



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC MISC. APP. NO. 14 OF 2017
MARTIN NYAARI.....APPLICANT
VERSUS
DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT
R U L I N G

1. The Applicant filed an application in court on the 2nd February 2017 pursuant to **Articles 10, 22(1), (2), 23(3)(f), 47(2), 48, 157(11), 158(1) and 165(3)(d)(II)** of the **Constitution of Kenya 2010**, **Section 5(4)(e)** of the **Office of Director of Public Prosecutions Act**, **Sections 2 and 5(2)(b)** of the **Fair Administrative Action Act**, **Section 8 and 9** of the **Law Reform Act** and **Order 53 rule (1), (2), (3), (4) of the Civil Procedure Rules, 2010** seeking orders of mandamus against the Director of Public Prosecutions (herein the DPP).
2. The orders sought to compel the DPP to review the summary of findings of the Ethics and Anti-Corruption Commission Report and recommendations, submitted to him by a letter reference EACC. 6/27/2VOL. X (378), dated 16th December 2016 and received on January, 3, 2017 and to compel the DPP to provide written reasons for the decision made in consequence of reviewing the summary of the findings of the EACC Report and recommendations.
3. The DPP filed a response stating that he had already reviewed the report submitted by the EACC and made a decision thereon which was published on the website of the Office of the DPP for public information. He further averred that the application for mandamus was in respect of an action that had already been overtaken by events and was therefore superfluous and ought to be either withdrawn or dismissed with costs.
4. When the matters came before the court on 20th March 2017, Mr. Otongo learned counsel for the Applicant admitted that their application had been overtaken by events and applied to withdraw it. He prayed that there be no order as to costs.
5. Learned State Counsel Mr. Ashimosi appearing for the Respondent raised no objection to the application for withdrawal but urged the court to exercise its discretion and grant costs to the Respondent. He argued that the application was an abuse of court process as it was filed for extraneous purposes as part of the process to commence the removal of the Auditor General while purporting to sue the DPP and had not therefore been filed for genuine reasons.
6. Mr. Ashimosi contended that simultaneously with the application the Petitioner filed a petition in

parliament 'NK2' for the removal of the Auditor General pursuant to Article 250 of the Constitution. He pointed out that at no time did the Applicant write to the DPP to find out the progress of the matter as far as the DPP was concerned. That by the time this application was served on the DPP he had already made his decision in this matter.

7. Counsel urged that upon realizing that the application had been overtaken by events the petitioner withdrew his petition No. 6 of 2017 and filed another No. 7 of 2017. He averred that the application was therefore an abuse of court process and prayed for costs.

8. I have considered the brief arguments made by the two counsels on whether the prayers for costs by the DPP should be granted and note two things. First, is that the office of DPP as established by **Article 157** of the **Constitution** is an independent office. The functions of the office of DPP are to initiate prosecutions, take over prosecutions initiated by other persons/authorities and, in some cases, discontinue prosecutions. In performing these functions, the DPP has the responsibility to ensure the Constitution and the values therein are observed while under **Article 157(11)**, the DPP is required to take into account public interest in the discharge of his functions.

9. By the provision of **Article 157 (10) and (11)** respectively 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. 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.

10. By attempting to compel the DPP to review the report submitted by the EACC the Applicant was in essence attempting to direct or control the DPP in the exercise of its functions contrary to **Article 157(10)**. The court was told that the office of the Director of Public Prosecution had already reviewed the findings submitted to it by EACC and made its own decision which was published on their website for public information by the time the Applicant filed this application.

11. Mr. Otongo argued that the application was filed before the DPP's determination was made public. The logical sequence of events would have been however, for the Applicant to communicate with the Office of the DPP if he wanted to find out the progress of the matter before considering the option of going to court to seek Judicial Review orders.

*12. The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It is the duty of court to stop such abuse of the justice system. – see **Peter D'Costa vs AG & Anor, Petition No.83/2010 (U.R.)***

13. On the question of costs, under **Section 27(1) of the Civil Procedure Act** subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge. The court is vested with full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid.

14. Even where the court has no jurisdiction to try a particular suit this is no bar to the exercise of those powers. The provision is that the costs of any action, cause or other matter or issue shall follow the event unless the court shall for good reason otherwise order. In this case it is obvious that the application for judicial review order was unnecessary and having been withdrawn the costs must follow the event. In the premises costs of the application are hereby granted to the Respondent.

DATED and DELIVERED at NAIROBI this 23rd day of March, 2017

L. ACHODE

JUDGE