



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

MISCELLANEOUS CR. APPLICATION NO. 20 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR PUBLIC PROSECUTIONS.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

JUSTUS ONGERA.....EXPARTE APPLICANT

RULING

Background

1. Justus Ongera(herein referred to as “the applicant”) moved to this court under exparte chamber summons dated 14th February 2017 and filed the same day seeking orders as follows:

(1) That the application be certified urgent and heard exparte in the first instance.

(2) That leave be granted to the exparte applicant to apply for an order of certiorari, to remove into this honourable court and quash the decision of the 1st respondent to institute criminal proceedings against the exparte applicant following an investigation by the 2nd respondent namely an inquiry into an allegation of irregular procurement of the Audit Vault Software by the office of the Auditor General vide inquiry file No. EACC/FI/INQ/62/2015.

(3) That leave be granted to the Applicant to apply for an order of PROHIBITION directed to the 2nd respondent barring the 2nd respondent from arresting, incarcerating, instituting and/or undertaking or proceeding with any criminal charges against the exparte applicant or otherwise prosecute him on matters relating to the inquiry into an allegation of irregular procurement of the Audit Vault Software by the office of the Auditor General vide inquiry file No. EACC/FI/INQ/62/2015 until the determination of this suit.

(4) That the grant of such leave in (2) and (3) above do operate as stay of the decision of the 1st respondent to charge the applicant with the offence of knowingly deceiving principal contrary to Section 41(2) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act.

(5) That the honourable court be pleased to give further orders and directions as it may deem fit and just to grant.

(6) That the cost of this application be provided for.

2. The application was premised upon grounds on the face of it, statement of particulars and verifying affidavit of even date sworn by the exparte applicant together with various annexures thereof. The matter was certified urgent on the same day and interim orders in terms of prayer 4 granted and a date for directions set for 6TH March 2017. The court directed the respondents to file their response within 7 days and the applicant granted corresponding leave to file a further affidavit in case of need. .

3. Subsequently, on 17th February 2017, the 1st respondent filed their replying affidavit sworn the same day by Nicholas Mutuku deputy

Director of Public Prosecutions. Mr. Mutuku averred that, the decision to charge the exparte applicant and another was properly, procedurally and legally made hence nothing irregular or irrational.

4. On 27th February 2017, the second respondent equally filed their replying affidavit deponed the same day by Mulki A Umbar also challenging the application on grounds that there was no proof that they had abused any process or authority in recommending the prosecution of the exparte applicant with various charges relating to corruption.

5. On 6th March 2017, parties sought more time to comply with court's previous directions. In response to the respondent's replying affidavits, the exparte applicant filed a supplementary affidavit on 10th March 2017. However, before the application could be heard, one Annette Wambui Mwangi came on board on 10th April 2017 vide a notice of motion dated 13th March 2017 seeking to be enjoined as 2nd exparte applicant. Her request was rejected by the court the same day when it directed her to file a separate exparte application which would then be consolidated with the current application if found appropriate.

6. Consequently, the hearing of the application dated 14th February 2012

Proceeded to interpartes hearing On 10th April 2017. After evaluating the application and submissions by counsel, the court dismissed the application on 20th July 2017 holding that the application lacked merit as it did not meet the threshold. Subsequently, the exparte applicant lodged an appeal to the Court of appeal challenging the ruling.

7. On 25th May 2018, the court of appeal delivered its judgment setting aside the ruling of the high court stating that the court had substantively dealt with the application on merit even in the absence of a substantive application. The court (Court of Appeal) granted the applicant leave to file a substantive notice of motion within 21 days and the same was to be disposed of expeditiously.

8. Following the Court of Appeal orders, the exparte applicant filed a notice of motion of even date on 11th June 2018 seeking the following orders:

(1) AN ORDER OF CERTIORARI to remove into this Honourable Court and quash the decision of the 1st Respondent to institute criminal proceedings against the Ex parte Applicant, following an investigation by the 2nd Respondent namely an inquiry into an allegation of irregular procurement of the Audit Vault Software by the office of the Auditor General vide inquiry file no. EACC/FI/INQ/62/2015.

(2) AN ORDER OF PROHIBITION directed to the 1st Respondent barring the 1st Respondent together with its employees, servants, agents and/or representatives from instituting and/or undertaking or proceeding with any criminal charges against the Ex Parte Applicant or otherwise prosecute him on matters relating to the inquiry into an allegation of irregular procurement of the Audit Vault Software by the office of the Auditor General vide inquiry file no. EACC/FI/INQ/62/2015.

(3) AN ORDER OF PROHIBITION directed to the 2nd Respondent barring the 2nd Respondent together with its employees, servants, agents and/or representatives from arresting, incarcerating, instituting and/or undertaking or proceeding with any criminal charges against the Ex Parte Applicant or otherwise prosecute him on matters relating to the inquiry into an allegation of irregular procurement of the Audit Vault Software by the office of the Auditor General vide inquiry file no. EACC/FI/INQ/62/2015.

(4) That costs of this application be provided for.

9. The application is supported by grounds on the face of it and a supporting affidavit sworn on 11th June 2018 by Justus Ongera the Ex Parte applicant. The grounds are particularized as hereunder:-

a) **THAT** criminal proceedings are about to be commenced by the 1st Respondent in the absence of proper factual foundation or basis against the Ex-Parte Applicant following alleged investigation by the 1st Respondent; namely an inquiry into an allegation of irregular procurement of the Audit Vault Software by the office of the Auditor General vide inquiry file no. EACC/FI/INQ/62/2015.

b) **THAT** on the 3rd February 2017, the 1st Respondent directed the 2nd Respondent to arrest the Ex-Parte Applicant for purposes of instituting criminal proceedings against the Ex-Parte Applicant without reasonable and probable cause for mounting a criminal prosecution other than for malice and is thus an actionable act.

c) **THAT** the criminal proceedings that the 1st Respondent intends to carry out constitute an abuse of the court process as the 1st Respondent has absolved all the persons that gave approval of the Procurement that had given rise to this investigation.

d) **THAT** the 1st Respondent has directed that the Ex-Parte Applicant be charged with the offence of knowingly deceiving principal contrary to Section 41(2) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act.

e) **THAT** on 19th January 2017, when the matter was still under the consideration of the 1st Respondent, the Auditor General Mr. Edward Ouko wrote to Oracle Systems Limited seeking among others, a confirmation as to who their Partners (with local references) were, as at the time when office of the Auditor General was purchasing the Audit Vault System.

f) **THAT** on 8th February 2017 Oracle Systems Limited wrote to the office of the Auditor General a letter confirming at the time of sale of the Audit Vault System to the office of the Auditor General the ONLY Oracle partner with references in Kenya in 2013 was

OSI Slovenia and the implementing partner of the Audit Vault in 2013 was OSI Kenya Limited, who were a subsidiary of OSI Slovenia.

g) **THAT** this aspect was not covered by the 2nd Respondent and if a statement was obtained from Oracle Systems Limited confirming the above, then, the 2nd Respondent's recommendation and the 1st Respondent's decision in respect to the proposed charges against the Ex-Parte Applicant would have been different.

h) **THAT** the criminal proceedings about to be instituted by the 1st Respondent, if undertaken will be done impartially and against the rules of natural justice.

i) **THAT** by the 1st Respondent directing the Ex-Parte Applicant to stand trial violated his fundamental principles of justice which underlie the society's senses of fair play and decency.

j) **THAT** the application herein seeks reliefs in the nature of the prerogative writs issues which ought to be decided upon by the Honourable Court as a matter of urgency.

k) **THAT** Articles 2,10,21,22 (1)(3)(4), 23,25,27,47,50,73,157(11),159(2), and 232 of the Constitution are being undermined by the 1st Respondent recommending that the Ex-Parte Applicant be charged with the proposed offences and further instituting the said prosecutions for ulterior motives which only serves to undermine public interest and administration of justice.

l) **THAT** the launching of the said prosecution will be an outright abuse of the legal process and invites the Courts supervisory jurisdiction to be invoked under Article 165 of the Constitution of Kenya 2010 to give directions to protect the applicant's fundamental rights and freedom and ensure fair administration of justice.

10. In reply, the 2nd respondent filed their response on 31st July 2018 vide a replying affidavit sworn by Mulki A Umbar on 27th July 2018. The first respondent did not file any further response as they opted to rely on their replying affidavit sworn by Mr.Nicholas Mutuku on 17th February 2017 in response to the application for leave to file a substantive application. In response to the 2nd respondent's reply, the exparte applicant on 3rd August 2018 filed a supplementary affidavit sworn on 2nd August 2018.

11. When the parties appeared before me on 11th July 2018, they by consent agreed to dispose of the matter by written submissions and thereafter highlight on the same. Subsequently, the exparte applicant filed his submissions on 3rd September 2018. The Second respondent filed theirs on 13th September 2018 and the 1st respondent on 28th September 2018. On 5th October 2018, parties appeared for highlighting of submissions and ruling fixed for 7th November 2018.

Exparte Applicant's Case

12. The notice of motion herein is premised upon a supplementary affidavit sworn on 11th June 2018 and a verifying affidavit sworn on 14th February 2017 in support of the application for leave to institute judicial review proceedings against the respondents.

13. The Ex-parte Applicant was at all material times to this case the Director ICT department in the office of the Auditor General. He and the then IT Audit Manager one Annete Mwangi were sometime 2013 tasked with the duty of conducting due diligence on prospective suppliers of an Audit Vault Software an analytical tool used in the management of Auditing processes more particularly on the IFMIS platform. Their instructions were to establish and recommend the firms that would supply the software and which firm must have had local references. That Upon conducting due diligence, they confirmed that only OSL Kenya Limited (a subsidiary of OSL SLOVENIA) was known to have supplied the system in Kenya and the African region having supplied the same to Kenya Airways and Safari com Limited being the only two companies that had procured similar software in Kenya. He contended that their finding was supported by ORACLE the manufacturer of AVS via a letter dated 18th June 2013 confirming that IFMIS is ORACLE based and the AVS would fit seamlessly.

14. It was further contended that, his finding together with his colleague was duly communicated to the Auditor General and the Tender Committee who met and approved the purchase of the software through direct sourcing which decision was approved by the Executive Committee. The Ex-parte Applicant averred that he was not a member of any of the above mentioned Committees and did not have any power to influence their decision. He averred that, he and his colleague Annette Mwangi only made a recommendation that could either be accepted (with or without conditions) or rejected. That the decision to use direct procurement tendering method was communicated to the Public Oversight Authority in accordance with the Public Procurement and Disposal Act 2005.

15. It is further contended that an anonymous letter addressed to Treasury sometime 2017 claiming that the office of the Auditor General had irregularly purchased the AVS for Ksh.100Million instead of 18 million was malicious. He termed the corruption report made to the 2nd respondent who conducted investigations and recommended that he and others be charged with various offences contrary to the Anti-corruption and Economic Crimes Act, and more specifically for him to be charged with the offence of knowingly deceiving principal contrary to section 41(2) of the Penal Code as read with section 48(1) of the Anti-Corruption and Economic Crimes Act was ill informed.

16. He questioned the manner in which the 1st respondent handled the EACC'S investigation and recommendation report by declining to charge the Auditor General and members of the Executive Committee (decision makers) as the people who awarded the contract.

17. The Ex-parte Applicant asserted that the recommendation to be prosecuted while absolving the Auditor General, tender and executive Committee is discriminatory, irrational, abuse of the court process, and borne of exterior considerations and ulterior motives and as the said persons were in fact responsible for giving approval for the direct tendering method to be used in this procurement. That the

recommendation or decision to charge him did not take into consideration the relevant factors that led to the recommendation that OSI Kenya be awarded the tender.

18. He further stated that upon receipt of their recommendation, the Auditor General wrote a letter dated 19th January 2017 seeking to confirm whether Oracle partners was Oracle Kenya Ltd (See letter marked JO6). That on 8th February 2017 Oracle wrote to the Auditor General agreeing to his letter of 19th January 2017 in the affirmative (See letter marked JO7).

19. It is the applicant's contention that the letter dated 19th January 2017 to Oracle by the Auditor General, and Oracles letter of 8th February 2017 confirming positively the recommendations made by the applicant to the Auditor General was sufficient new evidence which the Director of Public Prosecutions (1st respondent) ought to have taken into account and rescind his recommendation to have him prosecuted. He attached a letter dated 13th February 2017(JO-10) in which he drew the attention of the 1st respondent of the new evidence that was not in his possession by the time he recommended prosecution against him.

20. The applicant denied any wrong doing, responsibility or ever misleading his boss. He stated that the award tender committee and procurement oversight authority had approved the tender award and wondered why he was discriminated against by being charged yet he did what he was lawfully supposed to do as a public officer.

21. In his supplementary affidavit filed on 3rd August 2018, he reiterated what he said in his verifying affidavit of 14th February 2017. At paragraph 19 he denied making any recommendation on the award of a tender to OSI Kenya Ltd and no award was made to OSI Kenya Ltd. He attached a copy of a fresh advertisement for provision of similar services in May 2018 but there was none qualified to apply. He challenged the 2nd respondent's assertion that there were other qualified service providers with implementable experience in Kenya.

1st Respondent's Case

22. Relying on the replying affidavit sworn by Nicholas Mutuku sworn on 17th February 2017 and filed on the same day, the 1st respondent contended that he acted properly and independently after reviewing the evidence presented by the 2nd respondent. The 1st respondent asserted that the applicant's memo of 18th June 2013 stating that OSI Kenya Ltd were the only accredited Oracle providers of an Audit Vault Solution to the office of Auditor General was false and misleading as there were several other accredited oracle providers of Audit Vault Solution.

23. That oracle wrote a letter dated 8th July 2015 (NM2) addressed to EACC confirming that there were accredited partners in Kenya with the capacity to supply and install Audit Vault Software to the public sector interalia; Oracle Gold, Platinum and Diamond partners who had a valid oracle network, membership and full use distribution agreement. That Oracle confirmed in the said letter that by 2013 they had partners among them;Hidra Ltd, Seven Seas Tech. Ltd, E. momentum interactive systems LTD, Tech net LTD, Verve K.O.G. Ltd., Netronics Communications Ltd., kpmg and Oslo Kenya among others.

24. The 1st respondent stated that several oracle partners recorded statements confirming that they were accredited partners with Oracle with capacity to supply and install Audit Vault to public sector. Among the listed witnesses are Luis Galliana MD, Indra Systems who recorded his statement on 2nd June 2016(NKM-3), Brian D. Souza KPMG who filed his affidavit on 24thJune 2016(NKM-4) confirming that they were accredited to Oracle and Fred Ouma J. Oyenga of Netronics Communications Ltd accredited to oracle platinum who confirmed that they have installed similar software in various public institutions in Kenya(NKM-5).

25. That by the applicant recommending OSI Kenya Ltd as the only Oracle partner in Kenya, was not only misleading but criminal offence hence the charges preferred and therefore the issues raised will only be canvassed on evidence and not under orders of judicial review.

2nd Respondent's Case

26. The second respondent relied on the averments contained in the replying affidavit sworn by Milk A Ummar sworn on 27th July 2018 and filed the same day. Basically, the second respondent's reply is similar to that of the 1st respondent. They are aggrieved by the exparte applicant's recommendation vide a memo dated 18th June 2013 to the Auditor General recommending OSI Kenya Ltd as the only accredited partner in Kenya for supply and installation of Audit Vault Software. That it was the Exparte applicant's recommendation that triggered single sourcing of the software instead of subjecting the contract to competitive bidding given that there were other accredited oracle partners with capacity to supply and install similar software.

27. They averred that the letter dated 8th February, 2017 addressed to the Auditor General by oracle (applicant's affidavit annexure JO7) is a contradiction to a letter addressed to EACC much later on the 21st April 2017 which confirmed that there were other several oracle accredited partners among them Oracle Ltd, Platinum and Diamond partners (MAU-3).

28. That upon conducting further investigation, it emerged that Kshs 36,000,000/= was paid to Stephen Ndungu Kinuthia Director General Corporate Services as kickback from OSI Kenya (copy of the bank statement from OSI attached MND- 7) and abroker by the name of Stephen Ndungu received 500,000/=, Charles Gichobi a Sales Executive received Kshs.10,000,000/= directly from OSI as kickback thus necessitating recovery proceedings in civil suit No. 5/18.

29. Lastly, they denied acting irregularly, irrationally or maliciously.

Submissions

30. In his submissions filed on 3rd September 2018, Mr. Manduku appearing for the Exparte applicant reiterated the grounds on the face of the application and averments contained in a verifying affidavit sworn on 14th February 2018 and supplementary affidavit aforementioned. Mr. Manduku submitted that the recommendation by the 2nd respondent to the 1st respondent to have the exparte applicant charged with the offence of knowingly deceiving the principle contrary to Section 41 (2) as read with Section 48 (1) of Anti-Corruption and Economic Crimes Act was an abuse of the court process and discriminatory as the 1st respondent absolved the tender committee people who were involved in the tender award.
31. Mr. Manduku opined that while the matter was still under investigations, the auditor general wrote to Oracle Systems Ltd seeking clarification among them confirmation as to who were their partners with local references as at 2013. That oracle having confirmed vide their letter dated 8th 2017 confirming that their only partner as at 2013 was OSI Slovenia through OSI Kenya, the respondents ought to have reviewed their decision to charge the exparte applicant.
32. Counsel argued that the criminal proceedings due to be preferred have violated the exparte applicant's fundamental rights and principles of natural justice hence an act amounting to ulterior motive thus undermining Articles 2, 10, 22, 23, 25, 27, 47, 50, 53, 157 and 159 and 232 of the Constitution.
33. Mr. Manduku urged the court to find that the exparte applicant and one Annette Mwangi conducted due diligence in recommending the OSI Kenya as the only accredited partner with local reference. He stated that the exparte applicant's action was professional and above board.
34. He maintained that, the 2nd respondent did not verify the second limb of the procurement requirement that the service provider was supposed to prove evidence of similar work done which none proved except OSI Kenya. He termed the recommended prosecution as based on inconsistent evidence which cannot sustain a conviction. To support this position, Mr. Manduku quoted the case of **R vs Attorney General Exparte Kipngeno Arap Ngeny HCCC Application 406/2001** in which the court said that criminal prosecution not based on factual foundation is suspect of ulterior motive or improper purpose.
35. Regarding the question whether the proposed prosecution was an abuse of the court process, Mr. Manduku questioned the rationale in absolving the tender committee and Auditor General from blame. Counsel urged the court to find that by absolving the two, the respondents abused their office and acted in a discriminatory manner hence their decision should be quashed. To support that position, counsel quoted the case of **George Joshua Okungu and another vs CM'S Court at Nairobi and Another (2014 e KLR** and **James Kuria and 3 others vs AG and 3 others (2018) eKLR**.
36. As to whether the proposed prosecution undermines the constitution, Mr. Manduku submitted that Articles 2, 10 (1), 21, 22 (1) (3) (4), 23, 25, 27, 47, 75, 157, 159 and 232 were all violated both in letter and spirit.
37. Learned Counsel addressed the court on the scope of Judicial Review orders urging that, it is settled law that judicial review proceedings are operated to the decision making process as opposed to merit. Reference was made to the case of **R vs Judicial Service Commission HC Misc. Appl. 1025 of 2003** and **R vs Kenya Revenue Authority exparte Yaya Towers Ltd. (2008) eKLR** where the court enlisted grounds for judicial review as abuse of discretion, irrationally, excess of jurisdiction, improper motives, failure to exercise discretion, abuse of the rules of natural justice, fettering of discretion or error of the law.
38. Counsel however urged the court to widen the scope of the traditional grounds for judicial review to include Article 47 of the Constitution which provides for fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Mr. Manduku referred the court to Section 7 (2) of the fair administrative Actions Act to the effect that a court or tribunal may review an administrative action or decision if the person who made it was not authorised, acted in excess of jurisdiction, biased or reasonably suspected to be biased, denies reasonable opportunity to a person entitled, decision was procedurally unfair, or action or material was materially influenced by an error of law, decision taken with ulterior motive, administrator failed to take into account relevant considerations, decisions were in bad faith, abuse of discretion, decision is unreasonable, unfair or decision made through abuse of power.
39. Mr. Manduku extracted a parliamentary Hansard of 15th April 2015 surrounding the debate on when the fair administrative actions was pursued to fortify the objective for enacting the Act.
40. It was Mr. Manduku's submissions that the Director of Public Prosecutions having been given a letter from Oracle confirming that OSI Kenya was the only accredited partner in Kenya should have reviewed and withdrawn his recommendation which was based on a wrong reasoning and an error based on misinformation.
41. As to whether an order of certiorari is applicable, Mr. Manduku submitted that under Article 165 of the Constitution, this court has jurisdiction to exercise supervisory powers upon the respondents. It was his contention that the decision to prosecute the exparte applicant was irrational, illegal and unprocedural. Counsel referred the court to the case of **R vs National Transport and Safety Authority and 10 others Exparte James Maina Mugo (2015) eKLR** in which the court quoted Lord Diplock in the case of **council for civil service Unions vs Minister for Civil Service (1985) A.C 374 at 401D** where the court classified grounds for consideration before issuing certiorari orders as proof of illegality, irrationality and procedural impropriety.
42. On illegality, Mr. Manduku made reference to several authorities among them **Council for Civil Servants union vs Minister for Civil Service (supra)** where the court defined illegality as follows:

“...By ‘illegality’ as a ground for judicial review I mean that the decision maker must understand correctly the law that regularises his decision making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’....it applies to a decision which is so outrageous in its defiance of logic or of

accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision ”.

Counsel contended that the 1st respondent abused their discretion in recommending prosecution. (**reference was made to the case of R vs the Attorney General and 3 others exparte Tom Odoyo Oloo High Court of Kenya Nairobi JR App No. 196/2015**).

43. On irrationality, Mr. Manduku opined that the respondents had acted unreasonably by failing to take into account all relevant conditions. To buttress that position, Mr. Manduku referred to the case of **In Re Bukoba Gymkhana Club (1963) 1EA 478 at Page 479 Par “E”** where the court held:

“Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards”.

44. Regarding legitimate expectation, counsel submitted that he had legitimate expectation that the respondents would have sought confirmation from Oracle to confirm that OSI were the only confirmed Audit Vault Integrators in the region with local reference. To bolster and lay emphasis on what legitimate expectation entails, learned counsel relied on the case of **R vs Nairobi City County and Another Exparte Wainaina Kigathi Mungai (2014) e KLR and Keroche Industries Ltd vs Kenya Revenue Authority & 5 others(2007) 2KLR530** where the court held that legitimate expectation arises for example where a member of the public as a result of a promise or conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.

45. Lastly, Mr. Manduku urged the court to stop any prosecution intended as the law relating to prosecution was not properly followed to the letter.

1st Respondent’s Submission

46. Mr. Ashimosi appearing for the 1st respondent adopted the 2nd respondent’s averments in reply to the application and his submissions filed on 28th September 2018. He submitted that the applicant had not demonstrated that the 1st respondent acted in breach of rules of natural justice. He contended that the 1st respondent acted in good faith in execution of his mandate, and without taking directions from any quarters within the law pursuant to the mandate conferred by Article 157 of the Constitution. He opined that the power to recommend prosecution is discretionary as enshrined under Section 6 of the Office of the Director of Public Prosecutions Act (ODPPA).

47. He submitted that, a court can only interfere with the Director of Public Prosecution’s discretion where his act contravenes the Constitution. To solidify his position, counsel referred the court to the case of **Paul Nganga Nyaga vs AG and 3 others (2013) eKLR**. He further submitted that courts should not unnecessarily interfere with the DPP’s mandate or direct him on how to work. He referred the court to the case of **Kenya Commercial Bank Ltd and 2 others vs Commissioner of Police and Another Nairobi Petition No. 218/2012 (2013) eKLR** where Justice Majanja held that the office of the DPP and Inspector General of the National Police Service are independent offices and the court would not interfere in the running of their offices and exercise of their discretion within the limits provided by law unless the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution.

48. Mr. Ashimosi submitted that, when a crime has been reported, the work of the police is to investigate and where there is prima facie evidence, they can recommend prosecution and the rest is left to evidence and the trial court to analyse and determine. To support that proposition, counsel relied on the authorities in the cases of **Republic vs Commissioner of Police and another Exparte Michael Monari and another (2012) eKLR and William Ruto and another vs AG HCCC No. 1192 of 2004** where the court held that analysis of evidence should be done before the trial court and not the constitutional court. Mr Ashimosi submitted that the intended criminal proceedings is a matter of public interest visa a vis private interest hence the court must balance . In support of this submission counsel made reference to the case of **Kuria and another vs AG (2002)2 KLR 69**.

2nd Respondent’s Submissions

49. M/s Rosslyne Murugi appearing for the 2nd respondent filed their submissions on 13th September 2018 wherein she broke down the issues into four. Firstly, she sought to answer the issue whether the 2nd respondent acted within its mandate. Counsel relied on Section 13 (2) (c) and 23 of Anti-Corruption and Economic Crimes Act which allows EACC to investigate corruption and economic crimes, Section 32 relating to power to arrest, charge and detain for investigation and upon completion of investigations forward recommendations to the Director of Public Prosecution pursuant to Section 35 of Anti-Corruption and Economic Crimes Act. She contended that the applicant had not demonstrated abuse of that mandate.

50. Regarding the issue of issuance of the prerogative orders sought, counsel submitted that, there was no evidence that the 2nd respondent had acted in excess of their constitutional powers or jurisdiction. Reference was made to the case of **Kenya National Examination Counsel vs the Exparte Geoffrey Gathenji Njoroge and 9 others (1997) eKLR**.

51. Learned counsel opined that where the Director of Public Prosecution has recommended prosecution to commence, the same ought not to be interrupted unless there is proof of abuse of the DPP’s powers. To support that position, the court was referred to the case of **Reg vs D.P.P Ex. P. Kebilene (2000) 2 A.C 326** where it was held:

“.....in a case where it is obvious that the director wishes a charge to go to trial, I think the courts should be very slow to allow review of a consent to be used as a device for resolving points which otherwise be dealt with in the ordinary course of

the criminal proceedings. As a general rule, proceedings on Indictment should not be delayed by collateral challenges”.

52. As to whether the proceedings should be halted, counsel submitted that such orders shall amount to interference to the 2nd respondent’s mandate. Counsel relied on the authority in the case of **R vs Kenya Anti Corruption Commission and 2 Others Exparte wild life Lodges Limited (2014) eKLR** where the court held that,

“the mere fact that allegations made are likely to be found worthless is not a ground for halting investigations into the complaints made or brought to the attention of the 1st respondent since the purpose of a criminal investigations conducted bona fide is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which criminal charge may be laid”.

53. Learned counsel urged the court to let prosecution take its full course and that the applicant shall have an opportunity before the trial court to ventilate his case. Regarding the scope of judicial review, counsel submitted that the fair Administrative Actions Act has been complied with as there is no proof of abuse, bad faith, illegality, irrationality or ulterior motive. That to stop prosecution will amount to gagging the 2nd respondent from performing their responsibility.

Analysis and Determination

54. I have considered the notice of motion herein, supporting affidavit and supplementary affidavit, and the attendant replies plus submissions by both counsel.

Issues that crystallise for determination are:

- (a) Whether the respondents executed their mandate constitutionally and within the law in recommending prosecution of the Exparte Applicant.**
- (b) Whether the applicant has satisfied the law that the intended criminal proceedings ought to be halted.**
- (c) Whether the scope of Judicial Review proceedings after enactment of fair Administrative Action 2015 was properly exercised.**
- (d) Whether the applicant is entitled to orders of judicial review sought.**

55. The exparte applicant herein is seeking orders of certiorari and prohibition

against the respondents’ recommendation that he be arraigned in court for the offences of

- (1) Willfull failure to comply with the law relating to procurement contrary to section 45b(2) as read with section 48(1) of the anti corruption and economic crimes Act and –
- (2) Knowingly deceiving principal contrary to section 41(2) as read with section 48(1) of the anticorruption and economics crimes Act.

56. The law governing judicial review proceedings is anchored under order 53 of the civil procedure rules cap21 laws of Kenya and principally based on the common law principles in which courts or judicial review proceedings are concerned only with the decision making process as opposed to the merits of the decision. With the promulgation of the 2010 constitution and subsequent enactment of the Fair Administrative Actions Act, the scope or process of judicial review has been elevated to a pedestal that transcends the technicalities of common law(**see supreme court decision in the case of Communication Commission of Kenya vs Royal Media Services and 5 others petition no.14/2014 consolidated with Petition Nos.14A,14B,and 14C of 2014.**

57. It therefore follows that the High Court has powers to exercise supervisory powers over the respondents being public statutory bodies mandated to exercise certain administrative functions breach of which will attract judicial review orders from the High Court. This can be done either under Order53 of the civil procedure rules or Articles 22, 23 and 47 of the Constitution as well as the Fair Administrative Actions Act.

58. For the court to exercise powers of certiorari, prohibition or mandamus the court must be satisfied that the act or omission complained of was arrived at illegally, unreasonably, improperly, irrationally, biased, in bad faith or otherwise ultravires hence breach of the principles of natural justice.

59. An order of certiorari is therefore designed to prevent abuse of power and is intended to ensure that an individual is given fair treatment by the authority to which he is subjected (**see R vs Minister for Public government and another Experte Mwahima(2002) 2KLR557 and Jotham Mulati Welamodi vs Chairman Electoral Commission of Kenya (2002)1klr 486).**

60. In a nut shell, Certiorari orders can issue under certain circumstances as elucidated in the case of **Captain Geoffrey Kugoya Murungi vs A.G misc. civil Application no.293 of 1993** wherein the court held that;

“certiorari deals with decisions already made...such an order (certiorari) can only be issued where the court considers that

the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice or contrary to law. Thus , an order of certiorari is not a restraining order”

61. The order of certiorari is retrospective (restorative in nature as it directs reversion to the original position before the impugned decision was made) (see Central Organisation of Trade Unions (K) vs Benjamin Nzioka and others civil appeal NO.166 of 1993.)

62. On the other hand an order for prohibition is that which is prospective in character and is intended to restrain an inferior tribunal body or authority from assuming jurisdiction where there is none or from doing what it is not authorised to do. Its mandate is not a basis for reviewing errors or wrongs that have already taken place or occurred. The order is only focussed on the future and is intended to contain or stop an anticipated event like the intended prosecution in this case. This position was upheld in the case of Kenya Examination Council vs R Experte Geoffrey Gathenji Njoroje and 9 others (1997)eKLR where the court held that:

“where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of rules of natural justice, an order of prohibition will not be efficacious against the decision so made. Prohibition cannot quash a decision that has already been made, it can only prevent the making of a contemplated decision.”

63. In R vs Judicial Service Commission (2004)eKLR the Court held that, the remedy of judicial review is not to review the merits of the decision but the decision making process itself to ensure that an individual is given fair treatment.

64. However with the promulgation of the current constitution and enactment of fair administrative actions Act NO.4 Of (2015) there has been a paradigm shift in terms of the scope of interpretation and applicability of judicial review orders. This is a departure from the traditional common law understanding and limited application in terms of scope on judicial review declaratory orders. This position has clearly been captured in several cases within our jurisdiction.

65. In the case of Ernest & Young LLP vs Capital Markets Authority and another (2017) eKLR Mativo J had this to say;

“Judicial review is available as a relief to a claim of violation of the rights and freedoms guaranteed in the Constitution .The Constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising quasi-judicial function. The point of focus is no longer whether the rule was public or private or by a statutory body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47,or the right to natural justice under Article 50. The Kenya Judiciary must guard against the development of a two-tracked system of Judicial Review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010’s constitution principal of Judicial Review[On the other]. Those two tracks are likely to underline the establishment of a vibrant tradition of judicial review as required by the 2010 constitution”

66. Issuance of Judicial review orders can in summary be classified from the viewpoint of focusing on an illegality, irrationality and lastly procedural impropriety in decision making. This position was aptly captured by Odunga J. in the case of Republic vs National Transport and Safety Authority & 10 others Ex-parte James Maina Mugo 2010 while quoting Lord Diplock in the case of counsel for Civil Service Unions vs Minister for Civil Service (1985 A.C 374, At 401D where his lordship held that ;

“Judicial Review has I think developed to a stage today when ...one can conveniently classify under three heads the grounds upon which administrative action are subject to control by Judicial Review. The first ground I would call ‘Illegality’, the second ‘Irrationality’, and the third ‘procedural impropriety’...By ‘Illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it... By ‘Irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

Does the proposed prosecution meet the constitutional threshold?

67. In the instant case , the Ex-parte applicant is alleging that his constitutional rights have been violated and /or threatened to be violated pursuant to the respondent’s recommendation thus contravening Articles 2,10,21,22(1)(3)(4)23,25,27,47,50,73,157(11),159,165(3) and 232 of the constitution. Article 2(1) of the constitution provides that this constitution is the supreme law of the republic and binds all persons and all state organs at both levels of government. Article 10 of the constitution provides that national values and principles of governance are binding to all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution, the Law or implements public policy decisions. National values include patriotism, national unity, the rule of law, democracy, human dignity, equality, non-discrimination among others.

68. It is the Ex-parte applicant’s contention that the 1st Respondent discriminated against him when he dropped charges against the other suspects and recommended for his prosecution and that of Annette Mwangi. It is a constitutional imperative that nobody should be discriminated against and where the court is confronted with proof such decision should be quashed. Article 21 underscores implementation of rights and fundamental freedoms and the state and every state organ duly bound to observe respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

69. As a state organ, the DPP is subject to the authority of the constitution being a product of the constitution itself under Article 157 who’s functions includes directing Inspector General of Police to investigate any allegation of criminal conduct, recommend, institute and undertake criminal proceedings, can take over or discontinue any criminal proceedings commenced before any court by any other person. In

executing that mandate, the DPP shall have due regard to public interest, promote the interest of justice, apply national values and principles of good governance, promote the rule of law and only be answerable to the constitution. He is expected to work diligently without any discrimination, abuse of power/office and free from any direction, control or influence from any quarters.

70. Article 27 of the constitution commands equality and freedom from discrimination and that every person is equal to the law hence entitled to equal protection. It is on the basis of this provision that the applicant is alleging discrimination by the DPP's office without justification thus setting free the members of the tender committee who awarded the tender the subject of the intended prosecution. According to him, he will be denied fair hearing if the intended prosecution is undertaken against him thus undermining Article 50 of the constitution.

71. In response to the claim that the 1st respondent has violated the Ex-parte applicant's constitutional rights, Mr. Ashimosi submitted that, in recommending the prosecution against the applicant, the DPP properly exercised his constitutional powers under Article 157 and Section 6 of the Office of Director of Public Prosecution Act which provide that; Section 6: pursuant to Article 157 (10) the Director of Public Prosecution shall-:Not require the consent of any person or authority in the exercise of his powers or functions under this constitution, this Act or any other written law and will be subject only to the constitution and the law.

72. For the court to interfere with the decision of the Director of Public Prosecution there must be sufficient proof that the DPP's action or decision is actuated with malice made in bad faith hence ultravires and amounts to abuse of office. Mr. Ashimosi submitted that it's incumbent upon the Ex-parte applicant to prove that the DPP acted beyond his powers and contrary to the law. He referred the court to the case of **Paul Ng'ang'a Nyaga vs Attorney General & 3 others (2013 eKLR)** where the court held that ;

“This court can only interfere with and interrogate the Acts of other constitutional bodies if there is sufficient evidence they acted in contravention of the constitution.”

73. There is no doubt that for the court to interfere with decisions made by the Director of Public Prosecution, one must demonstrate sufficiently that the Director of Public Prosecutions has exceeded his mandate or acted in contravention of the law. The Director of Public Prosecution does not have blank cheques to do what he wishes regardless of the law. He is bound by the Constitution and where there is clear and sufficient proof of such contravention of the law, the court will not hesitate to set such orders aside.

74. In the case of **Diamond Hasham Lalji and another vs Attorney General and 4 others [2018] eKLR** the court of appeal extensively considered in detail the applicable law and circumstances under which the court could interfere with the exercise of prosecutorial discretion by the DPP. Among the guiding principles outlined in section 4 of ODPP'S Act No. 2 of 2013 and the National prosecution policy formulated by the DPP pursuant to section 5(1)(c) of the ODPP Act are that; “The decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted”

75. Paragraph 4 (B)(2),of the said policy provides ; “the Evidence test- public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available”

76. In diamond's case (supra), the court held in Para. 42 as follows;

“The burden of proof rests with the person alleging unconstitutional power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision”

In para.45 the court went further to state thus;

“In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which the DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage the courts should not hold a fully fledged inquiry to find if evidence would end in a conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of the facts and circumstances of the case are absolutely imperative”

77. Recommendation of prosecution by the Ethics and Anti Corruption Commission or Director of Public Prosecution is clearly guided by the law and where excesses arise, then the decisions arising therefrom must be interfered with and set aside albeit sparingly. In the recent decision of the Court of Appeal in the case of **Proff. Njuguna S.Ndungu vs Ethics and Anti corruption Commission (EACC) and 3 others Civil Appeal No.333 of 2018 delivered on 20th December 2018,** the Court had this to say with regard to the powers of the DPP:

“The jurisprudence show that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise sparingly”

In the instant case the applicant is alleging that Ethics and Anti Corruption Commission recommended prosecution of members of tender committee including the Auditor General but the Director of Public Prosecution decided to absolve the charges against them and recommended his prosecution alone. He is referring to this decision as discrimination.

78. The duty to investigate crime by Ethics and Anti Corruption Commission is well captured under Section 13 (2) (c) of the Ethics and Anti Corruption Commission Act 2011 and Section 23 of the Anti Corruption and Economic Crimes Act and submit their recommendations to the Director of Public Prosecution under Section 35 of Anti Corruption and Economic Crimes Act for further directions. In the instant EACC did discharge its mandate as constitutionally and statutorily required in recommending prosecution of the applicant.

79. The commission has no control over what the Director of Public Prosecutions does. Equally, the Director of Public Prosecutions has powers to decide on who to charge based on the evidence at hand. He cannot be directed on who to charge and who not to charge. In fact, the Director of Public Prosecutions can recommend or discontinue prosecution if he finds it necessary. As to whether the person charged is guilty or not, it is for the court to decide upon conducting full trial.
80. It is common knowledge that the Director of Public Prosecutions can drop charges against a suspect or an accused person or an accomplice and treat such person as a witness against the person charged although an accomplice. It matters not whether the one treated as a witness is culpable like the one charged. However the DPP must justify the reasons for dropping charges against some suspect or suspects facing similar allegations without appearing to discriminate the one charged.
81. Therefore, it is a fallacy for the exparte applicant to claim that, by absolving some suspects from prosecution and recommending his prosecution together with another was discriminatory. The Director Public Prosecution has powers to decide on who to charge for which offence. He cannot work under direction not even from the court on who to charge save where there is discrimination without justification. In this case the Director of Public Prosecution dropped charges on account that the executive tender committee was misled by the recommendation of the exparte applicant and one Annette Mwangi. Prima facie, this can be a justification sufficient enough to absolve those that the Director of Public Prosecutions finds are not culpable from the evidence at hand.
82. The high court would therefore act with utmost and extreme caution and restraint not to unnecessarily interfere with decisions of the Director of Public Prosecutions or other statutory bodies in a manner that will disable their operations hence cause an injustice to the public who are consumers of justice and interested parties in the outcome of criminal justice (**See Bitange Ndemo vs Director of Public Prosecutions and 4 Others (2016) eKLR**). In this case I do not find any fundamental wrong committed in absolving the tender executive committee members for the reasons advanced.
83. There is no dispute that it was the applicant and his colleague Annette Mwangi who gave professional advice that it was OSI Kenya who were the only suppliers of Oracle vault software in Kenya thus necessitating the tender committee to award the contract through single sourcing under section 74(2) of the procurement Act 2005. It is worth noting that the aforesaid section only allows single sourcing in situations where there is only one person who can supply the goods, works or services being procured and that there is no reasonable alternative or a substitute for the goods, work or services being procured. Therefore the burden to prove that there were no other accredited suppliers or alternative source other than OSI Slovenia Kenya lies with the exparte applicant.
84. According to the exparte applicant, the recommendation they made to the tender committee to award the tender to OSI Slovenia Kenya through single sourcing was based on the criterion set by the procurement request. He argued that after the Ethics and Anti-Corruption Commission made recommendation for his prosecution and the tender committee, the Auditor General wrote to the Country Director Oracles Systems Kenya LTD on 19th January 2017 (See annexure JO6 in support of verifying affidavit) seeking confirmation on who were the oracle referenceable partners with local reference sites in Kenya as at June 2013 and the implementing partners of the same.
85. That on 8th February 2017, Oracle responded to the Auditor General's letter (See JO7 in support of verifying affidavit) in which he stated that the partner with Audit Vault reference sites in Kenya by 2013 was OSI Slovenia and the implementing partner was OSI Kenya Ltd (a subsidiary of OSI Slovenia).
86. As a result of that confirmation, the exparte applicant wrote to the DPP vide his letter dated 13th February, 2017 forwarding the two letters and urged the DPP to reconsider his decision of recommending prosecution as it had been confirmed that there were no other accredited partners with local reference as contended by EACC (2nd respondent) in their recommendation for prosecution. It is this failure to act and reconsider this fact of new evidence that the exparte applicant is alleging the DPP did not exercise his powers reasonably under the Fair Administrative Actions Act by taking into account fresh evidence which exonerated him from culpability. Mr. Manduku urged that the DPP's inactivity in reviewing his decision is malicious, unreasonable and ultravires hence the orders of certiorari and prohibition should apply.
87. In response to this argument, Mr. Ashimosi and Ms Murugi for the 1st and 2nd respondents respectively argued that the letter dated 19th January 2017 addressed to Oracle by the Auditor General seeking clarification on Oracle's partners in Kenya with local reference and Oracle's response vide their letter dated 8th February 2017 was an afterthought and suspect as EACC was not given a chance to verify the same. Mrs. Murugi referred the court to a letter dated 21st April 2017 from Oracle addressed to the Chief Executive Officer of EACC which clarified that the accredited partners of Oracle in Kenya with capacity to supply and install Audit Vault Software to the public include Oracle Gold, Platinum and Diamond with Oracle Partner Network membership.
88. The letter which is marked as (MAU 3) in support of the second respondent's replying affidavit sworn on 27th July 2018 by Mulk A Umar confirmed that by 2013 Oracle Partners in Kenya were Indra Ltd, Seven Seas Technologies Ltd, Next Technologies Ltd, Netronics Communications LTd, Momentum Interactive Systems, OSI Kenya among others.
89. According to Manduku, the only difference between those other partners with Oracle OSI is that OSI have local or regional reference having installed similar systems for Safaricom and Kenya Airways thus the only partner that met the set criterion.
90. I have looked at the letter dated 8th February 2017 stating that OSI was a local partner for oracle being a subsidiary of Oracle Slovenia. The letter dated 21st April 2018 confirmed a long list of other partners without specifically stating which one had local reference. The letter addressed to the Auditor General by Oracle dated 8th February 2017 in response to the Auditor General's request to confirm whether OSI had local reference came up after the respondents had already made a decision to charge the Exparte applicant. It would appear from the Auditor's letter to Oracle on 19th January 2017 that it was triggered by the recommended prosecution hence after thought.
91. By making the effort in writing to Oracle Kenya on 29th March 2017, the Ethics and Anti Corruption Commission was exercising

diligence in confirming the true position regarding actual accredited partners of Oracle in Kenya. This action was in compliance with the requirements stipulated in the Fair Administrative Actions Act in making fair, diligent and accountable administrative decisions without bias.

92. Having received the letter dated 21st April 2017 from Oracle which confirmed that there were other accredited partners of oracle which letter came later after the one dated 8th February 2017, the Director of Public Prosecution had prima facie evidence to recommend the prosecution which then will be subjected to scrutiny upon trial. We cannot therefore say that the Director of Public Prosecution or Ethics and Anti Corruption Commission's conduct contravened the Fair Administrative Actions Act nor the Constitution.

93. The finer details regarding the contract and who met which requirements and to what extent the applicant misled the Auditor General and the entire tender committee into awarding a contract through single sourcing instead of subjecting it to competitive bidding will be a subject of the trial court. The High court should be slow but cautious before curtailing other independent offices from executing their statutory mandate unless it is overtly clear that such action will definitely deliver a miscarriage of justice.

94. In this case, from the onset and initiation of the procurement process, the element of sourcing a supplier with local reference in terms of having supplied and installed similar software within Kenya was not mentioned anywhere. This issue came up when the Auditor General solicited for that confirmation on 19th January 2017 and I believe for a purpose to defeat the intended prosecution.

Is the Exparte Applicant entitled to the orders of Judicial Review

95. Having scrutinized the proposed charges against the applicant and further having examined the relevant material placed before the respondents, I am satisfied that there are high prospects of a conviction against the applicant for giving misleading information or professional advice thus causing his boss the Auditor General and the tender committee to award a tender through single sourcing which they could not have done had true and correct information been given. Having held that the respondents properly acted within their Constitutional and statutory mandate in recommending prosecution of the appellant, it then follows that the prerogative orders of certiorari and prohibition are not applicable. Consequently, the application herein is dismissed and the interim prohibitory orders issued on 14th February 2017 vacated. Regarding costs, I find the matter bordering on public interest litigation and protection of individual rights and freedom. Each party shall bear own costs.

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 30TH DAY OF JANUARY, 2019.

J.N. ONYIEGO

JUDGE