



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**IN THE ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**

**MISCELLANEOUS APPLICATION NO. 4 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**AND**

**ETHICS & ANTI-CORRUPTION**

**COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**THE BUNGOMA CHIEF MAGISTRATE’S**

**ANTI-CORRUPTION COURT.....2<sup>ND</sup> INTERESTED PARTY**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> INTERESTED PARTY**

**EXPARTE**

**BENSON KHWATENGE WAFULA.....APPLICANT**

**JUDGMENT**

1. The Petitioner/Exparte Applicant filed before this Court miscellaneous application which he refers to as **“Exparte Applicant’s Statement and Petition”** dated 13<sup>th</sup> February, 2018. He sought the following orders:

*1. THAT pending the hearing and determination of these Judicial Review proceedings, the Honourable Court be pleased to issue an order staying prosecution of the exparte applicant in the Bungoma Chief Magistrate’s Anti-Corruption Court Case No. 1 of 2017 and lift the suspension of the ex parte applicant from his employment in pursuant to the prosecution.*

*2. THAT this Honourable Court be pleased to issue an Order of Certiorari to remove and bring to this Honourable Court for the purpose of quashing the decision of the 1<sup>st</sup> Interested Party to recommend to the Respondent that the ex parte applicant be charged with the anti-corruption offence and the decision of the Respondent to direct prosecution of the Exparte Applicant Benson Khwatenge Wafula via the Office of the Director of Public Prosecutions letter dated 11<sup>th</sup> December, 2017 and in the consolidated charge sheet in an Anti-Corruption Case No. 1 of 2017 Republic –vs- Godfrey Sifuna Wanyonyi & 7 others before the Chief Magistrate’s anti-Corruption Court in Bungoma.*

*3. That the Honourable Court be pleased to issue an Order of Prohibition prohibiting the Respondent from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in the Anti-Corruption Case No. 1 of 2017 between Republic –vs- Godfrey Sifuna Wanyonyi & 7 Others before the Chief Magistrate’s Court in Bungoma so far as they touch on or relate or however concern the 8<sup>th</sup> Accused (the Exparte Applicant herein) Benson Khwatenge Wafula in Count XII or in instituting any other charges in any other court against the Exparte Applicant over the alleged loss of public funds totaling to the sum of Kshs.7,793,366.00*

*4. THAT such further or other relief as this Honourable Court may deem just and expedient to grant in the circumstances.*

5. THAT costs of and incidental to the application be provided for.

2. Filed together with the "**Petition**" was a Notice of Motion of even date. It seeks the following orders;

1. THAT pending the hearing and determination of these Judicial Review proceedings, this Honourable Court be pleased to issue an order staying prosecution of the Exparte Applicant in the Bungoma Chief Magistrate's Anti-Corruption Court Case No. 1 of 2017 and lift the suspension of the Exparte Applicant from his employment issued in pursuant to the prosecution.

2. THAT this Honourable Court be pleased to issue an Order of Certiorari to remove and bring to this Honourable Court for the purposes of quashing the decision of the 1<sup>st</sup> Interested Party to recommend to the Respondent that the Exparte Applicant be charged with an anti-corruption offence and the decision of the Respondent to direct prosecution of the Exparte Applicant Benson Khwatenge Wafula via the Office of the Director of Public Prosecutions letter dated 11<sup>th</sup> December,, 2017 and in the consolidated charge sheet in an Anti-Corruption Case No. 1 of 2017 Republic –vs- Godfrey Sifuna Wanyonyi & 7 Others before the Chief Magistrate's Court in Bungoma.

3. THAT the Honourable Court be pleased to issue an Order of Prohibition prohibiting the Respondent from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in the Anti-Corruption Case No. 1 of 2017 between Republic –vs- Godfrey Sifuna Wanyonyi & 7 Others before the Chief Magistrate's Court in Bungoma so far as they touch on or relate or however concern the 8<sup>th</sup> Accused (the Exparte Applicant herein) Benson Khwatenge Wafula in Count XII or in instituting any other charges in any other court against the Exparte Applicant over the alleged loss of public funds totaling to the sum of Kshs.7,793,366.00

4. THAT such further or other relief as this Honourable Court may deem just and expedient to grant in the circumstances.

5. THAT costs of and incidental to the application be provided for.

3. On the 5<sup>th</sup> March, 2018 the court directed that the Attorney General should be enjoined to the proceedings to represent the 2<sup>nd</sup> Interested Party, hence the filing of the Amended Notice of Motion dated 5<sup>th</sup> March, 2018.

4. The Director of Public Prosecution (DPP) who is the Respondent filed Grounds of Opposition dated 4<sup>th</sup> April, 2018, while the 1<sup>st</sup> Respondent filed a Replying Affidavit. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties did not file any responses. The Petitioner/Exparte Applicant filed a Further Affidavit sworn on 16<sup>th</sup> April, 2018.

5. The parties through their advocates agreed to file written submissions which were highlighted during the hearing.

#### **THE PETITIONER/EXPARTE APPLICANTS' CASE**

6. The orders sought in the Petition and Application have been outlined above. The Petitioner/Exparte Applicant in his Supporting Affidavit has deponed that he was arrested by officers of the 1<sup>st</sup> Interested Party on 10<sup>th</sup> January, 2018 after the Respondent declined to have him as a prosecution witness. He appeared for plea before the Chief Magistrate's Anti-Corruption Court Bungoma for plea on 17<sup>th</sup> January, 2018.

7. He claims that the officers of the 1<sup>st</sup> Interested Party acted out of malice in having him arrested and charged since he did not commit any of the offences he is charged with. He goes on to state that he did not authorize any payments nor sign any cheques. That Nzoia Sugar Company bank accounts were investigated with the sole purpose of having him charged.

8. In summary, according to the Petitioner/Exparte Applicant, the 1<sup>st</sup> Interested Party's action to charge him was all done with malicious intentions.

9. **Mr. Masinde** appearing for him submitted that the Petitioner/Exparte Applicant is an advocate of the High Court of Kenya and holds a number of portfolios, one being the Company Secretary, Nzoia Sugar Company Ltd. He stated that the Petitioner/Exparte Applicant was charged with the offence of wilfully failing to comply with laws relating to the management of public funds, namely, Section 79 (2) (b) of the Public Finance Management Act No. 18 of 2012, authorizing payment of fictitious payment of claims from account No. 01001054695600. The said account is at National Bank of Kenya, Bungoma branch belonging to Nzoia Sugar Company Ltd. That the action led to a loss of public funds amounting to Kshs.7,793,366/=. He submitted that this offence is non-existent in law.

10. Thereafter, the Petitioner/Exparte Applicant was on 5<sup>th</sup> February, 2018 suspended from his employment pending the hearing and determination of the criminal trial. It was his submission that the Exparte Applicant did not commit any of the acts complained as it was not in his line of duty. He went on to outline his duties.

11. He also submitted that there is absolutely no evidence against the Exparte Applicant as no new evidence against him had emerged. He accused the investigating officer of acting maliciously against the Exparte Applicant. Further, that arraigning him in court without carrying out proper investigations violated his constitutional rights to a fair trial and due process.

12. Counsel relied on the following cases to buttress the Exparte Applicant's submissions; **Joram Mwenda Guantai –vs- Chief Magistrate's Nairobi Civil Appeal No. 228 of 2003**; **Stanley M. Githunguri –vs- Republic [1985] KLR 91**; **Praxides Namoni Saisi –vs- Director of Public Prosecution and Ethics & Anti-Corruption Commission, Nairobi Misc. Civil Application No. 502 of 2015** among others.

13. He further submitted that this Court has jurisdiction to grant the prayers sought without regard to technicalities. He accused the Respondent and Interested Party of abusing the due process by charging the Exparte Applicant.

### **THE RESPONDENT'S CASE**

14. The Respondent filed Grounds of Opposition in which he stated that it received a report from the 1<sup>st</sup> Interested Party under Section 35 (1) of the Anti-Corruption and Economic Crimes Act (ACECA) and Section 11 (1) (d) of the Ethics and Anti-Corruption Commission Act (EACCA) and made a decision to prosecute under the law.

15. Further, that the issues raised by the Petitioner were matters of sufficiency or otherwise of the evidence to charge which is not the reserve of the Constitutional or Judicial Review court but the trial criminal court. **Mr. Ashimosi** submitted that it had not been shown where the Respondent had erred, or acted unreasonably.

16. He said the law is that, courts should not usurp the constitutional mandate of the DPP as conferred by Article 157 of the Constitution. On this, he referred to the case of **Kenya Commercial Bank Ltd. & 2 Others –vs- Commissioner of Police & Another, Nairobi Petition No. 218 of 2012 [2013] eKLR**. He also referred to the case of **George Joshua Okungu & Another –vs- Nairobi Chief Magistrate Anti-Corruption Court & Another [2014] eKLR**.

17. Finally, he submitted that the Petitioner had failed to prove breach of any provision of the Constitution or any other written law or rules made thereunder to warrant any interference by this Court.

### **1<sup>ST</sup> INTERESTED PARTY'S CASE**

18. The 1<sup>st</sup> Interested Party filed a Replying Affidavit through Timothy Wahome an investigator with the 1<sup>st</sup> Interested Party. He deponed that the commission received a complaint of misappropriation of public funds by some employees of Nzoia Sugar Company Ltd. Investigations were carried out and the findings are outlined at paragraph 9 (a) – (h) of his affidavit.

19. A report and recommendations under Section 35 of ACECA were then made to the Respondent. Further investigations were conducted in respect of some cheques and the company's bank account No. 01001054695600 held at National Bank of Kenya Ltd., Bungoma branch. The findings are at paragraph 17 of his affidavit. These further findings were submitted to the Respondent who agreed that the Exparte Applicant should be charged for mismanaging public funds. He denied that any malice had been applied in this case.

20. **Mrs. Odipo** for the 1<sup>st</sup> Interested Party opposed the Petition and the Application. She relied on the Replying Affidavit, Written Submissions and Authorities filed. She pointed out that from a look at what was filed it was not clear what the Petitioner/Exparte Applicant sought as no declarations or violations had been cited. Further, that the orders sought can't be granted in a constitutional petition.

21. She further submitted that the Applicant had sought for Judicial Review orders in a Notice of Motion. More so, she said the orders sought can't be issued because no **leave** was sought before the application was filed. She referred to the case of **Sylvana Mpabwanayo Ntaryamira –vs- Allen Waiyaki Gichuhi [2016] eKLR** among others. She stated that the issue of a defective charge sheet should be addressed by the trial court. She referred to the case of **Thuita Mwangi & 3 Others –vs- Ethics and Anti-Corruption Commission & 3 Others (2013) eKLR**.

22. On the suspension of the Applicant, she submitted that the same was provided for under Section 62 of ACECA and was therefore lawful and discharging it would be against public interest. On this, she referred to the case of **Ethics and Anti-Corruption Commission –vs- The Attorney General Exparte Patrick Gichunge Mwambia & Another, Meru Judicial Review No. 25 of 2016**.

23. It was her further submission that there was no law barring one from being a prosecution witness to a suspect. That in this case, new evidence had come up and the investigating officer had applied it well. Further, that the investigating officer had lawfully acted under Section 23 (3) and (4) ACECA and Section 118 Criminal Procedure Code to carry out further investigations. She cited the case of **Busia County Government –vs- Ethics and Anti-Corruption Commission [2016] eKLR**. She submitted that the Exparte Applicant had not placed before the court any evidence to show that the investigating officer had acted with malice.

24. In a rejoinder, Mr. Masinde submitted that the Petition is clear on what they wanted and they did not require leave to file a constitutional petition. It was his case that there was no reason for investigating the Applicant hence the reading of malice in the whole investigation.

### **DETERMINATION**

25. I have considered all the pleadings, affidavits, submissions and authorities filed herein. Before this Court is what looks like a Petition but filed as a Judicial Review Application and vice versa. The title of what was filed is **“Judicial Review Division Misc. Civil Application No. 62 of 2018”**. It goes on to cite violation of several provisions of the Constitution, Fair Administration Act and The Office of the Director of Public Prosecution Act (ODPPA). He then quotes Section 8 and 9 of the Law Reform Act and Order 53 Civil Procedure Rules.

In his introduction, he states;

***“The humble petition of Benson Khwatenge Wafula, the Exparte Applicant ...”***

26. In his own pleadings, he refers to himself as the Petitioner as well as an Exparte Applicant. That is how dramatic what is before me is. Is it therefore a Petition or a Judicial Review Application?

27. In the Petition cum Judicial Review Application, he is applying for the following orders;

- (i) Stay of proceedings in the lower court;
- (ii) Order of certiorari; and
- (iii) Order of prohibition.

This falls under the purview of Judicial Review. Order 53 Civil Procedure Rules deals with Judicial Review applications. It provides as follows;

***R1 (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.***

***R1 (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.***

28. The Petitioner/Exparte Applicant herein never sought the **leave** of the Court to file the Judicial Review. In his response, Mr. Masinde submitted that one did not need **leave** to file a constitutional petition. That is the position in law that one does not require **leave** to file a constitutional petition.

29. Is what is before this Court a Petition or Judicial Review Application?

One thing that is clear is that no **leave** was sought to file the pleadings as is required under Order 53 Civil Procedure Rules. Therefore, the procedure adopted by the “Exparte Applicant” is wrong and would be the basis for striking out this Judicial Review application together with the Notice of Motion dated 5<sup>th</sup> March, 2018.

30. However, in the interest of justice, I will treat the pleadings as a Petition and consider it on its merits. Has the petitioner established his case to warrant the issuance of the orders sought?

The Petitioner’s complaint is four fold;

- (i) That there was no evidence to warrant his being arrested and charged;
- (ii) That he is facing a defective charge;
- (iii) That he should not have been suspended; and
- (iv) Stay of lower court proceedings against him.

***(i) Insufficiency of Evidence.***

31. The petitioner has accused the 1<sup>st</sup> Interested Party and the investigating officer of doing a shoddy job. That he had all along been treated as a prosecution witness but later, he was made a suspect. The investigation officer in his Replying Affidavit explained how he obtained evidence that incriminated the Petitioner. Search warrants were lawfully obtained from the court under Section 23 (3) and (4) ACECA and Section 180 of the Evidence Act and Section 118 of the Criminal Procedure Code.

32. The procedure of seeking such warrants is exparte unless the court directs otherwise. The investigating officer could not access the bank account of the sugar company without a search warrant. This was applied for to assist them complete the investigations.

33. The Petitioner has alleged that the investigating officer was biased against him and he read malice in the action of obtaining search warrants by the investigating officer.

Section 107 (1) of the Evidence Act provides;

***“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

34. It was therefore incumbent upon the Petitioner to demonstrate before this Court the investigating officer’s malice and bias.

35. It is true that the Petitioner had all along been treated as a prosecution witness. After the further investigations, the new evidence was presented to the DPP (Respondent) with recommendations. The respondent in exercise of his mandate under Article 157 (10) and (11) recommended that the Petitioner should be charged.

36. It was again the duty of the Petitioner to demonstrate to this Court that the Respondent in recommending that he be charged acted

unlawfully, maliciously or contrary to the laid down procedures and written law.

37. The court can only interfere where it has been clearly shown that the 1<sup>st</sup> Interested Party went beyond their mandate as they carried out their duty. See *Kenya Commercial Bank Ltd. & 2 Others –vs- Commission of Police and Another, Nairobi Petition No. 218 of 2012*. There is no law which says that a prosecution witness can never become a suspect and vice versa.

38. The Petition has dwelt so much on the issue of **“insufficiency of evidence.”**

The sufficiency or insufficiency of evidence in a matter pending before another court is not for this Court to determine. The trial court is the best placed court to hear the evidence and make a determination. This Court would only analyze that evidence at the appropriate time if the matter comes up on appeal.

### **(ii) Defective Charge**

39. It has been alleged that the Petitioner is facing a non-existent charge before the Magistrate’s Court. Again, the Petitioner has not shown the inability of the trial court to deal with the issue. There are well set provisions of the Criminal Procedure Code which deal with the issue of defective charge sheets.

40. *Majanja J.* in the case of *Thuita Mwangi & 2 Others –vs- Ethics and Anti-Corruption Commission & 3 Others (2013) eKLR* while faced with a similar issue, had this to say;

**“90. The petitioners contend that there was duplicity of charges and that the charge sheets were defective. I agree with the respondents’ submission that issues of competency of charge sheets are matters perfectly within the jurisdiction of the trial court. I am satisfied that matters of competence of the charge sheets are catered for under sections 89(5), 137 and 214 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya).**

**91. I agree and adopt the holding of the court in *William S. K. Ruto and Another v Attorney General Nairobi HCCC No. 1192 of 2005 [2010] eKLR* where it stated, “The applicants only need to move the trial magistrate to strike out the charge for being incompetent or the prosecution can seek to substitute the charges. The fact that the charge is defective does not raise a Constitutional issue.”**

My finding is that the said concern should be raised before the trial court.

### **(iii) The Petitioner’s Suspension**

41. It is not in dispute that suspension of the Petitioner only occurred after he had been arraigned in court to face the charges.

Section 62 of the ACECA provides;

**“(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) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.**

**(5) The following shall apply with respect to a charge in proceedings instituted otherwise than by or under the direction of the Attorney-General—**

**(a) this section does not apply to the charge unless permission is given by the court or the Attorney-General to prosecute or the proceedings are taken over by the Attorney-General; and**

**(b) if permission is given or the proceedings are taken over, the date of the charge shall be deemed, for the purposes of this section, to be the date when the permission is given or the proceedings are taken over.**

**(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.**

**(7) This section does not apply with respect to a charge laid before this Act came into operation.”**

42. The Petitioner has been charged with a corruption and economic crime related offence, and is therefore subject to the suspension under

Section 62 ACECA. Suspension is not permanent.

43. *Wendo J.* in the case of *Gichinge Mwambia & Francis Atanasio, Kithure, Meru Judicial Review No. 25 of 2016* on the said issue of suspension had this to say;

***“Would the public have faith in such officer, that he will serve them faithfully when such allegations hang on his head? Granting a stay order in such a case would be sending the wrong message to the public, that even if you are indicated for corruption and economic crimes, you can still sit put in your office and transact business as usual even when things are not normal. The applicants should be cleared first. Grant of the order of stay is a discretionary one and can be denied even if deserved. In this case, the order of stay would be against public interest.”***

44. This Court would therefore have no reason to interfere with the suspension. A further decision will be made when the Petitioner is discharged, acquitted or otherwise, dealt with by the lower court.

***(iv) Staying of The Lower Court Proceedings Against The Petitioner***

45. Having found as I have in issues Nos. (i) – (iii), it is clear that there is absolutely no basis for staying the proceedings in the Chief Magistrate’s Court. Staying the proceedings would result in unnecessary delays in hearing and determining the case. The Petitioner has been charged and the matter has been fixed for hearing and should be allowed to proceed.

46. All in all, I find no merit in this Petition/Judicial Review Application and I dismiss it with costs.

***Dated, signed and delivered*** in open court at Nairobi this ***24<sup>th</sup>*** day of ***May, 2018*** at Nairobi.

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**HEDWIG I. ONG’UDI**

**HIGH COURT JUDGE**