal Memo to all CEC members to this effect. The CEC also resolved that the various departments nominate representatives to sit in the Nyandarua Investment Conference Secretariat Committee, in which the 1st respondent also had a role, that was charged with planning, county profiling and stakeholder networking.

8. At the request of the petitioner as resolved in the CEC, all the Departments of the County Assembly wrote to her profiling the various projects for showcasing during the investors' conference. A cumulative proposal on projects to be showcased was developed. Several meetings were held towards ensuring that the conference would be a success, and a briefing was also held to update the 1st respondent on the preparations for the conference. The meetings were attended by the Deputy Governor, and the Kenya Investment Authority also participated in the planning of the conference.

9. In order to enhance visibility and cut advertising cost, the petitioner had written to the CEC member, Public Administration and ICT, requesting for the conference's micro-site to be hosted on the main conference website. Further, a concept paper was developed outlining all issues, action plans, strategies and activities relating to the conference to aid in the planning process. The 1st respondent also developed an invitation for his signature soliciting sponsors of the conference. A concept note summary was also drafted for use by sponsors and other stakeholders and a programme for the conference had also been developed. As the CEC member for Trade, Industrialization and Cooperatives, the petitioner was assigned the duty to spearhead activities of the conference.

10. The petitioner contends that she was subjected to an investigation by the EACC on alleged offences committed whilst planning and organizing the investment conference. The investigations touched on alleged pre-payments for procurement of goods and services for the conference. The alleged offences were attributed to her individually, yet the entire CEC made all the resolutions regarding the holding of the conference collectively and also resolved to assign roles to sub-committees and individual officers of the 2nd respondent. It is the petitioner's case that the assignment of personal responsibility over a collective decision of the CEC is discriminatory, unfair and irregular.

11. The petitioner avers that she did not participate in the procurement of any goods or services of any kind in the planning of the investors' conference. The procurement process from requisition by the user department, request for quotation for every service, appointment letters of the tender opening committee, tender opening register, appointment letters of the Evaluation Committee, evaluation reports, professional opinions, notification of awards, response to the professional opinions and Local Service Orders are outside her scope, functions and powers. Further, that the payment process from preparation of payment vouchers and the entire IFMIS payment processes are not matters that she can perform in her capacity as a CEC member as they are all responsibilities of other line officers.

12. The petitioner states that the allegations against her are that she authorized payment of suppliers, a function she does not hold since she is a policy maker and not an accounting officer in her department. That the Chief Officer and Procurement Officers have their roles clearly cut out in the Public Finance Management Act, 2012 and the Public Procurement and Assets Disposal Act, 2015, and she has absolutely no role in procurement of or payment for goods or services.

13. The petitioner contends that though she is alleged to have endorsed a letter or document that was relied upon in making payments, she never authored or endorsed such document. She had come to learn of the document that she had allegedly endorsed, which carried her signature or endorsement, purportedly issuing notice of satisfactory provision of goods and services for the investors' conference and confirming that the CECM – Finance and Economic Planning of the 2nd respondent could proceed and make payments to suppliers.

14. The petitioner maintains that there was a Tender and Evaluation Committee appointed by the Accounting Officer of her department, and that the department was also assigned a procurement officer who managed all procurement aspects. It also had an AIE (Authority to Incur Expenditure) holder charged with the responsibility of ascertaining that vouchers were in order and well examined, and to ensure that there is enough budgetary provisions, the services so requested are in the procurement plan and all due processes are followed. There was also a director of payments, IFMIS officers, and Treasury Accountants and payment officers. It is her contention therefore that answers to any queries on the tenders issued and payments made can only be sought from the rightful persons as she had no role in the anomalies alleged, if there were any.

15. The petitioner contends that she notified the CEC member – Finance and Economic Planning, of the forgery of her signature in the alleged endorsement of the document. She also took it upon herself to ask that the payments be reversed. As a result, all the payments made to six suppliers were reversed by the Central Bank of Kenya and as a result of her intervention, no public funds were lost.

16. The petitioner complains that the EACC has been conducting investigations and could, for lack of information and in contravention of her constitutional rights, charge her for offences that she did not commit. She asserts that her petition will answer the question whether she can be individually held liable over a collective decision of a constitutional body like the CEC. She contends that the decision of the court in this petition will assist EACC to make an informed decision on whether to prefer charges against her or not. It would also set the record straight and assist the EACC understand the circumstances around the matter at hand. In the event that the EACC charges her in court, it would not only be discriminatory against her but she would irreparably suffer injury because of the manner in which arrests are made and publicized. The determination of the petition would help to protect her fundamental rights guaranteed in the Constitution.

17. The petitioner further contends that, any investigations and actions by the EACC relating to the investor's conference should be pursued jointly against all the CEC members of the 2nd respondent and not against her alone. Because of her position as an Advocate of the High Court of Kenya in good standing, her arrest would have grave damage to her good standing, specifically on matters of future client prospects and relationships, which are often purely based on trust.

18. The petitioner alleges victimization and discrimination against her on the basis that she performed functions that legally do not fall within her ambit contrary to Article 236 of the Constitution of Kenya. She further alleges discrimination on the basis that she has been singularly targeted individually for collective functions performed by the CEC of the 2nd respondent, a violation of Article 10 and 27 of the Constitution.

19. In her submissions, the petitioner states that she has filed the petition because she has been singled out, isolated and unfairly targeted for investigation by the EACC. The investigations are based on the allegations against her relating to alleged contravention of the Public Procurement and Asset Disposal Act and the Public Finance Management Act during the planning of the investors conference of the 2nd respondent. She now faces allegations of offences arising out of alleged irregular pre-payments for the procurement of goods and services for the investors' conference.

20. The petitioner submits that the alleged offences are attributed to her alone whereas the CEC collectively made decisions and resolutions with regard thereto. She contends that the EACC is being overzealous in carrying out investigations against her in isolation to satisfy or advance a vendetta held by the 1st respondent against her. It is also her submission that she is being investigated over the contravention of the procurement legislation alone yet such legislation does not place personal liability on her in respect of decisions made collectively by the CEC of the 2nd respondent that the 1st respondent sits in and chairs. The investigations, whose intention and foundation are ill motivated, shall have grave consequences on her image as an Advocate of the High Court of Kenya.

21. The petitioner submits that singling her out and commencing investigations against her in relation to the investors' conference which has its basis on the collective decisions of the CEC is discriminatory. It also has no backing in law and is ill motivated. That the decisions and resolutions relating to the planning of the investors' conference were made during meetings chaired by the 1st respondent. She was guided, as an advocate of the High Court of Kenya, by the principles set out in the Constitution in the performance of her duties at the 2nd respondent as the CEC for Industrialization, Trade and Cooperatives.

22. The petitioner cites Article 10 on the national values and principles of governance and Article 27 which guarantees to all equality and freedom from discrimination. She also cites the definition of discrimination in **Black's Law Dictionary, 9th Edition** and **Article 236(a)** which she submits protects public officers from victimization and discrimination for having performed the functions of office in accordance with the Constitution. She reiterates that EACC has moved to isolate and investigate her, which in her view amounts to discrimination within the definition of the term as stated in the case of **Peter K Waweru v Republic [2006]eKLR** that:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured or not.”

23. It is her submission that if any liability or responsibility is to be attached on any of the members of the CEC, it should be attributed to all CEC members and not her alone. She asserts that EACC has targeted her for no justifiable reason to bear all liability for the acts of the CEC, which amounts to discrimination.

24. The petitioner contends that the act of the EACC in singling her out and commencing investigations against her is malicious and amounts to an abuse of investigative powers. She observes that under section 11(d) of the EACC Act, EACC has power to investigate and recommend for prosecution to the DPP, among other things, acts of corruption, bribery or economic crimes. She submits that the manner in which EACC is carrying out investigations against her alone leaves a lot of questions unanswered. In her view, it is not within the confines of the ordinary course of prosecutorial powers to isolate her and commence investigations over the alleged contravention of the Public Procurement and

Asset Disposal Act and the Public Finance Management Act during the planning of the investors' conference. It is her case that the motivation behind her isolation in the investigations remains malicious. The EACC has no authority to impose liability on her for acts and decisions collectively reached by the CEC.

25. The petitioner cites the case of **Republic v Attorney General & another ex parte Kipng'eno Arap Ng'eny [2001] eKLR** in which the court stated that there must be shown some reasonable ground for mounting a criminal prosecution against a person. Should there be none, then the court should prohibit the prosecution.

26. The petitioner also cites the definition of '*malice*' in **Black's Law Dictionary, 9th Edition** in which malice is defined as:

“Malice in law means wrongful intention. It includes any intent which the law deems wrongful and which therefore serves as a ground for liability. Any Act done with such an intent, in the language of the law, malicious, and this legal usage has etymology in its favour.”

27. The petitioner also relies on paragraph 4 (B) (1) and (2) of the National Prosecution Policy with respect to the factors to be taken into account in making a decision to prosecute. She submits that EACC has little or no information concerning the peculiar and unique nature of the circumstances surrounding this case. In her view therefore, EACC is in no position to make a sound judgment on whether to prefer any charges against her or the entire CEC. The only document that purports to link her to the investigations is Exhibit '**EW 8**', a commitment form which she submits is without any shred of doubt prepared by the accounting officer in her department. She submits that the said accounting officer had indicated at the bottom of the document that the works and supplies had been done to the satisfaction of the department.

28. It is therefore her submission that it is the Chief Officer who can vouch for the accuracy or otherwise of the said commitment form. She denies having signed the commitment form, which she asserts is not, in any event, a statutory form. Further, that she is not legally authorized to sign it since she is not an accounting officer.

29. The petitioner relies on the case of **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** and **Kipngeno Arap Ngeny** (supra) with respect to the power of the court to stop prosecution where it is shown to be an abuse of the court process.

30. The petitioner submits that the EACC has no justifiable reasons or foundation to separate her from the rest of the members of the 2nd respondent's CEC and investigate her. That its action is unfair as it amounts to sacrificing her by letting her bear all the responsibility for the decisions made collectively by the CEC. She contends that personal liability cannot be imposed on her for the collective decisions made by a constitutional body. Her capacity as the moderator and coordinator of the investors' conference did not entail any powers to authorize any purchase or payment of services rendered. Her role was initiating action in line with the investors' conference, and as a member of the CEC, like any other member, she ought to be treated equally with the other members as contemplated under Article 27 of the Constitution.

31. The petitioner further submits that the power to make any purchases on any goods and services is conferred upon procurement officers. She is not qualified or competent to be a procurement officer as she is an Advocate and was employed by the 2nd respondent as a policy maker. Additionally, if any purchases were to be made, the CEC had to approve such transactions before they are processed by the procurement department.

32. The petitioner asserts that at all material times during her tenure as a CEC member in charge of Industrialization, Trade and Cooperatives, she operated under the instructions of the CEC and not in her own capacity and volition. Further, that by extension, she acted as an agent of the 2nd respondent by virtue of being its employee working in strict compliance with the decisions and resolutions of the CEC. As an agent of the 2nd respondent, her actions cannot be separated from acts of the 2nd respondent. She relies on the definition of the agency relationship in **Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001** to submit that the creation of the agency relationship between her and the 2nd respondent absorbs the purported individual liability from her and places the liability, if any, on the CEC.

33. Finally, the petitioner submits that she does not have the authority to procure, approve or authorize the payment of any goods or services rendered to the 2nd respondent. She contends that the allegations of irregular pre-payment for goods and services rendered to the 2nd respondent are unfounded since that particular function was not part of the spearheading role assigned to her by the 2nd respondent. She is not a trained professional in the field of procurement procedures and as an Advocate, her job description does not include or involve the authorization of payment for any goods or services rendered to the 2nd respondent. Public procurement procedures and safeguards are elaborately laid down in the Public Procurement and Asset Disposal Act and it is the Accounting Officer who retains the authority to approve any procurement of goods or services.

34. In her view, this is a malicious attempt to disparage her character, integrity and reputation. Should the petition not be allowed, she will suffer damage to her character and reputation in view of the nature of her ordinary dealings which are based on faith and trust in the Advocate. She is no longer an employee of the 2nd respondent as she has moved into full time practice. The institution of investigations against her and the consequent arrest over charges preferred against her are unmerited, discriminatory, and ill-informed. Such charges would bring instant disrepute to her and her legal profession and damage the relationships that she has built over a long period of time.

35. The petitioner submits that this court has the jurisdiction to issue the prohibitory orders that she seeks. She cites Article 165(3) (a) and (b) of the Constitution to submit that the court has the power and duty to bring to a halt criminal proceeding where they are being brought for ulterior motives or for achievement of some collateral purposes. She relies in support on the case of **Joram Mwenda Guantai vs. the Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170** with regard to the power of the High Court to issue orders of prohibition against a prosecution if it amounts to abuse of the court process. It is her submission that the commencement of investigations

against her by EACC is ill informed and a violation of her constitutional rights, and she asks the court to grant the prayers sought in her petition as prayed.

The Respondents' Case

36. The 1st and 2nd respondents filed a joint response to the petition. They state that the petitioner ceased to work as a CEC member following her termination by the 1st respondent. They concede that the petitioner is an Advocate as she avers, but they argue that no-one's profession should be used as a shield from facing the law. They further state that the EACC is within its mandate under the Constitution and the law to investigate the conduct of the petitioner or any persons it may deem fit. It is their case that the doctrine of collective responsibility was fashioned to bring synergy in operations of a cabinet or CEC but is not intended to result in blanket punishment for all cabinet members where an error is occasioned by a single member of the cabinet. They confirm that the petitioner was the CEC in charge of the Department of industrialization, Trade and Cooperatives and the investors' conference fell under her department. Accordingly, any procurement or payment required needed the petitioner's approval, and she was therefore accountable for all the procurements and payments that were made.

37. The respondents argue, however, that they have been wrongly jointed to this petition as they are not responsible for the investigative functions which have been placed in the EACC by the law. They pray that they be removed from the proceedings and the petition be dismissed with costs.

38. In the affidavit sworn by Hiram Mwangi Kahiro, the County Secretary of the 2nd respondent, the respondents aver that the petition is an afterthought as it was filed long after the termination of the petitioner's employment and is an attempt to shield her from the law. As the CEC member in charge of the Department of Industrialization, Trade and Cooperatives, she was entirely responsible for the said department and the investors' conference squarely fell within her direct and full control, and she must honour the duty that was bestowed upon her. If any liability arose in respect thereto, she must take responsibility.

39. The respondents aver that the petitioner is trying to shift blame to the CEC collectively yet she was the one assigned duties to spearhead activities of the conference. If any liability arises, it is for the EACC to determine which persons are culpable and the petitioner cannot allocate or apportion blame. The EACC has already taken up the investigation of the investors' conference and this petition is only intended to forestall its legitimate investigations.

40. In their submissions, the respondents contend that EACC is mandated by the Constitution to conduct investigations either on an individual or a public body especially where public funds are suspected to have been misappropriated or lost. The petitioner has ceased to be a member of the 2nd respondent's CEC, and she has filed this petition to shield herself from the law. They rely on the case of **Tower Hawlets of London vs Chetnik Development Ltd [1988] 1 ALL ER 956** to submit that the petitioner is subject to the rule of law. She was appointed as a CEC member in charge of the Department of Industrialization, Trade and Cooperatives, which was in control of the investment conference, where funds were misappropriated under her leadership. The respondents also cite the case of **The Speaker of the National Assembly and Patricia De Lille (MP) & another, Case No. 297/98** where the Court held that **"...No Parliament, no official and no institution is immune from judicial scrutiny..."**

41. The respondents note that the petitioner does not deny being the member in charge of the Department of Industrialization, Trade and Cooperatives. All other Departments were addressing and handling their respective contributions to the organization of the investment conference. It is their submission therefore that the EACC is entitled to investigate the petitioner. As a constitutional commission established under Article 79 of the Constitution, it is an independent body which reports only to Parliament in the performance of its functions and is not subject to the direction or control of any other person or authority. It is expressly allowed to conduct any kind of investigation especially when it is suspected that either an individual or a public body has engaged in corrupt activities or property has been acquired corruptly or unethically.

42. In the respondents' view, it would be impractical to grant the petitioner relief barring the EACC from carrying out its investigations on the basis that it is singularly targeted investigation. The respondents rely on the case of **Kenya Plantation & Agricultural Workers' Union -v- Roseto Flowers [2013]eKLR** in which it was held that:

"...However, when applied in misconduct and punishment, the notions of collective ownership and responsibility as invoked in the ultimatum principle can very easily yield into absurd and unjust outcomes. It can very easily lead to imposing punishment against innocent persons who are not aware of the ultimatum or who are not involved in the dispute at hand or who have individual explanations in self-exculpation."

43. In the respondents' view, the petitioner's prayer for EACC to investigate the 2nd respondent's CEC collectively is itself an admission and that she wants to *'hide in the crowd'*, which the court should not allow. They ask the court to dismiss the petition with costs.

The Case of the EACC

44. EACC opposes the petition. It filed grounds of opposition dated 11th November 2019 and a replying affidavit sworn on 6th March 2020 by Ms. Esther Wambugu, an investigator with the EACC and a member of the team tasked to investigate the matters raised in this petition. It also filed written submissions dated 17th June 2020.

45. EACC states that it is established under section 3 of the EACC Act pursuant to Article 79 of the Constitution. Its functions are spelt out under Article 252(1)(a) of the Constitution. Section 11 (1)(d) empowers it to investigate and recommend to the DPP the prosecution of corruption or economic crimes under any law enacted pursuant to Chapter Six of the Constitution. It is empowered under section 11 (j) of the EACC Act to *inter alia* institute and conduct proceedings in court for the recovery or protection of public property, or to freeze or confiscate proceeds of corruption or related to corruption. Its investigators have the powers, privileges and immunities of a police officer under section

23 of ACECA. Article 252(1)(a) and section 13(2)(c) of the EACC Act vest in it the power to conduct investigations on its own initiative or on a complaint made by any person.

46. Regarding the facts forming the basis of this petition, EACC states that on 24th August 2018, it received an anonymous report on allegations of embezzlement or misappropriation of public funds. The complaint indicated that fraudulent and irregular payments to the tune of approximately Kshs. 13,000,000 were made by the 2nd respondent through the Ministry of Trade and the Ministry of Finance to six contractors for an alleged investors' conference which was never held. It was also reported that the monies paid were recalled from the purported contractors' bank accounts and paid back into the County Revenue Fund (CRF) of the 2nd respondent. EACC exhibits a copy of the report as annexure 'EW 1'. It therefore commenced investigations to establish the veracity or otherwise of the allegations received.

47. From its preliminary investigations, it established that the 1st respondent, in his manifesto and in the County Integrated Development Plan (2017-2022), had planned to hold an investors' conference in the County. The conference was intended to attract development partners and investors to the County. The County department of Industrialization Trade and Co-operative Development was tasked with facilitating the planning and hosting of the conference.

48. In the course of the planning process, on 3rd May 2018, the petitioner, in her capacity as the CEC member in charge of the department, presented a concept paper dated 12th April 2018 on investment conference preparation in a CEC meeting and briefed the CEC members on the event that was anticipated to be held on 24th and 25th May 2018. The concept paper was discussed and deliberated on by the CEC which noted that the investors' conference would be an important platform that would provide opportunities to local and international business players interested in investing in the county. A copy of the concept paper ('EW 2 i') and the resolution by the CEC ('EW 2 ii') were placed before the court.

49. According to the EACC states that, the 2nd respondent had, in the budget for the 2017/2018 financial year, allocated Kshs. 109,197,255 to the Department of Industrialization Trade and Co-operative Development. It had two procurement plans for the financial year 2017/2018. The investment conference for the department of Industrialization Trade and Co-operative Development was not factored in the first plan. It was, however, slotted in the second quarter financial plan as 'Trade Shows and Exhibitions' with an estimated cost of Kshs. 13 million.

50. EACC states that, the 2nd respondent had, on 18th December 2017, advertised in the Standard Newspaper for pre-qualification of suppliers and contractors for supply of goods, works and services for the 2017/2018 financial year (exhibit 'EW 3'). On 17th May 2018, requests for quotations for goods and services for the investors' conference were placed to suppliers who were selected randomly from the list of pre-qualified suppliers for the financial year 2017/2018. The requests for quotations ('EW 4') of items in six categories were for provision of tents, décor and seats; audio visual equipment; printing materials, signage and stage concept; event management services; TVCs, videography and live streaming; and for provision of entertainment, security and fast response.

51. During tender opening on 24th May 2018, twenty-four (24) quotations in the above six different categories were opened. They were evaluated on 24th and 25th May 2018 and the evaluation report was prepared with recommendations for the lowest bidders which EACC sets out in a table in Ms. Wambugu's affidavit. EACC deposes that the head of supply chain management services in the Department of Industrialization Trade and Co-operative Development forwarded files with the tender evaluation report to the Director, Supply Chain Management, for a professional opinion on 28th May 2018.

52. After going through the files, the Director, Supply Chain Management, in his professional opinion, observed that first, the services that were being procured were all meant for the investors' conference. They could therefore be termed as one activity and awarded as one contract as opposed to split tenders as had been proposed. His second observation was that splitting the tenders undermined section 54(1) of the Public Procurement and Asset Disposal Act 2015. Thirdly, that the total amounts to be incurred in procurement of the services totalled to Kshs. 12,988,000 which was way above the threshold of Kshs. 2,000,000 for procurement of services through Request for Quotations. In his report ('EW 5') which was not favourable to the proposals by the Department of Industrialization Trade and Co-operative Development, he advised the Accounting Officer not to award the subject procurements to the alleged successful suppliers and to prepare a tender document which should capture all the activities and advertise as a National Open Tender.

53. EACC avers that some of the alleged successful suppliers did not know how their firms were pre-qualified in some categories since they had not applied for the pre-qualification in those categories. Others were 'prequalified' for services they do not offer. Further, that the notifications of award letters were not received by the alleged successful suppliers, and there were no contracts between the alleged successful suppliers and the 2nd respondent. Further forensic document examination revealed that the Request for Quotations forms (RFQs) were filled by some officials of the 2nd respondent instead of the bidders, and its preliminary investigations had made findings of fraud and conspiracy. It notes that despite the dissenting professional opinion, the 2nd respondent had gone ahead to allegedly 'issue' notifications of award to six suppliers for provision of various services during the investor's conference.

54. Between 25th and 26th May 2018, an official of the 2nd respondent, through a fraudulent or conspiracy scheme between officers of the 2nd respondent and private contractors, raised six payment vouchers in favour of the alleged contractors, voted on the vouchers, authorized on the payment vouchers as the AIE holder without authority, and finally examined the vouchers as the examiner, all of which activities were performed by one person instead of different persons. It found that the signatures in all the above mentioned activities on the payment vouchers, though bearing different signatures, were signed by one officer as was revealed through document examination. EACC exhibits copies of the vouchers as 'EW 6'.

55. It contends that as part of the fraudulent and/or conspiracy scheme on the part of the petitioner, despite there being no services that had been offered by the alleged successful suppliers, on 6th July 2018 the petitioner signed a Commitment Form ('EW 7') confirming that the services that had been tendered towards the investors' conference were offered to the satisfaction of the Department of Industrialisation, Trade and Co-operatives and Investment.

56. Further, that as part of the said fraudulent scheme on the part of the County officials, despite there being no Local Supply Orders (LSOs) and invoices to support any payments, the 2nd respondent proceeded to make payments that were captured in the IFMIS platform (exhibit 'EW 8') on 26th June 2018. Payments were made to the alleged successful suppliers' bank accounts on 10th July 2018 through Central Bank of Kenya as can be discerned from the bank account statements from CBK, Bank of Africa, Cooperative Bank, NIC Bank and Family Bank. EACC had applied for warrants ('EW 9 i') to search the bank account and exhibits copies of the bank account statements ('9 ii').

57. According to EACC, the CEC Finance and Economic Development of the 2nd respondent, one Mary Mugwanja, upon learning of the fraudulent payments, directed that letters be written to the affected banks requesting them to reverse the payments. The banks were notified on 16th July 2018 ('EW 10 i') to reverse the 'erroneous' payments paid to the alleged successful suppliers' accounts to the 2nd respondent's recurrent account. An email ('EW 10 ii') was also sent to CBK on 20th July 2018 requesting for cancellation of the payments that were made to the alleged successful suppliers since the payments were erroneous. The funds were reversed on diverse dates between 18th and 25th July 2019.

58. EACC avers that payments to two of the suppliers, M/s Hams Camera Services and M/s Smart People Africa did not reflect in their bank accounts held at Bank of Africa. The funds were held in suspense accounts awaiting provision of supporting documents as proof of work done by the suppliers in accordance with the bank's internal procedures. The suppliers were unable to provide any supporting documents and the bank therefore reversed the funds as evidenced in a statement from a bank official ('EW 11').

59. On 3rd August 2018, following the irregular payments to the six suppliers, residents of Nyandarua County tabled a petition at the County Assembly seeking the removal of Mary Mugwanja, the CEC Finance, as well as the petitioner, on several allegations of gross misconduct leading to loss of public funds. The payment to suppliers for an investors' conference that did not take place was one of the issues that were raised in the aforesaid petition.

60. EACC submits that there is reasonable cause to allow it to proceed with the investigations to conclusion. It is its case that the truthfulness or otherwise of the petitioner's allegation that the signature on the commitment form is not hers and was forged can only be established through investigations, so it should be allowed to proceed with the investigations to their conclusion. It notes that the petitioner has not demonstrated that she caused reversal of the monies that had been paid to the suppliers as she alleges, its preliminary investigations having shown that it was the CEC member for Finance and Economic Development, Mary Mugwanja, who had advised that a letter be written to the banks to reverse the payments back to the County's recurrent account at the Central bank of Kenya.

61. EACC takes the position that all the allegations and averments by the petitioner in this matter can only be established through investigations. In its view, the present petition is an attempt to direct its investigations, which contravenes the provisions of Article 249 (2) (b) of the Constitution and section 28 of the EACC Act. It is the EACC's case therefore that the present petition lacks merit and should be dismissed with costs to it.

62. With regard to the alleged violation of the petitioner's constitutional rights, EACC submits that the petitioner has not shown, with a reasonable degree of precision, what provisions of the Constitution it has violated with regard to her, or the manner of violation. It places reliance for this submission on **Anarita Karimi Njeru v Republic (1979)** which was further amplified in **Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012**.

63. EACC notes that the petitioner has sought an order barring it from undertaking singularly targeted investigation and prosecution against her as opposed to the entire CEC. In its view, however, such an order cannot issue against an action or decision which it has taken or made in execution and discharge of its constitutional or legal mandate to implement Chapter Six of the Constitution and the Anti-Corruption and Economic Crimes Act (ACECA). It is an independent constitutional commission which is not subject to any control or direction. Upon conclusion of its investigations which in this case are still ongoing, it forwards a report to the DPP under section 35 of ACECA, and the DPP independently reviews the evidence available in making a decision to charge. It is its case that the petitioner has not placed facts or evidence before this court to demonstrate that it has acted without or in excess of its jurisdiction or abused or exercised its powers in a manner contrary to the law.

64. EACC notes that the petitioner filed the present petition on 3rd October 2019 before it could complete its investigations on the complaint it had received regarding the irregular payments by the 2nd respondent through the Department of Industrialization, Trade and Co-operatives. It further notes that the petitioner grounds her petition on the allegations that she was subjected to an investigation by EACC for alleged offences committed whilst planning and organizing the investment conference. The alleged offences are attributed to her individually yet the CEC made all the resolutions, and therefore requiring her to take personal responsibility for a collective decision is discriminatory, unfair and irregular.

65. EACC addresses 5 issues in its submissions. It first addresses the question whether the petitioner has been held personally responsible for a collective decision of the CEC and whether the doctrine of collective responsibility applies. The second is whether the EACC should be barred from carrying out its mandate and whether its investigations are targeted only against the petitioner or isolate her in a discriminatory manner. The third issue that it addresses is whether there is good cause for its investigation of the petitioner. It addresses, as a fourth issue, whether the petitioner has proved her case for the orders sought to be granted and finally, which party should bear the costs of the petition.

66. Regarding the petitioner's argument that she has been held personally responsible for a collective decision while she did not personally make any decisions and that all decisions were made by the CEC, EACC submits that it has not breached the provisions of Article 10 and 27 of the Constitution which provide for the national values and principles of governance, and equality and freedom from discrimination respectively. The rights guaranteed in the Constitution are not absolute except with respect to those provided for under Article 25 of the Constitution as non-derogable. These rights do not also legitimize criminal conduct. EACC notes that under Article 10, state organs and state officers, public officers and all persons are required to take into account national values and principles. Among these principles is good governance, integrity, accountability and transparency. Its submission is that any interpretation regarding the petitioner's rights would not exclude other values recognized in the Constitution and there should therefore be no selective application of the Constitution.

67. EACC submits that the doctrine of collective responsibility does not apply in this case as there was personal wrong doing and an element of *mens rea* on the petitioner's part. In its view, the petitioner's claim that decisions were made collectively by the CEC remains an allegation as she did not annex the alleged collective decision or minutes of meetings by the CEC making the decisions to pay suppliers. On the contrary, its investigations have established that the petitioner signed a Commitment Form confirming that goods and services had been supplied to the satisfaction of the Department of Industrialization Trade and Cooperative, in which she was the CEC member, when none of the goods or services had been supplied.

68. EACC submits further that the petitioner was aware that the investors' conference was not going to be held in that financial year yet she participated in the process of payments by signing a Commitment Form, a requirement by the County in paying out public funds to contractors. It is also its submission that most of the companies that were allegedly awarded the tenders did not tender their quotations, receive any letters of award or Local Supply Orders (LSO) or have any contracts with the 2nd respondent. Its conclusion, therefore, is that the signing of the Commitment Form by the petitioner while knowing too well that the goods and services had not been provided, and by the contractors receiving monies in their bank accounts knowing too well they had not supplied any goods or services to the County, is clear evidence that there was collusion amongst some officials of the 2nd respondent, including the petitioner, and contractors, to embezzle public funds through a fraudulent scheme.

69. EACC emphasizes that there was *mens rea* on the part of the petitioner who signed a commitment form to enable the payment process to the alleged contractors so as to complete the fraudulent scheme to embezzle public funds contrary to the provisions of Article 226 (5) of the Constitution which stipulates that a holder of a public office who directs or approves the use of public funds contrary to law is liable for any ensuing loss.

70. EACC submits that it is investigating criminal liability and or culpability of all those involved in committing breaches of the law in the process of planning of the investors conference. It is its case that collective responsibility, which is a policy, governance and accountability concept, does not apply in cases of personal liability or individual culpability. EACC relies on the definition of collective responsibility by Shane Darcy in the book '**Collective responsibility and accountability under international law**', at page xvi as follows:

"Collective responsibility refers to the responsibility of groups consisting of two or more persons, for a particular act or acts committed by individual members of the group or by the group as a whole."

71. It further relies on the holding of the court in **Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR** in which the Court of Appeal considered the question of collective responsibility for violations of the Constitution.

72. EACC asks the court to be guided by the Wambora decision and find that a declaration that the petitioner as an individual member of the CEC of the 2nd respondent cannot be found to carry personal liability for collective decisions of the County Executive Committee on account of Article 10 and 27 of the Constitution of Kenya cannot be granted.

73. Regarding the question whether the court should bar it from carrying out its investigations on the basis that they are discriminatory for singularly targeting the petitioner as opposed to the entire CEC, EACC submits that pursuant to Article 249(2) of the Constitution and section 28 of ACECA, it is independent of control or direction by any person. In its view, the petitioner, by alleging that its investigations are singularly targeted against her, is attempting to control and direct its investigations contrary to the law.

74. It is its submission that it can only be barred from carrying out investigations in limited circumstances. These are where it has exceeded its mandate or powers, or its decision to investigate was motivated by other considerations other than the discharge of its constitutional mandate, or where it has interfered with the constitutional rights of a person. It submits that its mandate is spelt out in Article 252(1)(a) of the Constitution and section 11 of the EACC Act, and that section 11 (1)(d) empowers it to investigate and recommend to the DPP the prosecution of corruption or economic crimes under any law enacted pursuant to Chapter six of the Constitution. It is further mandated by section 11 (j) of the EACC Act to *inter alia* institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or related to corruption.

75. EACC further submits that under section 23 of ACECA, its investigators are clothed with the powers, privileges and immunities of police officers. It also has power, pursuant to Article 252(1)(a) and section 13(2)(c) of the EACC Act, to conduct investigations on its own initiative or on a complaint made by any person. It is its submission therefore that its investigation into the commission of an offence is not an infringement of the petitioner's rights. It contends that in this case, an offence has been committed, and it is in the public interest that the said offence is investigated and prosecuted if sufficient evidence is obtained.

76. On the contention by the petitioner that she has been singularly targeted, EACC submits that her role was to record a statement with the EACC and to provide relevant information pertaining to the issues under investigations. Thereafter, she was to leave the EACC to carry out its functions without attempting to direct or control it. It submits that the petitioner did record a statement with it, and she has not alleged or complained that her statement has not been considered in the investigations. She is also aware that several other officers from the 2nd respondent recorded statements, as did contractors. It cannot be true therefore that the investigations are singularly targeted against her. In its view, it is premature for the petitioner to contend that the investigations target her when the investigations are not complete and the outcome is unknown.

77. To the question whether the court should interfere with its investigations, EACC submits that so far, its investigations have established that several offences have been committed by several persons. Upon conclusion of its investigations, it shall forward its report to the DPP under section 35 of ACECA. The mandate to institute criminal proceedings lies with the DPP, who has the sole mandate to decide who is to be charged. EACC submits therefore that this petition is **premature and that she** is attempting to pre-argue her case before this court by setting out her defence, when the proper court should be the trial court.

78. EACC notes that the petitioner alleges that no public money was lost and that as such there is no reason for an investigation. It submits

that although the monies were paid back upon intervention of the CEC Finance, its investigations show that there was an attempt to commit an offence of corruption or economic crime under section 47A of the ACECA, among other offences, which it shall report to the DPP as is required by the law. The DPP will independently review the evidence presented and make a decision whether or not to charge.

79. Regarding the petitioner's allegation that she did not sign the Commitment Form, that she is the one who caused the reversal of the payments that had been made, and that she did not authorize any payment of suppliers, EACC submits that she shall have a chance to present her evidence before the trial court which shall guarantee her rights to a fair trial under Article 50 of the Constitution. She also has a right of appeal to the High Court in the event that she is not satisfied with the decision of the lower court. Its submission is that this court is only required to consider whether there was a violation of the petitioner's constitutional rights as alleged. It is not required to enter into an analysis of the evidence. It is its case that it should be allowed to complete its investigations and forward its report to the DPP for a decision to be made.

80. EACC relies in support of its submission that the petitioner is prematurely attempting to try her case before the High Court on the case of **Francis Mbugua vs. Commissioner of Police and 2 Others [2013] eKLR in which the court, following the decision in Elory Kraneveld vs. the Attorney General & 2 Others, Nairobi Petition No. 153 of 2012**, stated:

"Whereas every person has a right to the protection of the Constitution, it is not in all cases that orders as prayed should be granted. I say so because the Petitioner has conveniently forgotten that the Constitution must be read holistically for its real meaning and import to be discerned. Our judicial system is not one where a judge is granted such powers as to investigate criminal complaints. That power lies in Article 157(4) of the Constitution. Further, whether or not the investigations leading to the Petitioner's arrest disclosed an offence is not for this court to determine as I am not seized of the evidence to be presented against him. The Petitioner has literally jumped the gun because he has presented his defence of innocence not before the trial Court but this Court. His actions are premature."

81. EACC submits that the petitioner has failed to prove her contentions that it acted illegally during investigation. She has not shown that there was a violation or threatened violation of her constitutional rights in the cause of investigation. It had acted with due regard to the public interest and in the interests of the administration of justice, and the petitioner's rights, and it is not in abuse of the court process. She has also not demonstrated that it acted in contravention of the Constitution or the law, or that it acted with malice, dishonestly or unreasonably. It relies for this submission on the decisions in **Paul Ng'ang'a & 2 others –v-Attorney General & 3 others [2013] eKLR; Total Kenya Limited & 9 Others v Director of Criminal Investigations Department & 3 others [2013] eKLR; Republic –v DPP & 2 others, MISC Civil Case No. Nrb 417 of 2014** and **James Ondicho Gesami v- Attorney General & 2 others [2012]eKLR** in which the courts underlined the principle that while courts can intervene in decisions to investigate and prosecute, the circumstances of such intervention are limited.

Analysis and Determination

82. I have *considered* the petition, the affidavits in reply and in opposition, and the submissions of the parties. The petitioner seeks to stop the investigations being carried out by the EACC or any prosecution resulting from such investigations on the basis that the investigations target her only, instead of the entire CEC of the 2nd respondent. She argues that any investigation or action by the EACC relating to the investors' conference should be pursued jointly against all the CEC members and not against her alone. She submits that this petition will answer the question whether she can be held individually responsible for collective decisions of the CEC. She alleges that by its investigations, EACC is in breach of Article 10 which contains the national values and principles of governance, as well as Article 27 which contains the anti-discrimination provisions of the Constitution.

83. *The* petitioner also hinges her case on the fact that she is an Advocate of the High Court. Should the EACC charge her in court, she would suffer irreparable injury because of the manner in which arrests are made and publicized.

84. EACC's case is that there is a proper basis for its investigations, which are not targeting the petitioner alone. She has made a statement to EACC regarding the events surrounding the preparation for the proposed investors' conference. She is, however, among many other officials of the 2nd respondent who have made such statements.

85. EACC presents in its replying affidavit what it sees as the basis for its investigations. It had received a complaint relating to the preparation for the conference, and the payment to suppliers allegedly contracted to provide goods and services pursuant to requests for quotations. It notes that some of the alleged successful suppliers, to whom funds amounting to Kshs 13,000,000 had been paid, did not know how their firms were pre-qualified in some categories as they had not applied for the pre-qualification in those categories. It further notes that some of the suppliers had been 'prequalified' for services they do not offer. The letters notifying the alleged successful suppliers that they had been awarded contracts had not reached them, and there were no contracts between the alleged successful suppliers and the 2nd respondent, yet funds had been sent to the bank accounts of these suppliers.

86. EACC also avers that its forensic examination of documents had shown that the Request for Quotations forms (RFQs) were filled by some officials of the 2nd respondent instead of the bidders. It had also established that between 25th and 26th May 2018, an official of the 2nd respondent, had raised six payment vouchers in favour of the alleged contractors, voted on the vouchers, authorized on the payment vouchers as the AIE holder without authority, and examined the vouchers. All of these functions, it contends, were supposed to be performed by different persons. It is also EACC's case that on 6th July 2018, the petitioner signed a Commitment Form ('EW 7') confirming that the services that had been tendered towards the investors' conference were offered to the satisfaction of the Department of Industrialization, Trade and Co-operative Trade and Investment. Its position, therefore, is that it should not be hindered from exercising its constitutional and statutory mandate.

87. I *have* noted the respective arguments of the parties, and the issues that they ask the court to address. In my view, however, it is not for this court to determine whether the petitioner can be held personally liable for collective actions of the CEC. The core issue that a court

dealing with a constitutional petition seeks to answer is whether there has been a violation of the petitioner's rights by the State institution in carrying out its mandate. If there has been, then the court may be inclined to restrain the institution from carrying out its mandate to prevent violation of the Constitution or abuse of the court process.

88. EACC is established pursuant to Article 79 of the Constitution, found in Chapter VI of the Constitution which contains the constitutional provisions on leadership and integrity. The Article provides that:

Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

89. Article 252 of the Constitution sets out the general powers and functions of independent offices and commissions in the following terms:

(1) Each commission, and each holder of an independent office—

(a) may conduct investigations on its own initiative or on a complaint made by a member of the public;

(b) ...

(c) ...

(d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

90. EACC is established under section 3 of the EACC Act. Under section 11 of the Act, it is granted powers as follows:

(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—

(a)

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution;

....

(j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

91. The petitioner asks the court to stop the investigation that were being undertaken by EACC in relation to the contracts allegedly entered into and payments made in respect to a proposed investors' conference by the 2nd respondent. I find, upon a consideration of the material placed before me, that at the stage at which the petition was brought before the court, no action had been undertaken by the EACC to show that the investigations were specifically targeting the petitioner. From the averments by Ms. Wambugu, there were valid questions raised with regard to the requests for quotations and subsequent documents on the basis of which certain payments were made to the alleged successful suppliers. Both parties concede that the payments were reversed. However, this does not, in my view, show that there was no wrongdoing, nor, conversely, does it show that there was wrongdoing, or by whom. It is only after investigations have been carried out that a decision can be made on culpability, and on whose part.

92. But the petitioner goes further in her petition. She not only seeks to stop the investigations; she also seeks to stop any prosecution that may follow upon such investigations. She has relied on the decision in **Kipngeno Arap Ngeny** (supra) in this regard.

93. Section 35 of the ACECA requires the EACC, after carrying out its investigations, to submit a report to the Director of Public Prosecutions on the results of the investigation. It shall include in the report any recommendation that it may have that a person be prosecuted for corruption or economic crime.

94. What the petitioner seeks in this case is to stop not only her investigations but, in the event that the EACC finds any evidence requiring her prosecution, any intended prosecution against her. Under Article 157 of the Constitution, State powers of Prosecution are vested in the Office of the Director of Public Prosecutions. This is an independent constitutional office whose powers are expressly set out in the said Article. Article 157(10) provides that:

(10) 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.

95. The question whether the court should intervene and stop investigations or prosecution has been the subject of judicial determination in a number of decisions. One such decision cited by the EACC is the case of **Total Kenya Limited & 9 Others v Director of Criminal**

Investigations Department & 3 others (supra). In his decision in that matter, Majanja J held that:

“I agree with the respondents that it is within the mandate of the police to investigate crime and where there is reasonable evidence to prosecute the offender.

20. The office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with the constitutional dictates. As I stated in *Kenya Commercial Bank Ltd and 2 others v Commissioner of Police and Another*, Nairobi Petition No. 218 of 2011,

“[25] The Office of the director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.” ...

21. Although this court has inherent jurisdiction to stop abuse of its process by prohibiting criminal proceedings where the same are found to be oppressive or otherwise an abuse of its process, such power must be exercised ever so cautiously so as not to stifle what is otherwise the lawful discharge of constitutional mandate by the police service and the DPP. That is why in *Kenya Commercial Bank Ltd* case (supra), I stated that “[23] ... the High Court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be exercised sparingly as it is in public interest that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes.”

96. The issue was also recently considered at length in *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR in which a five-judge bench of the High Court analysed various decisions in which the question of the circumstances under which the court could interfere in the exercise of prosecutorial discretion by the DPP. It stated as follows:

238. We observe that our jurisprudence is replete with decisions which identify with this non-intrusive approach on the basis that courts must grant a measure of deference to the DPP’s exercise of prosecutorial discretion. Such decisions include *Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission and 3 Others* (supra) and *Republic v Commissioner of Police and Another ex parte Michael Monari & Another* (supra) in which the court addressed the matters germane to the mandate of the police to mount investigations and stated that:

“The police have a duty to investigate on (sic) any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

97. The court went on to cite the decision of Onguto J in *Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others* [2016] eKLR in which he stated:

“116. The courts’ twin approach in ensuring that the discretion to prosecute is not abused if only to maintain public confidence in the criminal justice system and the same time balancing the public interest in seeing that criminals are brought to book has led to rather contradictory principles.

117. On the one hand the courts have consistently held that suspects investigated and charged before trial courts can only have their way before the trial court. It is stated that the trial court is the appropriate forum where evidence is to be tested and all defences raised...”

118. On the other hand, the courts have also been consistent that a prosecution which lacks a foundational basis must not be allowed to stand. The DPP is not supposed to simply lay charges but must determine on sound legal principles whether the evidence can sustain a charge prior to instituting the prosecution: ...

119. In *Republic vs. Attorney General Ex p Kipngeno Arap Ngeny* (Supra), the court observed as follows:

“It is an affront to our sense of justice as a society to allow the prosecution of individuals 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.” ...

122. Thus while it appears true that the court has authority to prevent abuses of its process and safeguard an accused person from oppression and prejudice on basis of baseless charges, the courts have also been quick to observe and hold that where an indictment is properly drawn in accordance with established practice and pursuant to a decision by the DPP to institute the prosecution the rest must be left to the trial court clothed with jurisdiction to deal with it and the accused is thereat to present its defence.”

88. The court in **Philomena Mbete Mwilu** concluded as follows:

244. To be underscored is that judicial review of the foundational basis of a charge should only be undertaken when an applicant has first established that there are reasonable grounds that the challenged proceedings are a vehicle for a purpose other than a true pursuit of criminal justice. To allow a willy-nilly and casual review of the foundational basis of criminal charges would be to turn judicial review proceedings into criminal mini-trials, a prospect that anyone keen to stop a criminal trial would relish. The question is whether the present case fits into the latter scenario.

99. In the present case, the petitioner wants the court to issue orders stopping, first, the investigations being carried out by EACC and secondly, any prosecution preferred by the DPP. With regard to the plea to stop the investigations by the EACC, I can do no better than to quote the words of Warsame J (as he then was) in **Republic vs. Commissioner of Police & Another Ex p Michael Monari & Another [2012]eKLR** in which he stated:

“The police have a duty to investigate on (sic) any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

100. Section 23 of ACECA gives EACC the powers of a police officer to investigate. It has constitutional and statutory powers to investigate corruption and economic crimes and make recommendations to the DPP for prosecution. At this point in time, it is unknown what the investigations will unearth. To stop the investigations would be detrimental to the public interest.

101. More importantly, the petitioner has not advanced any reason that would justify interference either with investigative or prosecutorial powers. She argues, first, that she is being targeted individually for decisions made by the entire CEC of the 2nd respondent. From the averments by the EACC, the matter is at the investigation stage, and various officers in the County have made statements. There is no evidence to show that no-one else in the CEC has been required to make a statement to the EACC. No assignment of responsibility has yet been done, so it is premature to complain that she is being individually targeted.

102. The petitioner alleges violation of her right to non-discrimination as a result of the investigations. The position, however, is that it is not discrimination for investigative agencies to carry out investigations into the acts or omissions of an individual, even within a body such as the CEC of the 2nd respondent. The EACC has indicated that its preliminary investigations showed that the Department in which the petitioner was the member in charge carried out certain acts that may have been short of the provisions of the law. The investigations also suggested that the petitioner signed certain documents that also did not conform with the law, and that public funds were paid out to suppliers in contravention of the law. It is not a violation of the right to non-discrimination or equality before the law for the EACC to investigate the petitioner with respect to allegations that offences may have been committed in the Department that she was in charge of at the 2nd respondent.

103. The petitioner, finally, complains that her arrest and prosecution will damage her irreparably as she is an Advocate of the High Court of Kenya whose occupation depends on the trust of clients. It must be appreciated, however, that one’s position or status in life is no bar to investigation, arrest or prosecution. Indeed, this is the other side of the equality coin in Article 27 that *‘every person is equal before the law and has the right to equal protection and equal benefit of the law.’* The implication of this equality protection is that regardless of one’s status or position, the law shall apply equally. If it is alleged that an offence has been committed, the investigative and prosecutorial authorities should apply the law equally to the highest and the lowest in society.

104. In the result, I find no merit in this petition. It is hereby dismissed but with no order as to costs.

Dated Delivered and Signed at Nairobi this 30th day of September 2020.

MUMBI NGUGI

JUDGE