



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**MISC. CRI. APP. NO. 22 OF 2017**  
**(FORMALLY ELDORET JR 59 OF 2016)**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**  
**ETHICS AND ANTI CORRUPTION**  
**COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**  
**CHIEF MAGISTRATE**  
**ANTI-CORRUPTION COURT ELDORET.....2<sup>ND</sup> INTERESTED PARTY**

**VERSUS**

**PAMELA INDIMULI**  
**LAWRENCE KIPROTICH KIRUI**  
**FLORENCE ANYANGO OTIENO**  
**TIMON KIPSEREM KOROSS**  
**GEORGE LISAMULA MALIMO**  
**JANE AKELLO ALUODO**  
**EMELDA MALENO AGOI .....EX-PARTE APPLICANTS**

**RULING**

1. Before the Court is a Judicial Review Application against the Respondent Director of Public Prosecutions (DPP) and the 1<sup>st</sup> Interested Party the Ethics and Anti-Corruption Commission (EACC) seeking:

- (i) An order of Certiorari to remove to the High Court for purposes of quashing the decision of the 1<sup>st</sup> Interested party to recommend to the Respondent that the Ex-parte Applicants be charged with various anti-corruption offences and the decision of the Respondent to direct the prosecution of the Ex-parte applicants in Eldoret Anti-Corruption case No. 3 of 2016.

(ii) An order of Prohibition to prohibit the Respondent from prosecuting or conducting or in any manner dealing with or completing the hearing of Eldoret Anti-Corruption Case No. 3 of 2016 in counts V and VI or instituting any other charges in any other Court against the Ex-parte Applicants.

### Applicants Case

2. The Applicants sought the orders on grounds of illegality and irrationality. They contended that the decision to charge them was tainted with illegality and did not accord with the Procurement and Disposal Act of 2005, the Regulations of 2016 and the County Government Regulations of 2016.

3. Mr. Gachuba, Counsel for the Ex-parte Applicants submitted that Count 5 and 6 purported that the Applicants were members of the Tender Committee, who failed to follow procedure in the acquisition of land for the execution of a Referral Hospital in Trans-nzoia. That the appointment of the Tender Committee is guided by **Section 3 and 6 (b)** of the **Public Procurement and Disposal Act 2005 (PPDA) 2005** and in particular Section 36 (5) (b) of the PPDA 2005 read together with the regulations 7(1) (a), 8, 9 of 2006 and the schedule to the PPDA and County Government Regulations.

4. Counsel stated that under the foregoing provisions those to be so appointed are required to be heads of Departments. In the verifying affidavit the Applicants gave their employment status to show that they were not heads of department as contemplated for appointment. They annexed evidence of the members of the Tender Committee appointed on 3<sup>rd</sup> May, 2014. They denied being members of the said Tender Committee and contended that for them to be charged as being members of the Tender Committee without evidence of appointment was a decision tainted with illegality.

5. Counsel submitted that the Respondents did not help the Court to understand the basis of the charges. He cited the authority of **Peter Ayodo Omenda & 6 Others vs Director of Public Prosecutions & 2 others (2016) eKLR**, where it was held that a Judicial Review court can look at the evidence, so that if it appears to the Court that the charges against the Applicant are farfetched, the Court can terminate them.

6. The Applicants annexed the affidavit sworn by the head of procurement at the time on 15<sup>th</sup> July, 2016 and contended that the Respondents did not bring any evidence to counter it. In the affidavit the deponent said that he was the Head of Procurement and the Secretary to the Tender Committee. He swore that the Applicants were not appointed as members of the Tender Committee and that on 3<sup>rd</sup> June, 2014 the Tender Committee did not sit. Further that as secretary to the Tender Committee and the Head of Procurement he was in a position to know these facts.

7. Counsel for the Applicant asserted that the law required the Respondent to act in good faith and in accordance with the law. He argued that the substance of the charge was based on illegality which the court ought to intervene and stop. The illegality, he argued, was that the Director Public Procurement and his staff were lawyers who understood the provisions of the law and ought to have applied the law and scrutinized the evidence before charging the Applicants.

8. Counsel contended that the decision of specialized bodies like the Respondent and the 1<sup>st</sup> Interested Party to charge them where there is no evidence was unreasonable. He relied on the decision in **Republic vs Director of Public Prosecutions & 2 others exparte Praxidis Namoni Saisi (2016) KLR**, where Odunga J quashed the charges against the Applicant on the basis of irrationality. The Applicant had been charged with witnessing the execution of a tender document which she did only after the Tender Committee had passed it.

9. In the second prayer herein the Applicants sought for orders of prohibition stating that since the case is in court, the court do prohibit not only the charging but also the continuation of the proceedings, as continuing the proceedings would be an unfair action.

### Respondents Case

10. Mr. Ndege, learned State Counsel appearing for the Respondent, DPP opposed the application relying on the grounds of opposition dated 11<sup>th</sup> November, 2016 and the submissions filed on 11<sup>th</sup> January, 2017. The State Counsel submitted that the Respondent is conferred with state powers of prosecution under **Article 157** of the **Constitution** and he preferred the charges herein pursuant to those powers after carrying out investigation and analysis of the evidence.

11. Mr. Ndege urged that the Ex-parte Applicants have not stated that the Respondent acted in excess of, or without powers as mandated by the Constitution under **Article 157 (6), (10), (11)**. He asserted that for the court to issue the orders sought by the Applicants would be tantamount to ordering the Respondent not to discharge his Constitutional mandate and functions.

12. The State Counsel referred to **Article 252(1) (a)** of the **Constitution** and **Section 11** of the **Ethics and Anti-Corruption Act** that mandates the 1<sup>st</sup> Interested Party, to investigate any complaint brought to its attention and send a report to the Respondent who shall analyse the evidence to make a decision on whether or not to charge. That in this case the 1<sup>st</sup> Interested Party acted within the law, in investigating and forwarding their report to the Respondent who analyzed the evidence and made a decision to charge the Ex-parte Applicants.

13. The State Counsel asserted that the High Court could not take the place of the trial court in assessing the evidence and making a finding whether a criminal offence was committed. Further that an order of certiorari can only issue to quash a decision made without, or in excess of jurisdiction, or where the rules of natural justice were not complied with, none of which the Ex-parte Applicant had demonstrated.

14. The State Counsel further contended that the order of prohibition is issued to an inferior Tribunal by the High Court to forbid the said Tribunal from continuing with proceedings in excess of its mandate, or in contravention of the laws or the rules of natural justice. Counsel contended that the Ex-parte Applicant had not demonstrated that the Respondent acted without or in excess of jurisdiction and such an order cannot issue against an action, or decision taken in execution or discharge of a constitutional and legal mandate.

15. The State Counsel urged that most of the issues that had been raised by the Ex-parte Applicants comprised the evidence which they ought to raise in the trial. That the trial court should be allowed to proceed with the criminal proceedings as the ex-parte Applicant will have the opportunity to present their case. Further that the Ex-parte Applicants did not demonstrate how and whether their rights had been violated, or that they would not be accorded fair trial. That in any case their rights are not absolute and ought to be balanced with other rights and the public interest.

16. The State Counsel submitted that whether or not the Applicants were members of the Tender Committee, was a matter of evidence, which would be well answered in the trial. He urged the court to find that the Application lacked merit and dismiss it with costs.

### **1<sup>ST</sup> Interested Party's Case**

17. Mr. Mbaka, learned State Counsel for the 1<sup>st</sup> Interested Party opposed the application and relied on their affidavit sworn on 6<sup>th</sup> December, 2016 and their submissions dated 1<sup>st</sup> March, 2017. He also associated himself with the submissions made on behalf of the Respondent.

18. Mr. Mbaka stated that in exercise of the decisional autonomy bestowed by Article 157 of the Constitution, the Respondent had moved to charge the Ex-parte Applicants. He cited the decision in **Nairobi JR NO. 114 OF 2014 Republic versus Chief Magistrate's Court, Nairobi, Director of Public Prosecutions and Martin Maina Right End Properties Limited ex-parte Stephen Oyugi Okero (2015) eKLR**, where the Court observed that the power to prohibit criminal prosecution should be exercised with care.

19. The State Counsel submitted that the orders of certiorari sought against the 1<sup>st</sup> Interested Party cannot

issue since they already advised the Respondent, which advice had already been acted on and the Ex-parte Applicants have been charged vide Eldoret Anti-Corruption Court case number 3 of 2016 which is pending before court. That in addition the statutory powers of the 1<sup>st</sup> Interested Party are only to recommend, while the Respondent makes the ultimate decision on whether or not to prosecute.

20. The State Counsel argued that the orders of Prohibition sought against the Respondent could not also issue as they had been overtaken by events as the Applicants had already been charged. He relied on the decision in **Civil Appeal 266 of 1996 Kenya national examinations council and Republic ex-parte Geoffrey Gathenji Njoroge and 9 others (1997)**, where the court observed that prohibition looks the future.

21. The State Counsel contended that it could not be said that the ex-parte applicants were prejudiced by the advice of the 1<sup>st</sup> Interested Party, rather by the actual prosecution, and even if the 1<sup>st</sup> Interested Party recommended that the charges against the Applicants be dropped, the Respondent is an independent office that is not bound by the recommendations.

22. The State Counsel asserted that the grounds in support of the Application can be adduced in their defence at the trial court. He relied on the decision in **Nairobi Misc. Application NO. 153 of 2012 Republic versus the Attorney General, The Director of Public Prosecutions, Commissioner of Police, Ethics & Anti-Corruption Commission and Bahadurali Hasham Lalji ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji (2014) eKLR**, where the Court observed that Judicial Review applications do not deal with the merit of the cases but only the process.

23. The State Counsel also cited the decision in **William Ruto & another v Attorney General case, Nairobi, High Court Civil Suit 1192 of 2005 (2010) eKLR**, where the Court was of the view that it was not for the Court to determine whether the charges as framed disclosed an offence. That there are adequate provisions for example **Section 89 (5) of the Criminal Procedure Code**, which could be deployed where the magistrate was of the opinion that a complaint as presented does not disclose an offence.

24. The State Counsel submitted on a without prejudice basis that the Applicants did commit irregularities as captured in their affidavit and that the matter before the trial court was competent and merited.

25. On the issue of illegality, the State Counsel urged that even if it could be argued that the applicants were not mandated to plan, manage and procure the land in issue, that would not be a ground at all. That under **Section 50 of ACECA** impossibility is not a defence so that even if it was not within their powers to approve or do anything pertaining to procurement, if they did it, they must be subjected to prosecution. He cited the decision in **Republic v Inspector General of Police Ex-parte Patrick Nderitu Nairobi, High Court Judicial Review 130 of 2013 (2015) eKLR**.

26. The State Counsel asserted that the Applicants have not demonstrated the error in law that the Respondents made or the abuse thereof.

27. On the issue of irrationality, the State Counsel submitted that the 1<sup>st</sup> Interested Party had demonstrated the role that the Ex-parte Applicants played in the purchase of the land in their affidavit through annexure "AFL3". Annexure "AFL3" are the minutes of the County Tender Committee held on 3<sup>rd</sup> June, 2014 in which all the Applicants were shown to have been present and had approved the purchase of the land in issue. That therefore, by virtue of the role they played the decision to charge them could not be said to be irrational.

28. The State Counsel pointed out that the minutes of 3<sup>rd</sup> June, 2014 alluded to had not been challenged by the Ex-parte Applicants who should not turn this court into a trial court or subject it to the process of evaluation of evidence. He urged that the merits and demerits of the matter could be best determined by

the trial court that the charges before the trial court are proper and the application should be dismissed with costs.

### **Analysis and determination**

29. The Ex-parte Applicants have raised several issues regarding the origin and substance of the subject of the controversy forming the basis of their prosecution in **Eldoret Anti-Corruption Criminal Cases No. 3 of 2016**. They were charged with the offences of engaging in a project without proper planning contrary to **Section 45 (2) (c)** as read with **Section 48 (1) of the Anti-Corruption and Economic Crimes Act, 2003** and willful failure to comply with the law relating to procurement contrary to **Section 45(2) (b)** as read with **Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003**.

30. The issue for determination before me is whether this Court should intervene and issue orders of prohibition and of certiorari to remove to the High Court and quash the criminal proceedings in **Anti-Corruption Criminal Case No. 3 of 2016** against the Ex-parte Applicants. To determine that issue, I must first look at the actions of the 1<sup>st</sup> Interested Party and the Respondent to determine whether they acted *ultra vires* or unreasonably in making the decision to prosecute the Ex-parte Applicants and whether that prosecution amounts to an abuse of Court process.

31. The Applicants have sought Judicial Review orders of Certiorari to remove to the High Court and quash the decision of the 1<sup>st</sup> Interested Party which recommended to the Respondent that they should be charged with various offences under ACECA and the decision of the Respondent to direct their prosecution.

32. In deciding whether the order or certiorari is merited I had recourse to the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** in which the court observed that;

**“...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

The Ex-parte Applicants must therefore demonstrate that the decision by the Respondent to prosecute them on the allegations that were investigated by the 1<sup>st</sup> Interested Party was made without jurisdiction, or was in excess of jurisdiction, or that the rules of natural justice were not complied with.

33. The Applicants have also sought Judicial Review orders of Prohibition to prohibit the Respondent from prosecuting or conducting or in any manner dealing with or completing the hearing of the Eldoret Anti-Corruption Case No. 3 of 2016 in Counts V and VI or instituting any other charges in any other Court against the Applicants. In **Ex parte Geoffrey Gathenji Njoroge & Others** (supra) the Court observed as follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...”**

34. As was aptly put in the above case the remedy of prohibition is only lost where a decision has been

made and not where the proceedings in question are still continuing. Accordingly, since the applicants herein are seeking to stop the Respondent from continuing with their prosecution, the mere fact that a decision was made to prosecute them and the prosecution has in fact commenced, is not a ground to decline to entertain an application seeking to prohibit the continuation of the said prosecution.

35. In **Republic V Chief Magistrates Court, Nairobi Director of Public Prosecutions and Martin Maina Right End Properties Limited ex-parte Stephen Oyugi Okero (2015) eKLR** the court observed that,

*“The power to prohibit criminal prosecution should be exercised with great care. It should be remembered that in the first place the people of Kenya bestowed prosecutorial power upon the DPP and in accordance with Article 157 of the Constitution granted him or her decisional autonomy. The DPP and his officers are expected to use their expertise in determining which case to prosecute and which one not to prosecute.”*

36. On the question of illegality and rationality Odunga J in **Republic v Inspector General of Police Ex-parte Patrick Nderitu Nairobi, High Court Judicial Review 130 of 2013 (2015) eKLR** rendered the following definitions:

*“illegality is when a 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...”*

37. The office of the DPP is established pursuant to **Article 157 of the Constitution. Clause 6(a)** thereof provides as follows:

*The Director of Public Prosecution 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.*

Under **Article 157 (10)** the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings in the exercise of his or her powers or functions and shall not be under the direction or control of any person or authority.

38. These provisions are reiterated in **Section 6 of the Office of the Director of Public Prosecutions Act. No. 2 of 2013** as follows;

*Pursuant to Article 157(10) of the Constitution, the Director shall-*

*(a) not require the consent of any person or authority for the commencement of criminal proceedings;*

*(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and*

*(c) be subject only to the Constitution and the law.*

The basis of these provisions is that the office of the DPP is an independent office, not subject to the direction of any other person.

39. Judicial review proceedings are mostly concerned with the process rather than merits of the

challenged decision or proceedings. The court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. Hence in determining the issues raised before it the Court should avoid the temptation to unnecessarily stray into the arena exclusively reserved for the trial Court in the criminal proceedings.

40. The power of the Respondent to prosecute should however not be exercised arbitrarily, oppressively or contrary to public policy. The Court will intervene where it is shown that the intended criminal prosecution is instituted for other purposes other than the genuine enforcement of criminal law or is an abuse of the court process. In this regard Mr. Gachuba was correct in pointing the court to **Peter Ayodo Omenda & 6 Others** (supra), to wit that a Judicial Review court can look at the evidence, so that if it appears to the Court that the charges against the Applicant are farfetched, the Court can terminate them.

41. This is in sync with exparte **Praxidis Namoni Saisi** where the court quashed the charges against the Applicant on the basis of irrationality, when the Applicant was charged for merely witnessing the execution of a tender document which the Tender Committee had already passed.

42. If a criminal prosecution is seen as amounting to an abuse of the process of the Court, the Court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court will unhesitatingly step in to stop it. See **Kuloba J in Vincent Kibiego Saina vs Attorney General Misc Application No. 839 of 1999**.

43. Similarly, in **Investments & Mortgages Bank Limited (I & M) vs Commissioner of Police and 3 others, Nairobi HC Petition No. 104 of 2012** Majanja J remarked as follows:

***“I agree with the respondents that it is within their mandate to investigate crimes where there is reasonable basis of commission of offence and that in performance of their duties, they are independent institutions. The Office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the Constitution dictates. One such dictate is that in the exercise of their powers, it is to 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.”***

The Court will therefore, in an ideal situation exercise its powers with great care and circumspection before interfering with any decisions made by the DPP and will only do so in the clearest of cases.

44. In essence the Ex-parte-party Applicants herein are asking the court to determine whether the charges against them disclose an offence or not, which question should be ventilated in the trial. The High Court has the power and the constitutional duty to supervise the exercise of the Respondent’s mandate whether constitutional or statutory so long as the complaint by an Applicant against any decision by the Director of Public Prosecutions properly falls within the parameters of judicial review.

45. The ex parte Applicants’ contention that they had not committed any offence because they were never appointed as members of the Tender Committee as required by the law and that there was no evidence by the Respondent that demonstrated that the Applicants attended the purported Tender Committee meeting in which the impugned procurement was approved is not a matter to be determined by this Court. It is only the trial Court that can determine the sufficiency of the evidence as presented.

46. The challenge made to the sufficiency of the evidence goes to the merits of the criminal case against the Applicants and to entertain it at this stage would be to pre-empt the Respondent’s case in the trial court by setting out the Applicants’ defence and accepting it as true. Therefore, as has been stated earlier in this ruling, the arguments raised by the Applicants as to sufficiency of the evidence should be made in the trial Court.

47. The Court found in **William S.K Ruto & Another** the court expressed itself as follows;

*“The petitioners have questioned the competence of the charges that they face. In our view, it is not for this court to determine whether or not the charges as framed disclose an offence. There are adequate provisions in the Criminal Procedure Code (CPC) for instance Section 89(5) CPC which can be used to address the issue. That Section states as follows-*

*“Where the Magistrate is of the opinion that a complaint, or a formal charge made or presented under this Section does not disclose an offence, the Magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reason for the order”.*

To the extent of the sufficiency of the evidence the circumstances of this case are not different from those that the court was faced with in William K Ruto above.

48. The Respondent herein received a report from the 1<sup>st</sup> Interested Party following its investigations into allegations of corruption. The Respondent reviewed the said report and made a decision to prosecute. The decision by the Respondent to prosecute the Applicants therefore is within the law, and within the mandate of ODPP under **Article 157** of the **Constitution**. The merits of the Ex-parte Applicants defence in the criminal process is not a ground that ought to be relied upon by a Court in judicial review proceedings to stop criminal proceedings. That defence is open to the applicant in the criminal proceedings.

49. Having carefully considered the rival arguments on each of the grounds raised by the Applicants, I find that none of the grounds can succeed to avail the Applicants the orders sought. In the premise the application is found to be lacking in merit and is dismissed with costs to the Respondents.

**SIGNED DATED** and **DELIVERED** in open court this **25<sup>th</sup> day** of **April 2017**.

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**L. A. ACHODE**

**JUDGE**