REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CRIMINAL REVISION NO 25 OF 2019

MOSES KASAINE LENOLKULAL.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING ON REVISION

1. The applicant is the Governor of Samburu County. He has been charged with various offences in **ACC No. 3 of 2019: R vs. Moses Lenolkulal and 13 others**. The applicant faces four counts under the Anti-corruption and Economic Crimes Act (ACECA). In the first count, he is charged with 13 others with the offence of conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48(1) of ACECA. Count II charges the applicant with the offence of abuse of office contrary to section 46 as read with section 48(1) of ACECA. He also faces at count III, the offence of conflict of interest contrary to section 42(3) as read with section 48(1) of ACECA.

2. Finally, at count IV, the applicant is charged with the offence of unlawful acquisition of public property contrary to section 45(1) (a) as read with section 48(1) of ACECA. All of these offences are alleged to have been committed between 27th March 2013 and 25th March 2019 during which period the applicant was the Governor of Samburu County. He was released on bail, some of whose terms were the subject of ACEC Revision No. 7 of 2019.

3. By a letter from his Advocates, V.A. Nyamodi & Co. Advocates dated 3rd June 2019, the applicant seeks revision of orders issued by the trial court in the said matter on 15th May 2019. The applicant states in the said letter that in a ruling delivered on 2nd April, 2019, the trial court issued interim orders prohibiting him from accessing Samburu County offices pending filing, hearing and determination of an application to be made by the prosecution, and the court directed the prosecution to file a formal application and serve the applicant. The prosecution duly filed an application dated 16th April 2019 in which it sought orders to bar the applicant and other accused persons from accessing any of the Samburu County Offices pending the hearing and determination of the criminal trial against them. The applicant states that a second application dated 23rd April 2019 seeking, among other things, to have the bail and or bond terms granted to the applicant cancelled was filed. This application, which was in any event dismissed, is not relevant for present purposes.

4. In her ruling dated 15th May 2019 on the Prosecution's first application, the court (Hon. Murigi), made the following order:

> ***1. The 1st Respondent who is the Governor of Samburu County is barred from accessing the Samburu County Government Offices without the prior written authorization from the CEO of the Investigative Agency (EACC) who shall put measures if any in place so as to ensure that there is no contact between the 1st Respondent with the prosecution witnesses and preserve the evidence until further orders of this Court.***

5. The applicant is aggrieved by the above order and seeks orders of revision from this court. He bases his application on Article 165(6) and (7) of the Constitution as read with section 362 of the Criminal Procedure Code. He submits that these provisions vest upon the High Court the powers to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

6. In the arguments set out in the letter seeking revision, the applicant's Counsel, Mr. Nyamodi, makes a three-pronged attack against the order of the trial court. He argues, first, that the applicant is the duly elected Governor of Samburu County by virtue of Article 180 of the Constitution. As such, he is a constitutional office holder within the meaning of section 62 (6) of the Anti-Corruption and Economic Crimes Act (ACECA). He can therefore only be removed from his office on grounds provided for under Article 181 (1) of the Constitution and pursuant to the procedure set out under section 33 of the County Government Act. It is his contention that the impugned order of the trial court bars the applicant, a constitutional office holder, from accessing the offices of the County Government of Samburu without a written authorization from the Chief Executive Officer (CEO) of the Ethics and Anti-Corruption Commission (EACC), who may allow such access

upon laying down conditions with respect to such access.

7. The applicant argues that the said order is illegal and unconstitutional as it amounts to the removal or suspension of the applicant from office in a manner contrary to the express provisions of Article 181 (1) of the Constitution and section 62 (6) of ACECA.

8. His second argument is that the order of the court is unlawful in terms of its operationalization or implementation. According to the applicant, the intent and purpose of the order is that the applicant, a sitting Governor, would have to get authorization from the CEO of the EACC if he is to access his office. In the event that he wants to be in his office every day in order to discharge his constitutional mandate, it would be impracticable for him to seek authorization from the CEO of the EACC on a daily basis. He further contends that in the event that the authorization is denied, the applicant would not be able to access his office at all. The practical impact of the operationalization of the trial court's order is that the CEO of the EACC would be seen as controlling the affairs of the office of the duly elected Governor of the County Government of Samburu. It is his submission that had the trial court assessed the practical impact of its order, it would not have issued it.

9. The applicant urges the court to be persuaded by the decision of the High Court in **Muhammed Abdalla Swazuri & 16 Others v Republic (2018) eKLR** in which the trial court issued an order directing the applicant to obtain prior authorization of the Secretary /CEO of the EACC in order to access his office. In an application for revision of that order, the High Court (Ong'udi J) set aside the order of the trial court.

10. The applicant contends, thirdly, that the concern of the trial court that the applicant would interfere with witnesses because he is in a position of authority over the prosecution witnesses is speculative as no evidence of such interference was presented by the prosecution. In any event, the investigations in the criminal matter are complete and what remains is the hearing of the case.

11. The applicant urges the court to call for the file and vary the orders of the trial court prohibiting the applicant from accessing his offices without the written authorization from the CEO of the EACC by setting aside the said order.

12. The application for revision came up for oral hearing before me on 26th June 2019. There was no appearance for the office of the Director of Public Prosecutions though the record indicated that service had been effected.

13. In his oral submissions on behalf of the applicant, Mr. Nyamodi argued that the bail term requiring the applicant to seek authorisation from the CEO of the EACC before accessing his office is unreasonable and unconstitutional. He reiterates the argument in the letter applying for revision that the bail term is directed at a constitutional office holder within the meaning of Article 180 of the Constitution as the applicant is the Governor of Samburu County. Further, that the condition ostensibly suspends his office by making his attendance in Samburu County subject to supervision by another body.

14. Mr. Nyamodi submitted further that the manner of removal of a Governor is set out in Article 181 of the Constitution. That the Constitution does not envisage and no provision is made for the suspension of a Governor from office, and nor is his attendance in office made subject to the supervision of another body.

15. According to Mr. Nyamodi, the law recognizes this constitutional provision in section 62 of ACECA. While section 62(1) provides for suspension of a public officer until conclusion of the case, section 62(6) provides that the section does not apply to a holder of a constitutional office where there is a mechanism for removal. Mr. Nyamodi submitted that Article 181 provides for removal of a Governor from office, which brings him within the protection of section 62(6). In his view, the conditions set in the bail term is unconstitutional and unlawful as it is made in contravention of section 62(6).

16. Counsel cited paragraphs 40-42 of the decision in **Muhammed Abdalla Swazuri & 16 others v Republic [2018] eKLR** (supra). He also relied on paragraph 11 of the decision in **ACEC Revision No. 7 of 2019- Moses Lenolkulal Kasaine v Republic** in which the court had observed that the time was not ripe in that application for revision for consideration of the issue whether or not the applicant could be barred from accessing his office. In his view, this was the appropriate time for the court to consider the issue and make a decision. He reiterated that the condition issued by the trial court is unlawful and unconstitutional and should be done away with.

17. In response to a question from the court, Mr. Nyamodi submitted that from the perspective of *'political hygiene'* which Chapter Six of the Constitution speaks to, it can be inferred that the holder of a constitutional office charged with an offence under ACECA should allow the process of prosecution to take place before he is then able to take up the office that he holds. However, Mr. Nyamodi sought reliance on the decision in **Philomena Mbete Mwilu v DPP (2019) eKLR** to submit that in a matter such as this in respect of a holder of a constitutional office in respect of which the Constitution sets out a mechanism for removal, the constitutional mechanism takes primacy over the criminal process.

18. It was his submission that section 62(6) remains good law and the bail term imposed on the applicant would result in applying the provisions of section 62(1) to the applicant without recognizing that section 62(6) is in place. He observed, however, that there was an important question as to whether the desire for 'political hygiene' can be achieved without a constitutional amendment. While observing that there have been instances where constitutional office holders such as Cabinet Secretaries (CSs) and Principal Secretaries (PSs) have stepped aside from their offices to allow for investigations, he was of the opinion that the positions of CSs and PSs is different as they hold office at the pleasure of the President who dismisses them at will.

19. According to Mr. Nyamodi, in the present case, the applicant is a Governor holding a devolved executive office whose mandate is derived from the people of the republic. Whereas the Constitution envisages vacancies arising in the office of a Governor, the circumstances of ACC No 3 of 2019 is not one of the circumstances. While conceding that from a 'political hygiene' perspective the best position is for a Governor or other constitutional office holder to step aside when facing charges such as the applicant currently faces, he was of the view that the Constitution does not envisage such a situation.

Analysis and Determination

20. This is an application for revision under section 362 of the Criminal Procedure Code. It has also been brought under the provisions of Article 165(6) and (7). Section 362 provides as follows:

> ***The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court***.

21. At Article 165(6) and (7), the Constitution vest in the High Court supervisory jurisdiction over subordinate courts in the following terms:

> ***(6). The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***
>
> ***(7). For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***

22. In accordance with the above provisions, I have considered the record of the trial court and the ruling that the applicant seeks revision of.

23. This revision application has its foundation in the provisions of section 62(6) of ACECA. The argument made on behalf of the applicant is that since he is a holder of a constitutional office, even though he is charged with an offence of corruption under ACECA, he should continue in office during his trial in light of the provisions of the section. Counsel referred the court to the decision in **Philomena Mbete Mwilu v DPP** (supra). I observe, however, that the matter related to an attempt by the petitioner to stop her prosecution on the basis that there is a constitutional procedure for her removal, and the facts thereof and the holding in the case are fundamentally different and distinguishable from the present case.

24. More apposite is the decision of my sister, Ong'udi J, in **Muhammed Abdalla Swazuri & 16 others v Republic** (supra) which Counsel for the applicant urged this court to be guided by. In that case, the High Court was asked to revise an order similar to the one currently before me. The court revised and set aside the said order, stating that:

> ***"37. It is a fact that the charges facing the Applicant in ACC case no 33 of 2018 arise from his operations at the NLC. Some of the witnesses are staff at the NLC and are obviously his juniors. I understand the trial court to mean that there could be fears of interference with the junior officers who are witnesses hence the need to secure the credibility of the judicial process.***
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> ***38. I appreciate this concern by the trial court but add that the securing for this credibility must be done within the confines of the Law and Constitution. In the instant case the investigating agency is EACC. The office supposed to give the authorization is the Secretary/CEO of EACC. The order further states that the Secretary/CEO shall give the authorization after due consultation with the EACC. This in fact is where the problem lies.***
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> ***39. What happens if any of these two parties refuses to have the authorization given" It would mean the Applicant does not go to the office. It has been submitted by counsel for the Applicant Prof Ojienda that following this condition of authorization set by the trial court, the Applicant has not been able to discharge his duties as the Chairperson of NLC.***
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> ***40. I find a big conflict of interest in the operation of the order by the learned trial magistrate. This is because the Secretary/CEO of EACC and the investigating agency (EACC) could be seen to be controlling the affairs at the NLC yet both EACC and NLC are independent commissions. See Re; The matter of the Interim Independent Electoral Commissions [2011] eKLR at paras 59-60 on the purposes and workings of independent commissions.***
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> ***41. Assuming for a minute that the Applicant wanted to be in his office every day would it be practical for the Secretary/CEO EACC and the EACC to be consulting and issuing authorization on a daily basis" The answer is NO. It was submitted that the investigations into this matter are complete. That being the position it means that the case is ripe for hearing and all that is required is to safeguard against witness interference.***
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> ***42. From my analysis above and especially on the issue of the operalization of the Order in respect of the Applicant, I am satisfied that the trial court did not assess the practical impact of the orders it gave in respect to the Applicant. I therefore find that section 362 CPC is applicable in the circumstances of this case. This is for the purposes of making it practical for the Applicant to carry out his official duty and not earn a full salary for doing nothing."***

25. The **Swazuri** case, to my knowledge, is the first case in which the High Court has been called upon to consider the situation of a holder of a constitutional office charged with a corruption offence under ACECA, and the application of section 62(6) of the Act. While the decision emanates from a court of concurrent jurisdiction and is persuasive in nature, Counsel for the applicant has urged this court to be guided by it and reach a similar conclusion. It is imperative therefore to consider the reasoning behind the decision to revise the order of the trial court barring the accused in the case, the Chairperson of the National Land Commission (NLC), from accessing his office without the authorisation of the CEO of the EACC.

26. As I understand it, the court in the **Swazuri** case was concerned that the investigating agency is the EACC, and the court had directed that

its CEO gives authorisation for the Chairperson of the NLC to attend to his office, after due consultation with the EACC. The court was further concerned that there would be a problem if these two parties refuse to give authorisation, in which case the applicant would be unable to go to his office. The court further found a problem with the operationalization of the orders of the trial court. It expressed the view that should the applicant wish to be in his office every day, it would be impractical for the CEO of the EACC and the EACC to be consulting and issuing authorization on a daily basis. The court therefore found that the trial court had not considered the practical implications of its order and proceeded to set aside the orders requiring prior authorisation before the applicant went to his office at the NLC.

27. To some extent, I agree with the findings of the High Court in the **Swazuri** matter. The applicant before me is a holder of a constitutional office. He is the Governor of Samburu County and would thus appear to be exempt from the provisions of section 62(1) of ACECA and protected by section 62(6) thereof as the grounds for his removal are set out in the Constitution.

28. Further, by requiring that he seeks authorisation from the EACC and its CEO, he is, to some extent, subordinated to the EACC. There may also be, as the court in **Swazuri** found, some practical difficulties in the manner in which the authorisation is to be given. It is thus notable that the concern in the **Swazuri** case was with respect to the interests of the applicant, the accused person, who also happened to be the Chairperson of an independent constitutional commission.

29. However, there is another perspective from which I believe the question of the applicant's access to his office must be considered, a perspective that looks beyond the interests of the individual holder of the constitutional office and considers the wider public interest. This perspective speaks to the question of what Mr. Nyamodi termed 'political hygiene,' and is a perspective that raises serious concerns that require judicial consideration with respect to section 62(6) of ACECA.

30. In enacting ACECA in 2003, Parliament intended to provide the legal regime for dealing with matters of corruption. The Act states in its preamble that it is ***"An Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith."***

31. Section 62 of ACECA deals with the suspension of public and state officers charged with corruption. It provides as follows:

> ***Suspension, if charged with corruption or economic crime***
>
> ***(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:***
>
> ***Provided that the case shall be determined within twenty-four months.***
>
> ***(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.***
>
> ***(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.***
>
> ***(4) ….***
>
> ***(5) ….***
>
> ***(6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.*** (Emphasis added)

32. A question may arise as to why it was deemed necessary to make provision for suspension of a public or state officer who has been charged with corruption, and whether such suspension is a derogation of any of the rights of such officer. This latter question and the provisions of section 62(1) of ACECA, in so far as they relate to public and state officers, have been the subject of judicial consideration in various decisions. The courts dealing with the questions have expressed the view that such suspension is not a violation of rights and is in accord with the constitutional provisions in Chapter Six requiring integrity from public and state officers.

33. In **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR** Majanja J stated as follows:

> ***"88. The 1st petitioner has challenged Section 62 of ACECA which require that a public officer charged with corruption or economic crime be suspended on half pay, on full allowances until proceedings are discontinued or the officer is acquitted. …***

34. After setting out the provisions of section 62 which I have reproduced above, Majanja J went on to observe as follows:

> ***"89. The section 62*** (sic) ***must be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in Chapter 6 of the Constitution. Suspension does not amount to a penalty but merely suspends certain rights pending determination of the trial. In the event the person is acquitted the full benefits are restored. If the person is convicted, then the suspension merges into a penalty."***

35. In his decision in **Moses Muteithia & 5 others v Jacob Muthomi Kirera & 4 others [2017] eKLR** Gikonyo J cited the words of Majanja J in **Thuita Mwangi** above and added as follows:

> ***"[10] The reasoning by Majanja J in the above case is quite apt and resonate well with the constitutional reality. First of all,***

the suspension has been provided for in law and is a permissible act within the Constitution, the realm of employment laws and other laws which deal with matters of integrity such as ACECA. Suspension at half pay pending conclusion of the case is not really a violation of the right to be presumed innocent until proven guilty which is guaranteed in the Constitution. In any event, sufficient safeguards against prejudice have been provided thereto in that, if the case terminates in his favour, he will be entitled to his full benefits and emoluments. Such suspension cannot be said to be a cruel subjection to or punishment or dis-proportionate to the objective intended to be achieved by the law.

36. In finding that there was no violation of the rights of an accused person arising from such suspension, Gikonyo J observed that:

> ***"Therefore, I am not able to find any violation of right to be presumed innocent until proven guilty, when a person charged with offences to do with corruption, economic crimes and integrity is suspended at half pay pending conclusion of his case. As I have already stated, section 62(1) of ACECA imposes a statutory obligation on the 2nd and 5th Respondent to suspend at half pay any public officer who has been charged under ACECA. Accordingly, the 1st Respondent ought to have been suspended at half pay pursuant to the provisions of Section 62 of ACECA as no prejudice would have been suffered by the 1st Respondent."***

37. The Learned Judge went on to conclude as follows:

> ***"The section must be understood within the inviolable wider objects of the Constitution to foster integrity for leadership in public service."***

38. In reaching a similar conclusion that there was nothing remiss in a public or state officer being suspended on half pay in **David Kinusu Sifuna v Ethics and Anti-Corruption Commission & 3 others [2017] eKLR**, Achode J expressed the view that it was discriminatory to subject some public or state officers to section 62(1), but not others. She stated as follows:

> ***"64. The third issue for determination is whether the Applicant has made a case for an order of Certiorari to issue to quash the letter dated 28th February, 2017 issued by the 1st Respondent purporting to direct the Chairman of the County Assembly Service Board of Trans Nzoia County Assembly to suspend the Applicant at half pay with effect from the date of the charge. In effect the question is whether the Court can issue a temporary order suspending the letter dated 20th February 2017 issued by the 1st Respondent purporting to direct the Chairman of the County Assembly Service Board of Trans Nzoia County Assembly to suspend the Applicant at half pay with effect of the date of charge. The court observes that the said letter is selectively discriminatory to the Applicant contrary to Article 27 of the Constitution as it purported to suspend the Applicant, the clerk and the driver but not other members of the County Assembly who were equally charged.***
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> ***65. The act of the 1st Respondent isolating the Petitioner by requiring that he be suspended at half pay from the date of the charge in the Eldoret ACC No. 2 of 2017 and yet there were other members of the County Assembly who were accused of misappropriation together with him is tantamount to selective justice. This promotes discrimination as was decided in the case of Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others (2015) eKLR where the court observed that:***
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> > ***"Under Article 3(1) every person has an obligation to respect, uphold and defend the Constitution. The said constitution also guarantees the equality of all persons before the law and equal protection and equal benefit of the law under Article 27 thereof. It is the said Article 27(under the Bill of Rights) which binds all and clause 4 of Article 27 enacts that:***
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> ***(4) the state shall not discriminate directly or indirectly against any person on any ground."*** (Emphasis added).

39. What emerges from the above cited cases is that where a public or state officer is charged with an offence of corruption, then the officer is required by law to be suspended with half pay, under the terms of section 62(1), until the conclusion of the case. If the prosecution results in an acquittal, then the public or state officer is restored to his position and paid all the monies that may have been withheld in the period of his suspension.

40. In her decision in **David Kinusu Sifuna v Ethics and Anti-Corruption Commission** (supra), Achode J dealt with the question of affording different treatment to different public officers. The applicant before her had been charged with members of the County Assembly, but only the applicant, who was the Speaker of the Trans Nzoia County Assembly, had been recommended for suspension.

41. Article 260 defines a public officer as follows:

> ***"public officer" means—***
>
> ***(a) any State officer; or***
>
> ***(b) any person, other than a State Officer, who holds a public office;***
>
> ***"public office" means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;***

42. The same Article defines a 'state office' and 'state officer' as follows:

"State office" means any of the following offices—

(a) President;

(b) Deputy President;

(c) Cabinet Secretary;

(d) Member of Parliament;

(e) Judges and Magistrates;

(f) member of a commission to which Chapter Fifteen applies;

(g) holder of an independent office to which Chapter Fifteen applies;

(h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;

(i) Attorney-General;

(j) Director of Public Prosecutions;

(k) Secretary to the Cabinet;

(l) Principal Secretary;

(m) …;

"State officer" means a person holding a State office;

43. Thus, persons in the position of the applicant, who is a County Governor, as well as members of constitutional commissions such as the Chairperson of the NLC are state officers. If some state officers are not to be afforded different, preferential treatment as observed by Achode J in the **Sifuna** case, then section 62(1), which refers to suspension of ***"a public officer or state officer who is charged with corruption or economic crime"*** should apply to them also.

44. One may then ask: what was the rationale behind section 62(6) of ACECA? In considering the provisions of the section, one must have regard to the provisions of the Constitution with regard to leadership and integrity, and the national values and principles that must underpin all actions and conduct by all public and state officers and all state organs.

45. Article 10 provides as follows:

10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

46. Chapter Six of the Constitution, which is titled **'Leadership and Integrity'** provides at Article 73 that:

73. (1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

47. The question then arises: after promulgating the Constitution with the national values and principles at Article 10 and the clear provisions on leadership and integrity in Chapter Six, could the people of Kenya have intended to then pass legislation that allowed state officers for whom grounds for removal from office are provided in the Constitution, to ride roughshod over the integrity required of leaders, face prosecution in court over their alleged corrupt dealings, and still continue to enjoy the trappings of office as they face corruption charges alleged to have been committed while in office and committed within the said offices?

48. Could the people of Kenya have wished to have their legislative authority, which they have delegated, under Article 1, to the legislature, to be exercised in such a way as to pass legislative provisions such as section 62(6) of ACECA that allow state officers whose removal is provided for in the Constitution to remain in the same offices that they are alleged to have abused and used to their personal enrichment to the detriment of the public they are supposed to serve while undergoing prosecution for such offences?

49. An examination of the rationale behind suspending public or state officers who have been charged with corruption may shed some light on the sort of answer that the people of Kenya would expect to the above questions if their governance is to accord with the constitutional principles with respect to leadership and integrity.

50. I was not able to find any local decision that speaks directly to this point. However, in the case of **R. Ravichandran vs The Additional Commissioner Of Police** accessed at **Indian Kanoon - http://indiankanoon.org/doc/83803/ 34**, the High Court in Madras was called upon to determine whether the suspension of a police officer charged under the Prevention of Corruption Act, 1988 of India was unlawful and should be revoked and the officer allowed to resume his duties. In declining to revoke the suspension, the Court observed as follows:

> ***"86. The duty of the Court is restricted only to the limited extent to see that where the appointing/disciplinary authority has taken into consideration the nature of the charge, its complexity, the public interest involved in retaining the government servant, against whom, serious imputation of corruption, misappropriation, embezzlement, etc., are levelled and whether retention of such person, would be scandalous to the department or sub-serve the discipline in the department or affect the morale of other government servants.***
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> ***87. The appointing/disciplinary, authority/government is entitled to exercise the control and maintain the master and servant relationship. To suspend an employee, as an interim measure for any one of the reasons stated supra, which are illustrative, is the absolute right of an employer and no employee can insist that he must be allowed to be retained in service and discharge his duties and enjoy the fruits or privileges attached to the post. While testing the correctness of the order of suspension, all that has to be seen by the Court is whether the power of the appointing/disciplinary authority, in controlling the employees, has been exercised reasonably, without any mala fide and that there should not be any lack of jurisdiction. Any action taken by the appointing/disciplinary authority, in public interest to maintain a clean and honest administration, cannot be interfered with lightly. Even though the government servant is put to mental agony, it is only to the limited extent of restricting him from discharging his duties and enjoy other privileges attached to the post and it is only an interim measure, till he is cleared off of the imputations levelled against him. The suspension cannot be attacked on the ground that the facts stated therein are not correct. It is well settled that the High Court cannot delve into the factual details, while adjudicating the correctness of an administrative order."***

51. The Court went further to state as follows:

> ***"88. The order of suspension for a misconduct, involving moral turpitude, in the instant case, alleged act of corruption and the further order, refusing to revoke the order of suspension, both being discretionary and administrative in nature, should not ordinarily be interfered with by the High Court under Article 226 of the Constitution of India. Allowing a person charged with serious acts of corruption or any other misconduct, involving moral turpitude, to discharge his duties and enjoy the fruits of the post, would be against a public policy and it would not be in public interest or to maintain a clean and effective administration.***
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> ***89. Cases involving serious charges of corruption and misappropriation of money, certainly involve moral turpitude, where there is implied depravity and villiness*** (sic) ***of character…[B]y allowing a government servant, facing serious charges of corruption or misappropriation or embezzlement, etc., to be retained in service, public interest would be affected."*** (Emphasis added)

52. In the matter before me, the Governor of a County, to whom Article 10 and Chapter Six apply is charged with the offence of abuse of office. He is charged with basically enriching himself at the expense of the people of Samburu County who elected him and whom he is expected to serve. Would it serve the public interest for him to go back to office and preside over the finances of the County that he has been

charged with embezzling from? What message does it send to the citizen if their leaders are charged with serious corruption offences, and are in office the following day, overseeing the affairs of the institution? How effective will prosecution of such state officers be, when their subordinates, who are likely to be witnesses, are under the direct control of the indicted officer?

53. It seems to me that the provisions of section 62(6), apart from obfuscating, indeed helping to obliterate the 'political hygiene' that Mr. Nyamodi spoke of, are contrary to the constitutional requirements of integrity in governance, are against the national values and principles of governance and the principles of leadership and integrity in Chapter Six, and undermine the prosecution of officers in the position of the applicant in this case. In so doing, they entrench corruption and impunity in the land.

54. The question then is what should be done in a case such as this in order to protect the public interest and ensure that the applicant does not use his position to undermine his prosecution. Does issuing an order requiring him not to access his office without prior authorisation amount to a 'removal' from office, contrary to the provisions for removal of a Governor in the Constitution?

55. Article 181 provides that:

> ***(1) A county governor may be removed from office on any of the following grounds—***
>
> ***(a) gross violation of this Constitution or any other law;***
>
> ***(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;***
>
> ***(c) abuse of office or gross misconduct; or***
>
> ***(d) physical or mental incapacity to perform the functions of office of county governor.***
>
> ***(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).***

56. Under Article 182, the office of governor may become vacant if the holder of the office:

> ***(a) dies;***
>
> ***(b) resigns, in writing, addressed to the speaker of the county assembly;***
>
> ***(c) ceases to be eligible to be elected county governor under Article 180 (2);***
>
> ***(d) is convicted of an offence punishable by imprisonment for at least twelve months; or***
>
> ***(e) is removed from office under this Constitution.***
>
> ***(2) If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor.***

57. First, I consider what the implications of directing that the applicant does not access his office are. Under the provisions of the County Government Act, where the Governor is unable to act, his functions are performed by the Deputy Governor. This is provided for in section 32(2) of the County Governments Act, which states that:

> ***(2) The deputy governor shall deputize for the governor in the execution of the governor's functions.***

58. The Governor in this case is not being 'removed' from office. He has been charged with an offence under ACECA, and in my view, a proper reading of section 62 of ACECA requires that he does not continue to perform the functions of the office of governor while the criminal charges against him are pending. However, if section 62(6), which in my view violates the letter and spirit of the Constitution, particularly Chapter Six on Leadership and Integrity, is to be given an interpretation that protects the applicant's access to his office, then conditions must be imposed that protect the public interest. This is what, in my view, the trial court did in making the order requiring that the applicant obtains the authorisation of the CEO of EACC before accessing his office. In the circumstances, I am not satisfied that there has been an error of law that requires that this court revises the said order, and I accordingly decline to do so.

59. Should there be difficulty, as the court in the **Swazuri** case was concerned about, in obtaining the authorisation from the EACC, I believe that there will be no vacuum in the County. I take judicial notice of the fact that there have been circumstances in the past in which county governors have, for reasons of ill health, been out of office, and given the fact that the Constitution provides for the seat of a deputy governor, the counties have continued to function. In this case, the applicant is charged with a criminal offence; he has been accused of being in 'moral ill-health', if one may term it so. He is alleged to have exhibited moral turpitude that requires that, until his prosecution is complete, his access to the County government offices should be limited as directed by the trial court.

60. I accordingly decline to exercise powers of revision over the decision of the trial court in this matter. The terms set for the applicant's access to his office shall remain in force for the duration of his trial. I need not add that it is in the public interest and the interest of the

applicant that the case against the applicant in ACC No. 3 of 2019 is proceeded with expeditiously.

61. Orders accordingly.

Dated Delivered and Signed at Nairobi this 24th day of July 2019

MUMBI NGUGI

JUDGE