



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 24 OF 2016

REPUBLIC.....APPLICANT

VERSUS

ETHICS & ANTI CORRUPTION COMMISSION.....1ST RESPONDENT

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

DR. WILLIAM N. OKEDI.....EX-PARTE APPLICANT

JUDGMENT

1. The Applicant **Dr. William N. Okedi** filed the Notice of Motion dated 22nd August, 2016 seeking the following orders;

a. An Order of Prohibition, prohibiting the respondents by themselves, agents and or servants from commencing, proceeding with, charging and/or prosecuting the applicant in any pretended corruption/criminal proceeding arising from the 2013 procurement of Consultancy Services of Management of Funding to Civil Society Organizations under the Alcoholic Drink Control Act, 2010.

b. An Order of Certiorari to remove and bring to this Honourable Court for purposes of quashing, the decision of the respondents to prosecute the applicant and the proceedings contained in the Charge Sheet referenced as CR. No. 148/17/2016 or as amended and presented to Court on 3/8/2018 under Court File NO. 10/16.

c. An Order of Mandamus compelling the respondents to investigate, charge and prosecute the persons responsible for NACADA's loss of Kshs.68,000,000/- arising from the irregular engagement of media services during the 2013/2014 financial year.

He relied on the verifying affidavit, statutory statement, submissions and authorities to support his application.

THE APPLICANT'S CASE

2. It is the Applicant's case that he is the Chief Executive Officer (CEO) of the National Authority for the

Campaign Against Alcohol & Drug Abuse (NACADA) since April 2012. As the CEO of NACADA, he serves as an ex-officio member of NACADA Board of Directors and attends Board meetings. He claims to have fully dedicated himself to the service of the organization since his appointment. That this can be attested to by the Board of Directors which has highly rated his performance.

3. He averred that when **Mr. John Mututho** became the Chairman of NACADA in September, 2013 he vowed to have him removed through hook or crook. To further his agenda, Mr. Mututho embarked on activities bent on undermining his leadership of NACADA, to frustrate him by depicting him as corrupt and a non-performer. He was clearly bent on having him removed from office, he deponed.

4. He deponed that to accomplish his agenda, Mr. Mututho did a number of things against him, among them;

*i. Institution of a **Constitutional Petition No. 420 of 2014 – Charles Omanga –vs- Dr. William Okedi & 3 Others**. This petition is still pending.*

ii. He used his friends at EACC to harass him over NACADA affairs, by pretending to be carrying out investigations. He referred to several letters from Mr. Mututho to the 1st Respondent and other State Agencies (WN-7).

iii. The pretext that the tender process for the management for the Alcoholic Drinks control Fund was faulty (WN-9).

*iv. A sustained falsified negative media campaign of officers of the 1st Respondent to investigate the tender and the loss of shs.99,000,000/=. That investigations revealed that there had been no such loss. In spite of this a **Mr. Anthony Kahiga** came to his office and informed him of how he was going to be charged in respect of the said tender process.*

v. His being forced by Mr. Anthony Kahiga to leave his hospital bed and appear for plea taking of what he calls a pretended charge sheet on 3rd August, 2016. The same was deferred to 17th August, 2016.

5. The Applicant has averred that the preferred charges only go further to confirm that they are malicious, ill-conceived and an abuse of statutory and constitutional powers of the Respondent with the sole intention of removing the Applicant.

He avers that this could be seen in the way there was a rush to have him appear for plea on 3rd August 2016. Further, he was also charged under a repealed law, with Mr. Mututho and his ally **Dr. Charles Nzai** as the sole witness.

6. The Applicant referred to the various counts in the charge sheet saying their particulars contradicted each other and that the questioned tender process had been regularly carried out (**WN-13**). He also claims that Mr. Mututho had used one of the Authority's officials to misappropriate close to shs.68 million at the time he was out of office. That the 1st Respondent had confirmed this in the course of the investigations but had refused to take action (**WN-14**) against Mr. Mututho and those concerned.

7. He blames Mr. Mututho for all the problems he has undergone. His belief is that the bad blood between him and Mr. Mututho has brought about all this. He winds by deponing that the Respondent's actions are unlawful, arbitrary, malicious, capricious, based on wrong interpretation of the law, unreasonable, discriminatory, actuated by bad faith, based on extraneous considerations, against his lawful legitimate and rightful expectation and taken in breach of the rules of natural justice.

8. **Mr. Agwata** for the Applicant in his written and oral submissions gave 4 reasons as the basis for the application viz;

- i. The criminal case facing the Applicant was initiated for an ulterior motive;*
- ii. The prosecution has been carried out in bad faith and with ill intention;*
- iii. There is breach of rules of natural justice;*
- iv. The court should intervene in view of the authority of the Director of Public Prosecution as enshrined in Article 157 (10) and (11) and the ODPP Act.*

9. He submitted that the Applicant's boss Mr. Mututho had always wanted to have the Applicant removed from office, hence his being the initiator of the investigations. He referred to the complaints raised by the Applicant as stated in the Replying Affidavit of Mr. Kahiga. In referring to the outcome, he said there were recommendations by PPOA for prosecution but nothing had been done. That even after the Applicant took plea, Mr. Kahiga still followed by asking Mr. Mututho to suspend him, yet Mr. Mututho was not his employer.

10. Mr. Agwata submitted that the Applicant was charged under Section 27 (2) of the PPDA 2005 which had been repealed and replaced by the new PPADA 2015 which took effect on 7th January, 2016. The Applicant took plea on 7th September, 2016. He referred to the case of **Republic –vs- Chief Magistrate's Court, Mombasa Exparte Mohamud Mohamed Hashi & 8 Others (2010) eKLR** to argue this point. It was his submission that the charges cannot be sustained in view of the repealed PPDA 2005.

11. He further submitted that if there was any breach under Section 27 (2) PPDA 2005 a procedure under the said Act ought to have dealt with that breach. That in this case, the said procedure was not followed and so such breach is not an offence under Section 45 (2) of Anti-Corruption & Economic Crimes Act (ACECA). Further, that counts No. 1 and 4 of the charges conflict each other. That the requirements for the Inspection and Acceptance Committee was repealed vide Legal Notice No. 106 of 18th June, 2013.

He finally submitted that NACADA did not lose any money and that the investigation and prosecution were tailored to meet certain goals and hence an abuse of the legal process. He referred to the case of **Republic –vs Director of Public Prosecution & 2 Others – Exparte Applicant Praxides Namoni Saisi [2016] eKLR**

THE 1ST RESPONDENT'S CASE

12. The 1st Respondent relied on the Replying Affidavit of Mr. Kahiga of 16th August, 2016 and 6th September 2016, the submissions and list of authorities.

Mr. Kahiga in his Replying Affidavit avers that the 1st Respondent acted within its mandate under Section 11 (1) (d) of ACECA when it received the documented reports (AK1) and acted on them by investigating the complaints. After completion of the exercise, a report was done and forwarded to the 2nd Respondent (AK-7) as per Section 35 of ACECA as read with Section 11 (1) (d) of the EACC Act 2011. The key issue was whether the procurement of Ernest Young as the Fund Manager for NACADA to fund and disburse money to civil society organizations was regular. He annexed several documents to his Replying Affidavit in respect of this investigations carried out.

13. **M/s. Ocharo** for the 1st Respondent in opposing the application submitted that the Applicant had failed to prove that the 1st Respondent had acted illegally, irrationally and unprocedurally. She explained what these terms meant i.e.

i. Illegality is when the decision making authority commits an error of law in the process of taking or making an act, the subject of the complaint e.g. acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles.

ii. Irrationality is when there is such gross unreasonableness in the decision taken or act done,

that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision.

iii. Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the rules of natural justice or procedural fairness.

It was her submission that the Applicant had failed to prove any of the above. All the documents relied on to arrive at the decision were made available through the Replying Affidavit of Mr. Kahiga.

14. She submitted that the bad blood between the Applicant and Mr. Mututho cannot be said to be a sign of bad faith by the 1st Respondent. That the Applicant had a duty to prove his allegation of bad faith on the part of the 1st Respondent. It was her submission that there was no evidence of malice, excessive jurisdiction, harassment and intimidation. She confirmed that Mr. Mututho had recorded a statement with the 1st Respondent, which statement it had acted on.

15. On the issue of refusal by the 1st Respondent to act on a complaint regarding shs.99 million disbursement to unregistered societies, she referred the court to Mr. Kahiga's Replying Affidavit and in particular annexure AK2. To be observed are the date it was written and the date of the receipt and the handwritten notes.

That it was clear that there was no refusal to act on the complaint. She further submitted that Section 27 PPDA 2005 was repealed on 7th January, 2016 while L.N. No. 106 of 18th June, 2013 came into play way after the contract had been entered into and that they were covered under Section 23 (3) (b) (c) (d) and (e) of the Interpretation and General Provisions Act (Cap 2) Laws of Kenya.

Finally, she submitted that the issues being raised in this Application by the Applicant can well be handled by the trial court.

THE 2ND RESPONDENT'S CASE

16. The 2nd Respondent in opposing the application relied on the Replying Affidavit of **Joseph Ruingu**, the written submissions and authorities. Mr. Joseph Ruingu in his Replying Affidavit sworn on 16th August, 2016 averred that he is a Prosecution Counsel in the 2nd Respondent's case and one of the Counsels seized of the conduct of this matter and familiar with the process leading to the decision to charge the Applicant and others. He deponed that the 2nd Respondent independently and thoroughly reviewed the evidence contained in the duplicate inquiry file No. EACC/F1/INQ/99/2015 and agreed with the recommendations of EACC and directed that prosecution should ensue. Under paragraph 6 – 26 he outlines the evidence that led them to the decision to charge. That the 2nd Respondent exercised its powers under Article 157 to arrive at the decision that was made.

17. He deponed that the Applicant had actually raised matters of evidence and his defence which should be deliberated on in the trial court and the basis of which his guilt or otherwise would be determined. That he had failed to show how the 2nd Respondent had abused his powers under the Constitution or any Statute.

18. In opposing the application, **Mr. Ndege** for the 2nd Respondent associated himself with the submissions by M/s Ocharo for the 1st Respondent. He submitted that the 2nd Respondent is conferred with the powers of prosecution and the charges the Applicant seeks to quash were preferred pursuant to those powers that the 2nd Respondent received and analysed the report by the 1st Respondent and elected to charge the Applicant. That there was no indication that the 2nd Respondent had acted without authority and that his rights were violated.

19. He further submitted that Article 252 (1) (a) of the Constitution and Section 7 (1) ACECA mandates the 1st Respondent to investigate complaints. The 1st Respondent acted within the law in making the report, on which the 2nd Respondent's decision was based. He said the decision was not made at the behest of Mr. Mututho. On the issue of the repealed law, he reiterated what had been submitted on by M/s Ocharo on behalf of the 1st Respondent.

REJOINDER BY THE APPLICANT

20. **Mr. Agwata** in his rejoinder reiterated that from the documents, it was very clear that there was a vendetta between the Applicant and Mr. Mututho. He referred to letters at page 168 (a) – (b) and 169 of the Application and the failure by the Respondent to act on the Applicant's complaint. This he said amounted to bias, and this could not await his day in court.

DETERMINATION

21. I have considered the application, affidavits, statutory statement, annexures, submissions and authorities cited by all parties. I find the issue falling for determination to be whether the Applicant has made out a case for the issuance of the Orders of Prohibition, Certiorari and Mandamus.

The Applicant filed his application under the Judicial Review regime in seeking the above orders. The application was brought under Order 53 Rule 3 and 4 Civil Procedure Rules, Section 8 (2) and (9) of the Law Reform Act Cap 26 Laws of Kenya and all enabling provisions of the law.

22. It is therefore important for this Court to establish what the extent and limits of Judicial Review are in a matter of this nature. The Court of Appeal in the case of **Kenya National Exam Council –vs- Republic Exparte Geoffrey Gathenji Njoroge & 9 Others Civil Appeal No. 266 of 1996 [1997] eKLR** discusses clearly the extent and limits of the Orders of Certiorari, Prohibition and Mandamus which are sought in this application. In **Municipal Council of Mombasa –vs- Republic & Umoja Consultants Ltd., Civil Appeal No. 185 of 2001**, the Court of Appeal set out the parameters of Judicial Review when it held as follows;

“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.”

23. The key elements that concern a court dealing with Judicial Review were well set out in the **Ugandan High Court Case of Pastoli –vs- Kabali District Local Government Council & Others [2008] 2EA 300-301**. The court stated thus;

***“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety
.....***

“Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality

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

***“Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision*”**

24. The Supreme Court of Kenya in the case of ***Peninah Nadako Kilishwa –vs- Independent Electoral Boundaries Commission (IEBC) and 2 Others (2015) eKLR*** stated this on Judicial Review;

“The well-recognized principle in such cases, is that the court’s target in Judicial Review, is always no more than the process which conveyed the ultimate decision arrived at. It is not the merits of the decision, but the compliance of the decision making process with certain established criteria of fairness. Hence an Applicant making a case for Judicial Review has to show that the decision in question was illegal, irrational or procedurally defective.”

25. It is upon the Applicant to prove any or all of the above-mentioned elements to establish his case. There is no dispute that the 1st Respondent has a clear cut out mandate to receive complaints in corruption and economic crimes related cases and carry out investigations. It may also conduct investigations on its own initiative.

Section 11 (1) (d) of the Ethics & Anti-Corruption Commission Act provides;

“investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution;”

Article 252 (1) (a) of the Constitution provides;

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

Under Section 35 of ACECA mandates the 1st Respondent after investigations to forward its report and recommendations to the 2nd Respondent.

26. The 2nd Respondent’s mandate is outlined under Article 157 of the Constitution, which provides;

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(9)The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

It is nowhere claimed by the Applicant that the Respondents' actions were ultra vires their powers.

27. His claim is that the person who complained to the 1st Respondent against him had a personal vendetta with him, and wanted him out of the office by any means. The material before this court shows that the Applicant was the CEO while Mr. Mututho was the Chairman both of NACADA.

That there were complaints raised by Mr. Mututho against the Applicant, this led to his being investigated and charged.

28. The 1st Respondent who investigated the complaints against the Applicant filed before this Court copies of print reports of complaints, (AK1). One of the investigators, Antony Kahiga in his replying affidavit at paragraph 11 avers that the complaints in AK1 led to investigations into the irregular procurement of the fund disbursement agency by NACADA. They even wrote the Applicant asking for documentation (AK2). It is the Applicant's case that the 1st Respondent's officers were influenced by Mr. Mututho while carrying out investigations. These are very serious allegations touching on the integrity of these officers, yet the Applicant did not file any evidence before this Court to confirm his allegations.

If the Applicant had any concrete materials in his possession to confirm this alleged influence by Mr. Mututho, nothing could have stopped him from producing or availing it in court.

29. The 1st Respondent has a duty to investigate complaints. All those found to be unfounded are dismissed. The 1st Respondent states that it found the complaints against the Applicant to be sustainable and made recommendations to the 2nd Respondent.

Again, the 2nd Respondent was not bound by the 1st Respondent's recommendations. It had to independently review the file and make its own decision. It was the duty of the Applicant to prove to this Court that the complaints against him to the 1st Respondent had no foundation at all, save for the vendetta.

30. The complaints involve a public entity headed by Mr. Mututho. As the head of NACADA he had a duty to report any malpractices in his organization. Furthermore, the 1st Respondent could not decline to carry out its duty of investigating the complaint just because the Applicant and Mr. Mututho had their own personal differences. The investigations were not on the personal differences but on NACADA and the procurement complained of.

Secondly, if Mr. Mututho failed to take action just because he had personal differences with the Applicant, he could have been failing in his duty as head of that organization which is run by use of public funds.

Mr. A. Kahiga in his replying affidavit annexed all the documents they used in their investigations, while Mr. Riungu annexed all documents used in reviewing the file i.e. AK 1-7 and JGR 1-7.

31. It is noted that the Applicant strongly believes that the vendetta between him and Mr. Mututho has led to him being charged and arraigned in court. Given that there was bad blood between them, the issue is whether this bad blood influenced the decision arrived at by both the 1st and 2nd Respondents to have him charged.

It was the Applicant's burden to prove this to the court. All he has done is to raise his defence to the charges facing him through the affidavits and submissions filed herein. It is nowhere alleged by the

Applicant that his rights were violated in the course of the investigation and his appearance in court. He was informed of the complaints; documents were requested for from him and he even recorded statements.

32. There is a prayer for mandamus to issue against the Respondents to investigate, charge and prosecute persons responsible for NACADA's loss of Kshs.68,000,000/= arising from the irregular engagement of media services during the 2013/2014 financial year.

The 1st Respondent has stated that it is investigating the matter and even the Applicant has recorded statements. It admitted that the investigation has taken long but it was at it. The court cannot therefore issue an order to compel them to do what they are already doing. To compel the Respondents to charge and prosecute persons would really amount to interfering with their constitutional mandate.

33. An issue was also raised about the Applicant having been charged under a law that was repealed.

It is true the PPDA 2005 was repealed and in its place we have the PPADA 2015. Section 182 (1) PPADA 2015 provides;

“The Public Procurement and Disposal Act, 2005 is repealed.”

It is the Applicant's submission that there is no saving provision in the PPADA 2015 for the offences facing him.

A number of authorities have been cited to support this argument. In the case of ***Republic –vs- Chief Magistrate's Court Mombasa Exparte Mohamed Mohamed Hashi & 8 Others [2010] eKLR***, the ***Hon. Justice Ibrahim*** (as he then was) had this to say;

“I have carefully considered the submissions of both counsel, the repealed law and provisions in the new Act. I find two problems;

The first is that it is a fact that the section 454 (1) which repealed it did not have an express saving or transitional provision. This omission had deprived or denied the prosecution the direct and unchallengeable right or advantage of proceeding with the prosecution and the court to continue with the trial. This is why the Respondent is left ill-equipped to fall back to interpretive provisions in other Statutes rather than the express and possessive takeover of the repealing Statute. Without invoking the Interpretation and General Provisions Act, the prosecution is faced with a fait accompli position, to wit, there is no saving of the offence under the repealed Section 69 of the Penal code to enable the prosecution and the court to continue with the case.”

34. I would at this juncture wish to point out that in the case of ***Mohammed & Others***, it was noted by the court that the new Act came into force on 1st September, 2009 while the case was on going and in fact the prosecution had just closed its case. In the present case, the new Act came into force on 7th January, 2016 and the Applicant was charged in August, 2016.

Another case referred to is ***Republic –vs- Public Procurement Administrative Review Board & 2 Others Exparte Coast Water Services Board & Another [2016] eKLR*** where ***Odunga J.*** States;

“In this case, the new 2015 Act in schedule 3 provided for transitional provisions. Section 1 of the said schedule provided that; “procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act”. In my view what the said clause preserved were procurement proceedings commenced before the commencement date of the new 2015 Act”.

35. Mr. Agwata therefore submitted that a charge could not be founded on repealed legislation as was held in the cases of ***David Andala and Ahiva Albert –vs- Republic [2016] eKLR*** and ***Sigilani –vs- Republic [2004]***.

M/s Ocharo and Mr. Ndege for the Respondent relied on Section 23 (3) of the Interpretation and General Provisions Act Cap 2 in defence of the Respondents' action. The said section provides;

“.....where a written law repeals in whole or in part another written law, then unless a contract intention appears the repeal shall not –

a. Revive anything not in force or existing at the time at which the repeal takes effect; or

b. Affect the provisions operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

c. Affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

d. Affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

e. Affect an investigation, legal proceeding or remedy; in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

36. Mr. Agwata in response submitted that this provision bars the Respondents from reviving anything not in force or existing at the time at which the repeal takes effect. To him the prosecution of the Applicant was not in place on 7th January, 2016 at the time the repeal of Section 27 (2) of the PPDA 2005 was taking effect and it therefore follows that the said prosecution could not be revived in August, 2016 following the repeal of the Act.

37. From what has been presented before this court, complaints on the impugned procurement started reaching the 1st Respondent in June, 2015 and investigations commenced. This confirms that as at the time of the enactment of the new PPADA 2015 investigations were ongoing and there was therefore no prosecution in place. According to the above provision, it is only what is in existence that can be revived. In this case, it provides;

“The repeal shall not affect any investigation.....and any such investigations.....may be instituted, continued.....as if the repealing written law had not been made.”

38. The new Act has the transitional provisions in its third schedule. Sections 1 – 6 of the said schedule deal with procurement proceedings. However, Section 7 of the third schedule talks of both ***procurement proceedings*** and ***contracts***. It deals with investigations, inspections, assessments and audits relating to prior contract (margin notes). It provides as follows;

“Section 43 of this Act shall apply to procurement proceedings and contracts formed before the commencement of this Act including contracts that are no longer in force at the commencement date of this Act.”

39. My view on this is that under Section 7 of the third schedule, both procurement proceedings and contract were saved under the new Act.

The matter which is the subject of the Criminal Case against the exparte Applicant is a procurement and contract signed in 2013 when the PPDA was operational.

The functions of the EACC are well set out in Section 7 of ACECA Cap 65 as follows;

“(a) to investigate any matter that, in the Commission’s opinion raises suspicion that any of the following have occurred or are about to occur.

- (i) conduct constituting corruption or economic crime;**
- (ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;**
- (b) to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime’**
- (c) to assist any law enforcement agency of Kenya in the investigation of corruption or economic crime.**
- (d) at the request of any person, to advise and assist the person on ways in which the person may eliminate corrupt practices;**
- (e) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures that, in the opinion of the Commission, may be conducive to corrupt practices.**
- (f) to advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such bodies that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt practices.**
- (g) to educate the public on the dangers of corruption and economic crime and to enlist and foster public support in combating corruption and economic crime;**
- (h) to investigate the extent of liability for the loss or damage to any public property and –**
- (i) to institute civil proceedings against any person for the recovery of such property or for compensation; and**
- (ii) to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya; and**
- (iii) to carry out any other functions conferred on the Commission by or under this Act or any other law.”**

Additional functions of the Commission are as set out under Section 11 of the Ethics and Anti-Corruption Commission Act as follows:

“(a) in relation to State officers?

(i) develop and promote standards and best practices in integrity and anti-corruption;

(ii) develop a code of ethics;

(b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anticorruption;

(c) receive complaints on the breach of the code of ethics by public officers;

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution;

(e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;

(f) oversee the enforcement of codes of ethics prescribed for public officers;

(g) advise, on its own initiative, any person on any matter within its functions;

(h) raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), as to confidentiality;

(i) subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices;”

40. I do not therefore agree with the submission that the 1st Respondent could only investigate NACADA on breaches of the PPDA 2005 on appointment by the Public Procurement Oversight Authority (PPOA). The 1st Respondent may investigate any complaint related to its functions either on receipt of a complaint or on its own initiative. Section 7 of the 3rd Schedule of the PPADA 2015 read together with Section 23 (3) of the Interpretation and General Provisions Act answer the issue raised by the Applicant on the repealed Act.

41. The decision being contested was made by the 2nd Respondent upon evaluating the material placed before it by the 1st Respondent who carried out the investigation. The said decision was not made by Mr. Mututho with whom the Applicant has or had issues. It was not enough for the Applicant to simply state that because of the bad blood between him and Mr. Mututho the investigations by the 1st Respondent and the decision by the 2nd Respondent could not stand the test of time. He had the burden to place before this Court material to show that the investigations and decision were influenced by the bad blood between the two of them.

42. This innocence or otherwise in the criminal case will only be established by the trial court as was held in *Meixner & Another –vs- Attorney General [2005] 2 KLR 189* which stated;

“Judicial Review is concerned with the decision making process and not with the merits of the decision itself. Judicial Review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to Judicial Review. A decision can be *upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise, of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General, and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the Prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Penal Code and the Evidence Act. There are also constitutional safeguards stipulated in Section 77 of the Constitution to be observed in respect of both criminal prosecution and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review Court to embark upon exam and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the Judicial Review Court. It would indeed, be a subversion of the law regulating criminal trials if the Judicial Review Court was to usurp the function of a trial court.”

43. I have considered the Applicant’s case as well as the Respondent’s case. I find this to be a case where the Respondents should be given an opportunity to present to the trial court the evidence they have. This evidence will be tested through cross-examination and the Applicant will have a chance to state this case.

The Applicant will also be at liberty to raise any preliminary issues he may want to before the trial court.

He has not claimed that he will not be given a fair hearing before the said court. There are sufficient safeguards under the Constitution, Criminal Procedure Code and Evidence Act for the criminal process. In my view, that is the best way to have this matter handled.

44. In conclusion, I find no merit in the Notice of Motion dated 22nd August, 2016 to make this Court halt the criminal proceedings. The application is dismissed with costs to the 1st and 2nd Respondents.

Signed, dated and delivered this 29th day of March, 2017 at Nairobi

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HEDWIG I ONG'UDI

HIGH COURT JUDGE