



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISCELLANEOUS ACEC NO. 52 OF 2017

IN THE MATTER OF AN APPLICATION BY BEN WAFULA WANJALA AND PIUS WAMALWA MUNIALO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE ETHICS AND ANTI-CORRUPTION COMMISSION AND ITS DECISION OF 17TH JANUARY, 2017 TO DEMAND FOR COLLECTION OF VARIOUS DOCUMENTS ON COUNTY GOVERNMENT OF TRANS NZOIA ON VARIOUS PAYMENTS

AND

IN THE MATTER OF THE ETHICS AND ANTI-CORRUPTION COMMISSION AND ITS DECISION OF 4TH APRIL, 2017 TO DEMAND FOR COLLECTION OF VARIOUS DOCUMENTS ON COUNTY GOVERNMENT OF TRANS NZOIA ON VARIOUS PAYMENTS

BETWEEN

REPUBLICAPPLICANT

AND

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION....2ND RESPONDENT

EXPARTE:

PROF. BEN WAFULA WANJALA1ST EXPARTE APPLICANT

PIUS WAMALWA MUNIALO2ND EXPARTE APPLICANT

JUDGMENT

1. This is an application for Judicial Review filed by the exparte applicants **Prof. Ben Wafula Wanjala** and **Pius Wamalwa Munialo**. The Notice of Motion is brought under **Order 53 Rule 3 (1)** of the **Civil Procedure Rules** and **Section 8 (2)** of the **Law Reform Act**. Leave to file the Judicial Review was granted on 22nd May 2017. The reliefs sought by the exparte applicants are that:-

a) An order of certiorari be granted to remove to the High Court and quash the decisions of the 1st Respondent contained in its letters dated 17th January 2017 and 4th April 2017 demanding from the exparte applicants the production and subsequent collection by the 1st Respondent of the documents of the County Government of Trans Nzoia on payments for various works done.

b) An order of prohibition be granted prohibiting the 1st Respondent whether by itself, its servants, officers or agents from making any demands for collection of any documents from exparte applicants on behalf of County Government of Trans Nzoia on various payment vouchers, which vouchers are already in the possession of the 1st Respondent.

c) An order of prohibition be granted prohibiting the 1st Respondent, its servants and/or agents from harassing, intimidating, arresting and/or charging the exparte applicants in respect of the demanded documents as contained in the 1st Respondent's letters dated 17th January 2017 and 4th April 2017.

d) Costs of the application be provided.

2. The grounds of the application are set out in the application and further expounded in a verifying affidavit dated 15th May 2017 sworn by the 1st exparte applicant. The Ethics and Anti-Corruption Commission (EACC) and the Director of Public Prosecutions (DPP) are cited as the 1st and 2nd respondents respectively although no relief was sought against the 2nd respondent.

EXPARTE APPLICANTS' CASE

3. The exparte applicants' case is contained in the application and the verifying affidavit sworn by the 1st exparte applicant. They also rely on the further affidavit dated 30th June 2017 sworn by the 1st exparte applicant together with the written submissions filed on 19th April 2018 and the oral the submissions made in court by Mr. Olaka, learned counsel for the exparte applicants in support of their case.

4. The 1st and 2nd exparte applicants are employed by the County Government of Trans Nzoia as Chief Officer, Finance and County Secretary respectively. The application concerns a letter dated 17th January 2017, annexure **BWW1** to the 1st exparte applicant's verifying affidavit by the 1st respondent addressed to the 1st exparte applicant headed "**NOTICE TO PROVIDE INFORMATION AND DOCUMENTS UNDER SECTION 27 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT (ACECA) 2003**". By this letter, the 1st exparte applicant was required to furnish the 1st respondent with certain documents/information listed therein relating to road works carried out in Trans Nzoia County during the financial year 2013/2014 being:-

- a) Approved original budget and any supplementary budget for the stated period;
- b) Invoice register for the relevant period;
- c) All payment vouchers in relation to the road projects for the relevant period;
- d) List/schedule of all payments made towards road projects undertaken during the relevant period giving details of name of the road, name of the contractor, contract sum, gross amount paid, bank account through which the amount was paid and date in which the payment was made;
- e) List of all pending bills in relation to road works for the stated period;
- f) IFMIS encumbrance details (indicating the total commitments and expenditure) per vendor for the road works for the stated period.
- g) Any other relevant document/information deemed necessary.

5. The 1st exparte applicant delivered his response to the 1st respondent's letter of 17th January 2017 in a letter erroneously dated 26th January 2016, annexure **3 (a)** served upon the 1st respondent on 27th January 2017. The letter reads in part as follows;

"Following your letter dated 17th January, 2017, Ref. EACC. ELD.6/15/3 (48). The following information is available.

- 1. By the financial year 2013/2014 E-procurement was not operational so there are no details on IFMIS encumbrance system. It was manually committed in Vote book which was availed to your officers.***
- 2. Name of the roads, contractors, contract sum and amount in gross details are in the payment vouchers attached, while bank accounts through which payments to contractors was made in the G-Pay system which was closed and we cannot access the information.***
- 3. Approved budget for the financial year 2013/2014 is available.***
- 4. Payment vouchers are available but some had already been collected by your officers, County Assembly of Trans-Nzoia and Kenya National Audit for verification to avail report.***
- 5. The invoice register by then was not in place."***

6. The 1st respondent again wrote to 1st exparte applicant on 4th April 2017 as shown in annexures **BWW2 (a) - (e)** requiring him to further furnish it with specific payment vouchers listed in the letters together with the supporting documents that authorized payments by the County's Departments of Public Works, Transport & Infrastructure, Education, ECDE & Vocational Training, Governance & Public Service Management, Environment, Water & Natural Resources and Finance to several entities listed therein. The 1st exparte applicant replied by a letter dated 14th April, 2017 annexure **BWW 3 (b)** seeking for an indulgence from the 1st respondent to allow him more time to compile the documents requested. It reads in part;

“Kindly note that the letter came to us at a time when we were all at the tail end of audit exercise undertaken by KENAO as you may be aware we require documents to respond to issues raised by the auditors (please see the attached copy of the letter).

Please also note that your request involves various dockets and coordinating the preparation of the documents and at the same time attending to the auditors is tasking and hence our request for more time.

As you are aware some of our senior officers who had direct responsibility over some of the documents requested are currently facing court cases at the instigation of the commission. We are apprehensive on preliminary basis that some of the documents concern matters already in court may have been irregularly catered away by the officers or some were taken by your officers during the investigations.

We are however doing everything possible to put together the documents that are available and once the audit exercise is concluded we shall deliver them to you.”

7. The 1st exparte applicant further wrote to the 1st respondent on 2nd May 2017, giving an update on the documents/information requested. The letter reads as follows;

“The subject matter refers your letter ref no. EACC. ELD. 6/15/3/72; EACC. ELD. 6/15/3/73; EACC. ELD. 6/15/3/74; EACC. ELD. 6/15/3/75; EACC. ELD. 6/15/3/76 dated 4th April 2017 and ours ref CGTN/FIN/120 dated 14th April 2017: However we are trying our best to retrieve some of the documents a part from the ones you have and make sure you get them as per the request.

I am obliged to state the availability of the aforementioned vouchers has been a big challenge since I am the third person to occupy this finance docket. The first occupant left and ended up in police cells (see appendix ii) and the second officer whom we were reshuffled with to different departments and this is how I came in. More so the County Executive Committee member who was the first one to take up the financial position was also transferred and later resigned from the County Government of Trans Nzoia. (See Appendix v, vi and vii).

The second County Executive Committee Member worked for some time and left because of court case as a result of EACC investigation (See appendix viii) and the third acting County Executive Committee Member for finance worked with us for a short period and resigned and I am now standing in for both positions i.e. Chief Officer Finance and CEC Finance.

The county secretary who was also a senior officer of the County Government has a case in court due to investigation by EACC and he is still out of office. The officer who was in charge of archives was suspended and later deployed in another department. (See attached transfer letter in Appendix iii).

The CEC for roads Mr. Ndombi was transferred to another department and later interdicted and attached is a copy of the interdiction letter he then went to court in Kisumu and submitted his resignation letter later on. Therefore, as a result of the aforementioned we suspect that these interdicted senior officers and transferred may have moved out from their former offices with a lot of documents and roads payment vouchers (See appendix i)

The County Assembly also collected a lot of roads payment vouchers for which they used to write a report on the roads. Furthermore, during the fiscal year 2013/2014 and 2014/2015 the county government had not set up proper structures that is why the entire county tender committee is in court for investigation by EACC. All these officers are also dealing with roads and therefore had an interest in payment vouchers of roads. Therefore I as an individual I cannot really know where some of these vouchers are. (See appendix iv).

The documents to that effect are enclosed for your perusal.”

8. The supporting documents accompanying the 1st exparte applicant’s letter included the following:-

a) Letter dated 7th August by the county government to Mr. John Lewis Ndombi, the County Executive Member for Health Services suspending him for gross misconduct.

b) Letter dated 5th May 2014 by the county government to Mr. Richard Ngoni Nyongesa, Outgoing- Interim Chief Officer- Finance terminating his services.

c) Letter dated 22nd March 2016 by the 1st exparte applicant making changes in staff at the finance department

d) A letter dated 1st September 2015 by the 1st exparte applicant forwarding the financial year 2013-2014 Voter book for the department of Public Works, and Transport together with payment vouchers to Pacific General works for Kshs.5,377,125/-, Progressive Roads Construction for Kshs.8,742,470/-, Brink Construction for Kshs.10,000,984/-, Tritex Consulting Limited for Kshs.4,195,948/-, M/s Aldan International Company for Kshs.1,066,320/-, Road Masters for Kshs.15,105,250/- and Afba Construction Company Limited for Kshs.9,922,640/-.

9. The exparte applicants claim that despite their explanation for the delay in submitting the documents, the 1st respondent has threatened them with unspecified punitive consequences. They claim that the use of threats by the 1st respondent is calculated to humiliate, harass and put them in fear. The exparte applicants aver that whereas the 1st respondent is mandated by both the Constitution and relevant statute to

carry out investigations, the law does not afford the 1st respondent a carte blanche to carry out investigations as it pleases.

10. They contend that the 1st respondent's power to conduct investigation should be in line with **Article 10** of the **Constitution** and **Section 12 (c)** of the **EACC Act**. They contend that the 1st respondent's decision to continue to demand for documents not in their possession despite the explanations for the failure to produce them is unfair since, they have all along co-operated with the 1st respondent as evidenced by the numerous correspondences to the commission. The exparte applicants are of the view that the 1st respondent's conduct is an abuse of its legal criminal process actuated by actual malice and improper motive since an unreasonable short period of time was given to compile the documents. They argued that despite the short notice, they managed to avail documents in their possession and gave an explanation on the whereabouts of the rest of the documents.

11. The exparte applicants urged that **Section 28** of the **ACECA** allows a person to give an explanation or information within their knowledge with respect to such records requested whether the records were produced by the person or not. They were of the view that having complied with the notice given by the 1st respondent by producing the documents in their possession and also explaining the likely whereabouts of some of the remaining documents requested and the respective officers reasonably believed to be in possession of some of the documents, the 1st respondent could invoke this provision to obtain the remaining documents. They argued that it was therefore an abuse of the process for the 1st respondent to issue them with the notice under **Section 27** of the **ACECA**.

12. They aver that the 1st respondent's conduct is contrary to **Article 47 (1)** of the **Constitution**, **Section 2** and **4 (3)** of the **Fair Administration Action Act**, **Section 11 (6) (a)** and **(d)** of the **EACC Act** and its **Code of Conduct**.

It is the exparte applicant's case therefore that the decision to issue the notices despite their explanations is therefore unfair and unreasonable. The exparte applicants relied on the cases of *Provincial Picture Houses Limited -vs- Wednesbury Corporation [1948] 1 KB 223*, *Republic -vs- Chairman Amagoro Land Disputes Tribunal & Another Exparte Paul Mafwabi Wanyama [2014] eKLR, Commissioner of Lands -vs- Kunste Hotel Limited [1977] eKLR, Republic -vs- Electricity Commissioners Exparte Electricity Joint Committee [1924] 1K.B . 171, Lodwar Constitutional and Judicial Review Division Miscellaneous Civil Application No. 2 of 2016* to urge the court to invoke its inherent power to intervene and prevent the abuse of the process by the 1st respondent in this case.

1ST AND 2ND RESPONDENTS' CASE

13. The respondent's case is contained in the 1st respondent's response to the exparte applicants' application vide a replying affidavit sworn by Mithell Omondi, the investigating officer in the case. The respondents also relied on the statement of grounds of opposition filed by the 2nd respondent on 29th May 2017 opposing the application. They further relied on the 1st respondent's written submissions filed on 18th April 2018 together with the oral submissions made in court by its counsel Ms. Jemutai. The 1st respondent contended that it derives its powers of investigation from the provisions of **Article 79** and **252 (1)** of the **Constitution**, **Sections 23** and **25** of the **Anti-Corruption and Economic Crimes (ACECA) Act** and **Sections 11** and **13 (2) (c)** of the **Ethics And Anti-Corruption (EACC) Act**.

14. It further contended that it is mandated under **Section 27 (3)** of the **ACECA** to obtain any information or documents in a person's possession that relate to corruption or economic crime. Further that **Section 27 (4)** of the **ACECA** penalizes any failure to comply with obligations pursuant to section **27 (3)** of the **Act**. The 1st respondent claimed that it commenced investigations into the affairs of the County Government of Trans Nzoia following intelligence reports obtained on 1st February 2016 on alleged irregular spending of Kshs.990,334, 936.61 in road works within the county.

15. The 1st respondent further claims that the investigations were also prompted by the findings of an audit report of the Auditor General on road works in the county titled "*Special Audit of the Auditor-General on Road Works in Trans Nzoia County*" in which the Auditor General raised alarm over several auditable issues. The report was annexed to the replying affidavit marked EACC1. The 1st respondent avers that all these led it to launch investigations into allegations of corruption in connection with the county government's contracts for road works.

16. The 1st respondent claims that it first wrote to the county government through the 2nd exparte applicant vide a letter dated 23rd September 2016, annexure **EACC2** requesting to be supplied with certain documents set out in the letter. The documents included the following;

- a) Approved original budget and supplementary budgets
- b) Approved consolidated annual procurement plan
- c) Approved road maintenance work plan
- d) Cash book for development expenditure
- e) IFMIS report/General vote book status report indicating the total commitment and expenditure on the road works
- f) IFMIS encumbrance details by vendors for the road works
- g) Quarterly reports for the department of public works, transport and infrastructure
- h) Approved list of pre-qualified suppliers

- i) A list of all contracts in relation to road works, their contractual sums and details of the awarded contractors
- j) All payment vouchers and all LSOs/LPOs books, issuance register
- k) Any other relevant document and correspondence on this matter

17. The 1st respondent avers that the letter elicited no response from the county government. On 30th September 2016 its investigating team visited the county government's offices where they were given several documents recorded in an inventory, annexure **EACC 3**. The documents included a vote book for the Department of Public Works, Roads and Transport, G-Pay Development Cash book together with six (6) payment vouchers prepared in May 2016. It claims that the documents were voluntarily handed over to its officers by the staff of the county government. The 1st respondent stated that a scrutiny of the documents necessitated a further enquiry from the county government and it therefore wrote to the 2nd exparte applicant in a letter of 7th November 2016 annexure **EACC4** requesting for additional documents listed in the letter.

18. In particular, the 1st respondent requested for the following documents;

- a) Approved user requisitions indicating the need for the roads;
- b) Approved procurement plan for the financial year 2013/2014;
- c) Tender/Quotation opening minutes including appointment letters of the officials involved;
- d) Tender evaluation reports including appointment letters of the officials involved;
- e) Tender Committee minutes including appointment letters of officials involved;
- f) Award and acceptance letters/documents to and from the contractors;
- g) Contract agreements between the County Government of Trans Nzoia and contractors listed;
- h) Inspection and acceptance documents including appointment letters of the officials involved;
- i) The official Engineers' estimates for each project;
- j) Tender documents (including the duly filled Bills of Quantities) of all bidders who participated in the tenders;
- k) Interim/Final completion certificates;
- l) Audited financial statements for the financial year 2013/2014;
- m) County integrated development plan 2013/2014;
- n) Road maintenance plan for the financial year 2013/2014; and
- o) County Budget Review Outlook Paper for the financial year 2013/2014.

19. The 1st respondent did not get a response to this letter. This prompted it to serve the notice dated 17th January 2017 in terms of **Section 27** of the **ACECA** addressed to the 1st exparte applicant's to compel the production of the documents requested. According to the 1st respondent, the 1st exparte applicant's response to the said notice contained in the letter of 26th January 2017, annexure **EACC 6** forwarded only a handful of the documents requested. It also claims that the 1st exparte applicant did not also comply with its letter of 4th April 2017. It accused the exparte applicants of being obstructive in their conduct.

20. According to the 1st respondent, the exparte applicants were not the only ones targeted by the investigations as the commission had also written to the county's Director, Supply Chain Management and the Chief Officer, Transport and Infrastructure as evidenced in annexures **EACC7, 8, 9 and 10**. It avers that the letters were addressed to the 1st exparte applicant since the documents being financial documents are in the custody of the Finance department. It further contends that the documents requested form part of the official county government records and cannot be in the custody of individuals as claimed by the 1st exparte applicant.

21. With regard to the relief sought by the exparte applicants in prayer no. 1, the 1st respondent is of the view that the same is not enforceable given that there is no decision communicated in the said letters. That notwithstanding, the 1st respondent contends that the prayer has been overtaken by events as investigation into the alleged corruption at the county government has commenced. To support this assertion the exparte applicants relied on the case of **Kenya National Examination Council –vs- Republic Exparte Geoffrey Gathenji Njoroge & Others [1997] eKLR**.

22. The 1st respondent also argues that no factual basis has laid for the grant of the reliefs sought by the exparte applicants. It further

contends that the ex parte applicants have not shown that the documents requested had been forwarded to the Kenya National Audit Office (KENAO) nor have they presented reports made to the police to support the allegation that the 1st respondent's officers irregularly catered away documents from their offices.

23. The commission is of the view that the prohibition orders sought will essentially stop its investigations a position which will serve to hurt the public interest. It cited the cases of *DPP –vs- Crossly Holdings and 2 Others, KSM CA No. 1 of 2013* and *Republic –vs- Chief Magistrate Milimani & Another Ex parte Tusker Mattresses Limited & 3 Others [2013] eKLR* to submit that it cannot be restrained from discharging its constitutional and statutory mandate without evidence of impropriety on its part.

24. The 1st respondent reiterates that the ex parte applicants have not demonstrated that it has acted in excess of its mandate or abused its powers in any manner. It avers that it gave them a fair hearing through its correspondences. Ultimately, it is the 1st respondent's case that the ex parte applicant's application has not met the threshold for the grant of the judicial review orders sought.

DETERMINATION

25. I have considered the pleadings, affidavits, annexures and submissions by the parties. The issue for determination is whether the applicants have made out a case for issuance of the Orders of Certiorari and Prohibition under Judicial Review.

26. The scope of Judicial Review has been well captured in the case of *Republic –vs- Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 208* where the court stated as follows;

“Judicial review applications do not deal with the merits of the case but only with the process. For instance judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

27. The Court of Appeal in the case of *Municipal Council of Mombasa –vs- Republic and Umoja Consultants Ltd. Civil Appeal No. 185 of 2001* also stated this of Judicial Review;

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision. It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it's a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”

28. It is thus clear that Judicial Review is concerned with the decision making process and illegality or otherwise of the decision rather than with the merits thereof. There is no dispute that the main mandate of the 1st respondent is to investigate corruption and economic crimes related offences.

29. There is also no dispute that the two ex parte applicants are senior officers in the Trans Nzoia County Government in their capacities as Chief Officer, Finance and County Secretary respectively. They are therefore public officers.

30. It is further not disputed that the 1st respondent is investigating a complaint in respect of expenditure of money allocated to construction of roads in Trans Nzoia County.

In the course of the investigations, the 1st respondent wrote two letters requesting for specified documents. The first is to the County Government through the 2nd ex parte applicant dated 23rd September, 2016 (EACC2). The 2nd letter is dated 7th November, 2016 (EACC 4) and its addressed to the 2nd ex parte applicant. There was no response to any of these letters.

31. Before the writing of the second letter of 7th November, 2016 the 1st respondent's investigating team had gone to the Trans Nzoia County Government's offices where they were given several documents as per the inventory (EACC 3). When there was no response to its second letter dated 7th November, 2016 the 1st respondent issued and served the notice of 17th January, 2017 in terms of Section 27 of the ACECA. The notice was issued to the 1st ex parte applicant.

32. There was a response to the notice vide the 1st ex parte applicant's letter dated 26th January, 2017 (EACC 6) where a few documents were forwarded prompting the 1st respondent to write another letter dated 4th April, 2017.

According to the ex parte applicants, they have complied with the 1st respondent's demands for documents by forwarding to them only what was in their possession. It is their position that they can only provide what they have and nothing more. They claim that the 1st respondent's insistence on them availing what is not in their possession amounts to harassment and intimidation hence the orders sought.

33. Based on the above pleaded facts, the ex parte applicants have sought for Orders of prohibition and Certiorari. Before issuance of these orders, the Court must take into account a number of things.

34. In respect to an Order of Prohibition, the Court of Appeal held thus, in the case of Joram Mwenda Guantai –vs- The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 E.A 170

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings

Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

35. The above authority sets the boundaries within which the High Court may entertain Judicial Reviews applications. It is therefore my view that where it is shown to the court that the 1st respondent is carrying out investigations with ulterior motives besides issues of corruption and economic crimes, the court will not hesitate in interfering with the said investigations.

36. The impugned notice dated 17th January, 2017 was issued under Section 27 of the ACECA which provides as follows;

“(3) The Commission may by notice in writing require any person to provide, within a reasonable time specified in the notice, any information or documents in the person’s possession that relate to a person suspected of corruption or economic crime.

(4) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.”

37. I have read the notice of 17th January, 2017 which contains a penal notice in terms of Section (4) of the ACECA. This is what the penal notice states;

“THAT FUTHER NOTICE that failure to comply with this Notice shall render you liable to the penal consequences stipulated under Section 27 (4) of the Anti-Corruption and Economic Crimes Act 2003.”

38. This penal notice is in conformity with Section 27 (4) of the ACECA and there is nothing strange about it. The 1st respondent was simply informing the 1st ex parte applicant of the consequences of non-compliance with the said notice. I have not read any threats and/or intimidation in the said notice.

39. It is the ex parte applicants’ prayer that this court prohibits the respondents from arresting and charging them. For such a plea to succeed, the applicants ought to have first of all shown that the respondents had such an intention in the first place. There is no mention of any intention to arrest and charge the ex parte applicants either in the said notice or in the letter of 4th April, 2017. That first test having failed, I can’t move further to the next step to determine whether such a move would be lawful or unlawful.

40. The applicants have also sought an Order of Prohibition to prohibit the 1st respondent from demanding for collection of documents from the applicants on behalf of the County Government of Trans Nzoia already in the possession of the 1st respondent. The 1st respondent has outlined the documents they have sought from the ex parte applicants.

41. There is no dispute that the ex parte applicants have supplied some of the said documents. The same has been acknowledged by the 1st respondent. All it wanted were the remaining documents.

42. The case of Tioko Logorion and 9 Others (Ex parte Applicants) –vs- Ethics and Anti-Corruption Commission and Another Lodwar Judicial Review No. 2 of 2016 has been heavily relied on by the ex parte applicants to buttress their case. The said case can be distinguished from the present case. In the Lodwar case, the ex parte applicants had supplied to the Commission all the documents which were being demanded for a second time. In the present case, what is being demanded for in the various letters and the notice has **NEVER** been supplied to the 1st respondent.

43. Secondly, the ex parte applicants have described themselves as senior officers in the Trans Nzoia County Government, and indeed they are. The offices they occupy are public offices. The documents being sought are public documents and ought to be well kept in those offices. The 1st ex parte applicant is the Chief Officer Finance, while the 2nd ex parte applicant is the County Secretary. They are responsible to an extent for the documents being demanded. If indeed some of the staff moved away with those documents, then full disclosure must be made to the 1st respondent in order for them to make a follow up with the specific officers.

44. For the ex parte applicants to demand that they be absolved from ever availing the said documents, would be to cripple the investigations. The only way the said documents have been asked for, is through the notice and letters issued. No evidence of any adverse

action by the 1st respondent against the applicants has been set out. The applicants can request for a meeting with the investigators in the presence of their counsel to iron out these issues.

45. The prayer for Certiorari is also in respect to the production of documents by the applicants. For an Order of Certiorari to issue, there must be evidence of dishonesty, bad faith, *mala fides*, and want of the mandate to investigate. The applicants have not challenged the 1st respondent's mandate to investigate a corruption related complaint. It has not been alleged that the 1st respondent exceeded its mandate to investigate as provided for under the Constitute ACECA and EACCA.

46. Had the applicants had a problem with the timelines for producing the documents, then they should have specifically sought for more time for compliance. In any event, the 1st respondent has informed the Court that since they did not get the documents from the applicants, they resorted to other means of getting them. In other words, investigations are ongoing.

47. I also find that the content of the notice of 17th January, 2017 and the letter of 2nd April, 2017 cannot be said to be decisions to be quashed. It is just part of the investigation process. Quashing the action of issuing a notice and a letter to call for documents would amount to asking the 1st respondent not to carry out investigations over such a serious matter where close to Kshs.1Billion of public funds is suspected to have been misappropriated.

48. In conclusion, I find that the exparte applicants have not made out a case for issuance of the orders sought. The application is hereby dismissed with costs.

Delivered, signed and dated this 31st day of ***May***, 2017 in open court at Nairobi.

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE