



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA, AT NAIROBI
ANTI-CORRUPTION & ECONOMICS CRIME DIVISION
ACEC MISC. APPLICATION NO. 44 OF 2016

REPUBLICAPPLICANT

VERSUS

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION2ND RESPONDENT

AND

STEPHEN NGELU

Speaker of the County Assembly of Makueni.....EXPARTE

JUDGMENT

1. The Applicant filed the amended Notice of Motion dated 23rd November, 2016 pursuant to leave granted on 1st November, 2016. The Application was brought under Order 53 Rule 3 and 4 Civil Procedure Rules and Section 1(a) (b) and 3(a) Civil Procedure Act and all enabling provisions of the law.

The Applicant sought the following orders:

- a) An Order of Certiorari removing into this Honourable Court for purposes of the same being quashed part of the ruling in EACC No. 10 of 2015 before the Chief Magistrate’s Court at Machakos issued on the 24th October, 2016 by the Hon. L. Mbugua to the extent that it makes an Order for the investigations, with a view to preferring charges, of the Speaker of the County Assembly of Makueni.
- b) An Order of Prohibition to prohibit the Respondents and the State from initiating any investigations or prosecutions against the Speaker of the County Assembly of Makueni arising from the Order of the Hon. L. Mbugua issued in EACC No. 10 of 2015 before the Chief Magistrates Court at Machakos to the extent that it makes an Order for the investigations, with a view to preferring charges, of the Speaker of the County Assembly of Makueni.
- c) Costs of this suit; and
- d) Any other remedy that the court deems fit and just.

2. The Application is supported by the grounds in the Statutory Statement and the Affidavit of Stephen Ngelu. The Applicant is challenging the Ruling by Hon. L. Mbugua, Chief Magistrate (as she then was) in Machakos ACC No. 10 of 2015 on the grounds that it was illegal, irrational and unreasonable. Secondly, that it was made unilaterally and arbitrary without according the Applicant an opportunity to be heard, since he was not a party to the said proceedings.

3. The Attorney General filed grounds of opposition on behalf of the 1st and 3rd Respondents dated 22nd February, 2017. They are as follows;

a) That Section 6 of the *Judicature Act* provides that no judge or magistrate and no other person acting judicially shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty.

b) That Judicial Review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.

c) That the application as drawn and taken out as against the respondents is incurably defective, incompetent and is otherwise an abuse of court process.

d) That the application is based on contradictory allegations which borders on mere relief, suspicion and speculations and hence incapable of any Judicial Review determination.

e) That there is no clear reliefs sought against the 1st respondent as the application is neither here nor there.

f) That the application is an abuse of court process and lacks merit and thus ought to be dismissed with costs to the respondent.

4. The 2nd Respondent filed Grounds of Opposition dated 21st March, 2017. They are as follows;

a) The Director of Public Prosecutions agrees that part of the Ruling Titled conclusion in EACC CR Case No. 10 of 2015 before the Chief Magistrate's Court at Machakos issued on 24th October, 2016 by Hon. L. Mbugua is so far it declares Prosecution malicious and manipulated prosecution instigated by Speaker of County Assembly of Makueni and actualized by Director of Public Prosecutions is unconstitutional and devoid of jurisdiction.

b) That such part of that Ruling declaring that the Accused right to fair treatment and equality before the Law to have been violated as they were arraigned in court irregularly and contrary to article 27 and 50 of the Constitution in view of the fact that the evidence fall short of the threshold that would reasonably be required to bring forth such charges is unconstitutional devoid of jurisdiction.

c) That such a part of Ruling declaring that the charges have failed to capture the objectives and spirit of Procurement Laws and Guidelines set out under Section 2 of PPD Act, 2005. The drafters of the charges herein completely failed to examine issues of conduct, ethics and integrity which are fundamental in determining what would amount to willful failure to comply, with laws relating to Procurement. Further, that the trial has not been conducted with regard to public interest, interest of Administration of Justice and need to prevent and avoid abuse of legal process as provided under Article 157 (II) of the Constitution is unconstitutional and devoid of jurisdiction.

d) The Ruling that investigation should be carried out with a view of preferring charges (of giving false information) against the Speaker of the County Assembly of Makueni to the effect that the project was ghost one again unconstitutional and devoid of jurisdiction

THE APPLICANT'S SUBMISIONS

5. **Mr. Willis Otieno** for the Applicant submitted that the Applicant was condemned unheard, which amounts to a violation of the provisions of Articles 47 and 50 of the Constitution. He referred to the following cases, namely;

(i) The Judicial Service Commission –vs- Mbalu Mutava & Another, Civil Appeal No. 52 of 2014;

(ii) Republic –vs- Truth, Justice & Reconciliation Commission & Another, Exparte Beth Wambui Mugo, Judicial Review Misc. Civil application No. 284 of 2013;

(iii) Halsbury’s Laws of Kenya 5th Edition Vol. 61 page 539 at paragraph 639

In **Republic –vs- The Hon. The Chief Justice of Kenya and Others, Exparte Moijo Mataiya Ole Keiwa, Nairobi HHCMA No. 1298 of 2004** it was held as follows;

“We must state that the rules of natural justice are not engraved on tables of stones. However, fairness demands that when a body has to make a decision which would affect a right of an individual, it has to consider any statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on a body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence, natural justice requires that the procedure before any making decision authority which is acting judicially shall be fair in all circumstances. In Tellis –vs- Bombay Municipal Corporation [1987] LRC (Constitution) 351 Chandrachud CJ said at page 376; “The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons.”

At page 375, he said; “The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.”

For a long time, the courts have without objections from Parliament supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose. We must add that before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. We think additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice ...” (Emphasis added)

6. He submitted that the Applicant was not a party to the proceedings before the Chief Magistrate, yet he was condemned unheard. That he was never given an opportunity to give his side of the story.

7. He further submitted that as the Speaker of Makeni County Assembly, the Applicant was carrying out his oversight mandate which is privileged as provided for under Section 4 of the National Assembly Powers and Privileges Act as read with Section 16 of the County Government Act which stipulates;

“No civil or criminal proceedings may be instituted in any court or tribunal against a member of a County Assembly by reason of any matter said in any debate, petition, motion or other proceedings of the County Assembly.”

It is therefore Counsel's submission that the Applicant is immuned against any civil or criminal proceedings arising from actions undertaken in fulfilment of his statutory mandate as was the case here. That the Applicant had reported to the Ethics and Anti-Corruption Commission suspicion of the Commission of offences.

8. On the privileges and mandate of the County Assemblies, he cited the cases of;

(i) Francis Matheka & 10 Others –vs- Director of Public Prosecutions & another. Miscellaneous Application No. 362 of 2014;

(ii) Okiya Omutatah Okiiti & 3 Others –vs- Attorney General & 5 Others. Petition No. 277 of 2013

9. In his oral submissions, Mr. Otieno for the applicant pointed out that the Application only sought to quash part of the Ruling by the Hon. Chief Magistrate (as she then was). The impugned part of the Ruling reads;

“Despite these findings from an investigating officer from EACC, accused persons were still arraigned in court on charges not recommended by the investigating officer. It appears that the investigating team was set loose on a fishing expedition going by the kind of inquiries that were being conducted. In light of the foregoing analysis, I proceed to make the following conclusions;

1. That there was relentless move to have the accused persons arraigned in court notwithstanding the fact that there was no evidence to support the charges. This is hence a malicious and a manipulated prosecution instigated by the Speaker of the County Assembly of Makueni County and actualized by the office of the Director of Public Prosecution.

2. The people of Mbooni Sub-County in Kikima have been denied their right to speedy social economic development (in terms of promotion of local industries).

3. Accused person's right to fair treatment and equality before the law have been violated as they were arraigned in court irregularly and contrary to provisions of Article 27 and 50 of the Constitution, in view of the fact that the evidence falls short of the threshold that would reasonably be required to bring forth such charges.

4. The charges herein have failed to capture the objectives and the spirit of procurement laws and guidelines set out under section 2 of the PPDA Act of 2005. The drafters of the charges herein completely failed to examine the issues of conduct, ethics and integrity which are fundamental in determining what would amount to willful failure to comply. Further, I find that this trial has not been conducted with regard to public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process as is provided for under Article 157 (11) of the Constitution.

5. Investigations should be carried out with a view of preferring charges (of giving false information) against the speaker of the county assembly of Makueni County as he is mentioned as the person who gave the false information to the effect that the project was a ghost one.”

10. Mr. Otieno was of the view that the Learned Trial Magistrate (as she then was) transgressed into areas that were not for the said court.

THE 1ST AND 3RD RESPONDENTS' SUBMISSIONS

11. Mr. Munene filed written submissions on behalf of the Attorney General. He relied on the said

submissions in which he reproduced the earlier filed grounds of opposition. He submitted that the Orders sought by the Applicant were meant to curtail the Chief Magistrate's statutory duty to hear and determine matters brought before it. He referred the Court to the Case of **Republic –vs- Kenya Revenue Authority & Another Exparte Bear Africa (K) Ltd.** where **Justice Majanja** quoted with approval the decision of **Justice Githua** in **Republic –vs- Commissioner of Customs Services exparte Africa K-Link International Limited Nairobi HC Miscellaneous Judicial Review No. 157 of 2012 [2012] eKLR** as follows;

“It must always be remembered that judicial review is concerned with the process of statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decisions within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellant court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies of public officers from the lawful exercise of power within their statutory mandates.”

12. He further referred to Section 6 of the Judicature Act which provides;

“No judge or magistrate and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of ...” This section of the Law covers the 4th Respondent against prosecution for any act done while he is in his judicial duty.”

In conclusion, he submitted that the 1st Respondent carried out its duty in accordance with the Law and the Application did not meet the basic tenets of a judicial review application and should be dismissed.

THE 2ND RESPONDENT'S SUBMISSIONS

13. **Mr. Ashimosi** for the 2nd Respondent in his submissions expanded on the Grounds of Opposition filed. It was his submission that the 2nd Respondent supported the Notice of Motion dated 23rd November, 2016 for the reason that the Learned Trial Magistrate (as she then was) exceeded her jurisdiction and transgressed into the jurisdiction of the following;

- (i) High Court sitting as a Constitutional Court under Article 165 of the Constitution by making declarations;
- (ii) Mandate of the Director of Public Prosecution under Article 157 of the Constitution by directing the DPP to investigate and prosecute. She even stated which offence the applicant should be charged with.
- (iii) She bypassed the role and mandate of the Ethics and Anti-Corruption Commission under articles 79 – 252 and Section 35 Anti-Corruption and Economic Crimes Act as read with Section 11 (1) (d) of the EACC Act

It was his submission that once she had arrived at a decision to acquit, she became *functus officio* and she could not make the declarations and conclusions she did.

14. Mr. Ashimosi had two (2) riders to add;

- (i) That if the Court finds that the Learned Trial Magistrate exceeded her jurisdiction, it should

quash the whole ruling and not just part of it.

(ii) That the prayer for prohibition should be limited to the matter in issue, a prayer Mr. Otieno agreed with.

DETERMINATION

15. Having heard and considered all the matters raised herein, I find the issues for considerations to be as follows;

(i) Whether the matter herein is properly before this Court;

(ii) Whether the Applicant is deserving of the Orders of Certiorari and Prohibition.

Issued No. (i) Whether the matter herein is properly before this Court.

16. It is a well settled principle of law that judicial review does not concern itself with the merits but the process of making any decision. That is, the process applied in arriving at the impugned decision.

In the case of ***Municipal Council of Mombasa –vs- Republic & Another. Civil Appeal No. 185 of 20-01 [2002] eKLR 223***, the Court of Appeal stated thus;

“That is the effect of this Court’s decision in the Kenya National Examination Council case and as the court has repeatedly said, judicial review is concerned with the decision making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the Court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, that is, the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself. Such as whether there was or whether there was not sufficient evidence to support the decision and that, as we have said, is not the province of judicial review.”

The decision above explains that acting in excess of jurisdiction is one of the issues examined by a judicial review court.

17. In this case, the Applicant has alleged the following;

(i) That a decision was made against him yet he was not a party to the criminal proceedings.

(ii) That the trial court made Orders which were an interference with the mandate of other institutions.

The Applicant invited this Court to look at the Ruling delivered on 24th October, 2016 in light of the issues raised. The merits of the decision is not a consideration at all in this matter. From the above, my finding is that the Application is properly before this Court for consideration.

Issue No. (ii) Whether the Applicant is deserving of the Orders of Certiorari and Prohibition.

18. The case, the subject matter of this Application was a criminal case EACC No. 10 of 2015 before the Chief Magistrate’s Court Machakos. Upon checking the names of the accused persons in the said case, I have failed to find the name of one ***Stephen Ngelu*** the Applicant herein.

The trial Court in its Ruling has given a summary of the evidence of all the Prosecution witnesses who were ten (10) in number. Again, that list of witnesses does not contain the names of Stephen Ngelu, the Applicant herein.

This leads me to the clear conclusion that Stephen Ngelu, the Applicant herein who is the Speaker of Makueni County Assembly was not a party to the criminal proceedings and neither did he participate in the said proceedings.

19. In the impugned Ruling, the trial court directed as follows;

“Investigations should be carried out with a view of preferring charges (of giving false information) against the Speaker of the County assembly of Makueni County as he is mentioned as the person who gave the false information to the effect that the project was a ghost one.”

It meant that through the criminal hearing, the trial court had investigated the case, preferred a charge and was now directing the relevant offices to do the same through these orders.

20. The mandate of the Police, EACC and DPP are clearly set out in the Constitution and various legislation under which they operate.

Of the DPP’s mandate, Article 157 (6) 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

(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.

Section 35 of the ACECA provides;

(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

(2) The Commission’s report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.

While Section 11 (1) (d) of the EACC Act provides;

“In addition to the function of the Commission under Article 252 Chapter Six of the Constitution, the Commission shall –

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution.”

21. From the above provisions, it has been shown that no one let alone the Court should be seen to be directing the DPP on whom to charge and with what offence?

22. After analyzing all the evidence by the Prosecution witnesses the trial Court made a finding stating thus;

“The upshot of the findings herein is that a prima facie case has not been made against all the accused persons with respect to the charges in Count 1 and hence the accused persons have no case to answer and are acquitted under Section 210 Criminal Penal Code. I also find that a prima facie case has not been made against the 8th accused person with regard to the charges in Count 2 and 3. She has no case to answer and is acquitted under Section 210 of Criminal Penal Code.”

23. This finding by the Court clearly marked the end of the trial as the Court did not place any of the accused persons on their defence. However, in this case where after acquitting the accused persons of all the counts, the Learned Trial Magistrate went ahead to re-analyze the evidence and make various findings and orders which were not necessary at all. This analysis should have been done before her final decision to acquit.

24. I quite agree with Mr. Ashimosi that upon finalising the matter and concluding that all the accused persons had no case to answer, the court became *functus officio* as far as the case was concerned.

25. The 1st and 3rd Respondents have submitted that the impugned Ruling should not be interfered with by virtue of Section 6 of the Judicature Act. It has not been shown by the 1st Respondent that the Learned Trial Magistrate is on trial for the Orders she made. If Section 6 of the Judicature were to be given, the interpretation attributed to it by the 1st and 3rd Respondents then it would mean each court’s decision would never be challenged by any one. This would result in courts being a law unto themselves which has never been and should never be the case.

26. From the foregoing, it is clear that the Learned Trial Magistrate went beyond what was expected of her in a criminal trial.

Mr. Ashimosi asked this Court to quash the whole impugned Ruling if it found the trial court to have exceeded her jurisdiction. In my view, doing so would mean that the accused persons would have to be arraigned in Court again for the conclusion of their matter for no fault of theirs.

My finding is that the part of the Ruling titled CONCLUSION was uncalled for as the trial court went into a fresh analysis of the evidence, even after acquitting the accused persons.

27. I find that the Applicant merits the Orders sought. I therefore grant the following orders;

(i) An Order of Certiorari removing into this Hon. Court for purposes of the same being quashed, part (5) of the ruling in EACC No. 10 of 2015 before the Chief Magistrate’s Court at Machakos issued on the 24th October, 2016 by the Hon. L. Mbugua to the extent that it makes an Order for the investigations, with a view to preferring charges, of the Applicant herein who is the Speaker of the County Assembly of Makeni.

(ii) An Order of Prohibition to prohibit the Respondents and the State from investigating and preferring of charges against the Speaker of the County Assembly of Makeni pursuant to the Order issued by Hon. L. Mbugua in EACC No. 10 of 2015 before the Chief Magistrates Court at Machakos.

(iii) The part of the Ruling titled CONCLUSION upto conclusion No. 4 shall be and is hereby expunged from the record.

(iv) Each party to bear his own costs.

Orders accordingly.

Delivered, signed and dated this this **27th** day of **April** 2017 at **NAIROBI**

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE