



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**MISCELLANEOUS CIVIL APP. NO. 44 OF 2017**

**DAVID KINUSU SIFUNA.....APPLICANT**

**- VERSUS -**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**CHIEF MAGISTRATES COURT**

**(ANTI-CORRUPTION COURT) ELDORET.....INTERESTED PARTY**

**R U L I N G**

1. This is a chamber summons application pursuant to **Section 3A** of the **Civil Procedure Act (Cap 21 Laws of Kenya)**, **Section 8 and 9 of the Law Reform Act, Order 53 Rule 1(1), (2), (3) and (4) and 3(1) of the Civil Procedure Rules**. The application sought for orders that;

a. That the Applicant be granted leave to apply for judicial review order of Certiorari to remove into this Honorable Court and quash the letter dated 28<sup>th</sup> February, 2017 issued by the 1<sup>st</sup> Respondent purporting to direct the chairman of the County Assembly Service Board of Trans Nzoia County Assembly to suspend the applicant at half pay with effect from the date of the charge.

b. That the Applicant be granted leave to apply for judicial review order of Certiorari to remove into this Honorable court and quash the charges and the charge sheet before the interested party in Eldoret ACC No. 2 of 2017 instituted by the 1<sup>st</sup> Respondent against the applicant herein.

c. That the Applicant be granted leave to apply for judicial review order of Prohibition to remove into this Honorable Court and prohibit the ongoing proceedings before the interested party against the Applicant.

d. That the leave so granted do operate as a stay of the proceedings before the interested party and;

e. That the Honorable Court do issue a temporary order suspending the letter dated 20<sup>th</sup> February 2017 issued by the 1<sup>st</sup> Respondent purporting to direct the chairman of the County Assembly Service Board of Trans Nzoia County Assembly to suspend the Applicant at half pay with effect of the date of charge.

2. The case was an inquiry into allegations of abuse of office contrary to **Section 46** as read with **Section 48(1)** of the **Anti- Corruption and Economic Crimes Act No. 3 of 2003**, as well as Fraudulent acquisition of public property contrary to **Section 45** as read with **Section 48(1) ACECA**, against public officers and Members of County Assembly of Trans Nzoia County.

3. The brief facts of the case are that on 8<sup>th</sup> September, 2014, Hon. Ronald Matongolo a Member of County Assembly of Trans-Nzoia County passed away at the Aga Khan hospital Nairobi. The Speaker of the Trans Nzoia County Assembly Hon. David Sifuna requested for a fresh AIE to aid in clearing the hospital and expected funeral expenses. The Governor agreed to provide Ksh. 3 Million. The County Treasurer released the Ksh. 3 Million to Hezron Kiplagat, the County Accountant through an imprest warrant No. 1971201.

4. On 8<sup>th</sup> September, 2014, Ksh. 1.2 Million of the 3 Million was deposited into an account of the Speaker at Co-operative Bank Kitale while the balance of Ksh. 1.8 Million was given to the Speaker's Secretary Roselyn Wesanza. On 8<sup>th</sup> September, 2014, the Clerk of the County Assembly Hon. Aineah Indakwa and his driver John Baraza were given Ksh. 70,000 and Ksh. 45,000 respectively as travelling allowances for official duty to travel to Murang'a County as well as an additional Ksh. 20,000 for fuel from the 1.8 Million. The balance left of Ksh. 1,665,000 was given to the Secretary of the Speaker by the accountant of the County Assembly and she deposited the money in her account.

5. On the 9<sup>th</sup> of September, 2014, 35 MCA's of Transzoia County passed a resolution that the money held by the Speaker's Secretary be distributed to them to facilitate their travel to Nairobi to receive the body. They were subsequently given Ksh. 47,000 each on the same day the body of Hon. Matongolo was transferred to Eldoret Referral Hospital Mortuary, hence they did not travel to Nairobi. The MCA's did not surrender the money.

6. A report was made to the EACC alleging that part of Kshs. 3 Million allocated to Transzoia County Assembly by the County Government had been misappropriated. Their Investigation revealed that the Ksh. 3 Million allocated had not been budgeted for.

### **APPLICANT'S SUBMISSIONS**

7. The Applicant in his submissions stated that he only utilized a total of Ksh. 1 Million and refunded the remaining Ksh. 200,000/= to the County Assembly. Further that he reported the said misappropriation to the county police commander and called upon his office to carry out investigations through a letter dated 16<sup>th</sup> September, 2014. That he also took an administrative action and recovered all the money that had been misappropriated by the County Assembly and reported to the 1<sup>st</sup> Respondent.

8. It was the Applicant's submissions that the charge against him was unconstitutional, illegal, and null and void for reasons that he was protected by **Section 65(1)** of the **ACECA** as an informer by virtue of the actions he took to bring to the attention of the EACC the misappropriation at the County Assembly. He further submitted that the jurisdiction of judicial review was principally based on illegality, irrationality and impropriety of procedure and an Applicant ought to prove that the procedure in question failed the test of the three. He relied on ***Republic vs. Minister in the Office of the President Provincial Administration & Internal Security & 2 others ex-parte Francis Kamau (2013) eKLR.***

9. The Applicant averred that based on ***Judicial Review Handbook, 3<sup>rd</sup> edition, para. 51.1, pages 751-2,*** abuse of power as well as bad faith have become the root concept that informs judicial review. Learned Senior Counsel Mr. Tom Ojienda submitted that from the manner in which the process leading to the Applicant's arraignment in court was carried out, it was manifestly clear that the Applicant was exposed

to procedural unfairness from the 1<sup>st</sup> Respondent to whom the Applicant had given all information about the misappropriation of funds and all the machinations were at the instigation of the 1<sup>st</sup> Respondent who was determined to use the criminal process as means of teaching the Applicant a lesson unknown in law. He added that the reading of **Section 65(1)** of the **ACECA** on protection of informers was very clear that the Applicant was protected by law. He cited the decision in *Speaker of the National Assembly v James Njenga Karume (1992) eKLR*.

10. Learned Senior Counsel urged the court not to uphold criminal proceedings marred with malicious undertones. The Applicant also relied in **Rahab Wanjiru Njuguna vs. Inspector General of Police & another, JR Application No. 187 of 2013**, where the applicant sought an order to restrain the respondent from harassing or in any way detaining her motor vehicles alleging that the Respondents without any justifiable cause had been harassing and intimidating the applicant the court held this amounted to irrationality since it defied logic stated thus;

**“From the foregoing, it is clear that where the authority whose decision is challenged displays 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 as where the decision is in defiance of logic and acceptable moral standards, the court will interfere even if there is no illegality or procedural impropriety.”**

Further support by Counsel was from the case of *Pastoli vs. Kabale District Local Government Council and Others (2008) 2 EA 300; Council of Civil Unions vs. Minister for the Civil Service (1985) AC and An Application by Bukoba Gymkhana Club (1963) EA 478 at 479*.

11. It was submitted that from the above, the decision by the EACC was irrational and the court ought to interfere with it in order to protect the interests of a fair trial as the court not only has power but the duty to intervene as the Court of Appeal did in **Joram Guantai vs The Chief Magistrate (2007) 2 EA 175, at pages 177, 178** and bring an end to it.

12. Counsel also contended that the letter dated 28<sup>th</sup> February 2017 from the EACC to the chairman of the County Assembly Board where EACC directed suspension of the Applicant at half pay and 2 other individuals was unconstitutional, illegal and null and void. He relied on **Section 62(6)** of the **ACECA** and the case of *Kones v Republic and Another ex-parte Kimani Wanyoike and Others (2008) 3 KLR EP 29* where the Court of appeal considered whether the nomination of Hon. Kones to Parliament under the former Constitution could be challenged by way of proceedings of judicial review. The court solid.

**“We think we have said enough to show that a seat in the National Assembly can be declared vacant under the circumstances stated in the Constitution and through the processes set out therein. That has always been the position taken by the courts in previous decisions”**

13. Counsel urged that **Article 178** of the **Constitution** as read with **Section 11** of the **County Government Act** and **Standing Order No. 58** of the **Transzoia County Assembly Standing Orders** provides for the Procedure for removal of the speaker and therefore Section 62 of the ACECA on suspension if charged with corruption or economic crime does not apply. He relied on the case of *Eldoret HC JR No. 8 B of 2014 Republic v Clerk County Assembly of Baringo Ex Parte William Kamket (2015) eKLR* where the Court affirmed that the provisions of law provide for removal and not suspension, to urge that the letter by the EACC lacked legal basis and was unconstitutional since a public officer duly elected cannot be suspended from office.

14. Counsel cited **Article 177(1)** of the **Constitution** on the composition of the County Assembly to state that the Speaker is a member of the County Assembly. Further that the impugned letter was discriminatory contrary to **Article 27** of the **Constitution**, when it purported to suspend the Applicant but not the other members of the County Assembly who were equally charged.

15. The Applicant wrote to the DPP on 3<sup>rd</sup> March 2017 explaining the chronology of events hoping that the DPP would be persuaded to invoke his powers under **Article 157 (6)(c)** and discontinue the charges

against him, but the said letter did not elicit any response. He therefore contended that it was self-evident that under the aegis of the 2<sup>nd</sup> Respondent, the EACC was determined to use the criminal process to taint his reputation and damage his nascent career in politics hence the continued press for charges against him.

16. Counsel contended that the criminal process was being used for ulterior and improper purposes. He cited the decision of **Chemetei J in R vs Chief Magistrate Kisumu & others ex-parte Mohanlal Arora & others (unreported) Kisumu High Court JR Misc. Application No. 7 of 2011** and the case of **R vs Chief Magistrates Court & Others ex-parte Qian Guo Jun & others.**

17. Counsel submitted that the court would only interfere in a matter that was before a lower Court, where the rule of law and the procedure laid down in law had been breached as was enunciated in the case of **Kuria & 3 Others vs Attorney General (2002) 2 KLR 69.**

18. Further that Judicial Review had since expanded to include abuse of power and bad faith as seen in **R vs Commissioner for Co-operatives ex-parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd (1999) 1 EA 245** at page 249 where the Court of Appeal held that:

*“It is axiomatic that statutory powers could only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith.”*

19. Counsel contended that this criminal prosecution was an abuse of the court process epitomized by selective prosecution by the DPP and it was a travesty to justice. That it was a sad day for justice when the processes of court are allowed to be manipulated, abused and/or misused and the court has no say in the matter, because the decision has been made. Counsel averred that the discretion and powers given to the 1<sup>st</sup> Respondent under Article 157 of the Constitution are not unfettered or absolute as was held by **Wendoh J. in Koinange vs. Attorney General and Others (2007) 2 EA 256.**

20. Counsel relied on the cases of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 ALL ER 935** as followed in **Republic v Land Registrar Kajiado North District & 6 others ex-parte Irene Naipanoi Montet (2014) eKLR** where the court rationalized the grounds of Judicial Review, and the case of **Rahab Wanjiru Njuguna v Inspector General of Police & another (2013) eKLR** where the court discussed the grounds upon which judicial review proceedings could be reviewed.

21. Counsel submitted that in cases where either the decision had not been implemented, or it is in the course of implementation a stay could be granted. He relied on the case of **George Philip M Wekulo vs. The Law Society of Kenya & another Kakamega HCMISCA No. 29 of 2005.** Further that the application would be rendered nugatory if the leave sought was not allowed to operate as stay as prayed, since the Respondent would institute any other, or further action(s) against the applicant once the proceedings in **Eldoret ACC No. 2 of 2017** are not stayed.

22. Counsel urged that the Appellant had established a prima facie case with real chances of success and in the circumstances his chamber summons dated 11<sup>th</sup> April, 2017 ought to be allowed with costs to the Applicant.

## **1<sup>ST</sup> RESPONDENTS SUBMISSIONS**

23. Mrs. Odipo Learned Counsel for the 1<sup>st</sup> Respondent (the Commission) filed an Affidavit in reply dated 19<sup>th</sup> April 2017 sworn by Anthony Kahiga an investigator with the Commission. Mr. Karuga averred that it was the legal mandate of the Commission to investigate corruption and economic crimes pursuant to Article 79 of the Constitution of Kenya **Section 13(2) (c) of the EACCA, 2011** and **Section 23 of the ACECA, 2003.** The Commission therefore has a duty and a responsibility under **Section 25 of the ACECA** to investigate all reports of alleged corruption, or give reasons for not investigating.

24. Mr. Karuga also deposed that through a letter dated 16<sup>th</sup> September 2014, the Commission received a complaint that the County Assembly clerk of Trans-Nzoia County was misusing funds. The Commission analyzed the commenced investigations and established that the Applicant and other members of the Trans Nzoia County Assembly had misappropriated public funds.

25. The EACC then recommended the prosecution of the Applicant jointly with others, with the offence of abuse of office contrary to **Section 46** as read with **Section 48 (1)** of the **ACECA** as required by law. The Commission made this decision pursuant to **Section 35** of the **ACECA**, where it is mandated to submit report and DPP recommendations to the DPP who then elects whether or not to prosecute the case. In this case the DPP analysed the report and concurred with the recommendations of the Commission. He gave consent for the Applicant and others to be arraigned before Eldoret Magistrate's Court in ACC No. 2 of 2017.

26. Mrs. Odipo submitted that the investigations were carried out in accordance with the law and procedure and that the Applicant's allegations that he assisted in investigation and subsequently cooperated and had hence acquired immunity against prosecution was misguided. Counsel submitted that the Applicant did not qualify to be regarded as an informer under **Section 65 of ACECA**. Further that, the Applicant's efforts to have the money paid back did not cure the offence already committed.

27. Counsel contended that the allegation that there has always been a budgetary allocation in the office of the speaker to cater for matters with regard to benevolence ranging from one million to ten million shillings was misguided. That it was for the above reason that the Applicant made efforts to ensure that the monies were refunded since he was aware their actions amounted to misappropriation of public funds. It was also the reason why the Applicant wrote a letter to the DPP pleading for withdrawal of the charges against him and others.

28. Counsel submitted that **Section 62** of the **ACECA** provides for suspension of an officer who has been charged with an Anti-Corruption offence and on that basis the Commission sent a letter dated 28<sup>th</sup> February 2017 to the Chairman of the County Assembly of Trans Nzoia directing that the Applicant, the Clerk and the driver be suspended at half pay with effect from the date of charge.

29. Counsel contended that **Section 62** of the **ACECA** is very different from **Article 11** of the **County Government Act** which provides for the removal of the speaker from office. Counsel averred that the **County Government Act section 9 (4)** as read with **178(2) (b)** provides that in the absence of the Speaker, a member is elected to serve as speaker and as such suspension of the Applicant would not affect the business of the Assembly.

30. Counsel argued that Prayer (2) in which the Applicant is seeking to quash the letter dated 28<sup>th</sup> February 2017 issued by the EACC is not enforceable as it is not possible to quash the letter, or the charge sheet. Further that an order of prohibition is powerless against a decision which has already been made as it can only serve to prohibit that which is ongoing and not that which has already been done.

31. Counsel pointed out that in the present case, the decision to charge had already been made. Further, that the Applicant has failed to show the Court that he has a prima facie case and if the prayers sought are not granted, this application would be rendered nugatory. It was submitted that judicial review applications do not deal with the innocence or otherwise of the Applicant but with the process of arriving at the decision. That the Applicant had not demonstrated that the Commission acted without, or in excess of its jurisdiction, or abused or exercised its powers in a manner contrary to the law. Further that he had not demonstrated the illegality or otherwise of the conduct of the Commission during the investigation and arrest of the Petitioner, or that the prosecution was irrational, or was actuated by ulterior motive or malice or was otherwise an abuse of the court process.

32. Counsel averred that the Applicant had not met the threshold for grant of leave which that his interests had been affected or threatened by the actions of the Respondents and the EACC cannot be restrained from discharging its constitutional and statutory mandate without any evidence of impropriety on its part. The Applicant would be afforded an opportunity to defend himself against the charges leveled against

him during trial.

33. The 2<sup>nd</sup> Respondent filed a Replying Affidavit dated 20<sup>th</sup> April 2017 sworn by Steven Githinji Ndung'u, a Prosecution Counsel in the Office of the Director of Public Prosecutions and submitted that upon the EACC concluding its investigations, they transmitted a report bearing their findings and recommendations that the Applicant be charged alongside other suspects with the offence of Abuse of Office contrary to **Section 46** as read with **Section 48 (1)** of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003**.

34. The DPP independently reviewed the evidence in the file and was satisfied that it was sufficient to sustain the proposed charges and accordingly directed that the applicant be charged. Further that the decision of the DPP was based on sufficiency of evidence and proper application of the law on the facts of the case as disclosed from the evidence and that any defence that the accused would wish to raise was available to him in the Criminal case.

35. The deponent submitted that the DPP did not breach any provision of the Constitution, or any written law or rule made there under, or the rules of natural justice. Neither was the decision to charge unreasonable, irrational, or actuated by malice, or in bad faith but was purely based on the evidence and the law.

36. With regard to **Section 62** of the **ACECA**, the DPP submitted that upon being charged with economic crimes or corruption offences any public, or state officer stood suspended with half pay. That the Applicant having not challenged the constitutionality of the said Section could not stay the application thereof.

#### **ANALYSIS AND DETERMINATION**

37. Having carefully considered the submissions and arguments that have been raised by the parties, these are the issues that I form for determination;

1. Whether the Applicant has made a case for an order of Certiorari to issue to quash the charges and the charge sheet in **Eldoret ACC No. 2 of 2017** instituted by the 1<sup>st</sup> Respondent against the Applicant herein.
2. Whether the Applicant has made a case for an order of Prohibition to issue to prohibit the ongoing proceedings before the interested party against the Applicant.
3. Whether an order of Certiorari can issue to quash the letter dated 28<sup>th</sup> February, 2017 issued by the 1<sup>st</sup> Respondent purporting to direct the Chairman of the County Assembly Service Board of Trans Nzoia County Assembly to suspend the Applicant at half pay with effect from the date of the charge.

38. Parties in these proceedings have raised several issues regarding the subject of the controversy forming the prosecution of the Applicants in **Eldoret ACC No. 2 of 2017** for abuse of office contrary to **Section 46** as read with **Section 48 (1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003**. In their pleadings and submissions, Parties have made a lot out of the substance of the aforesaid allegations of abuse of office and misappropriation of public funds. I have similarly heard a lot of arguments regarding the merits or otherwise of the evidence forming the basis for the impugned criminal charges.

39. The larger issue for determination now before me however is whether this Court should intervene and quash the criminal proceedings in **Eldoret ACC No. 2 of 2017** against the Applicant. To determine that issue, I must first look at the powers of the DPP to prosecute to establish whether the DPP has acted *ultra vires* or unreasonably in making the decision to prosecute the Applicant. In the process, I will answer the question as to whether the Applicant's prosecution amounts to an abuse of Court process.

## The Powers to prosecute

40. The office of the Director of Public Prosecution is established under **Article 157** of the **Constitution** which provides as follows in **Clause 157 (6)**:

*“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.”*

41. The decision to institute criminal proceedings by the DPP is however discretionary and is not subject to the direction or control by any authority because **Article 157 (10)** stipulates that;

*“The Director of Public Prosecutions 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.”*

42. These provisions are also 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.*

43. The basis of the above provisions is that the office of the DPP is an independent office and the Court will in an ideal situation exercise great circumspection before it interferes with any decision made by the DPP it will only do so in the clearest of cases. I call to mind the case of **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.”*

There is therefore no doubt that the office of the DPP should exercise its mandate and discretionary power to prosecute within constitutional limits and the independence of his office.

44. The allegation therefore made by Applicant that the DPP has prosecuted them illegally, irrationally and unreasonably is misplaced, considering that the DPP was acting on a report from the EACC which was the product of investigations on allegations of corruption and misappropriation of public funds and which recommended the prosecution of the Applicants.

45. The DPP made his decision to prosecute after reviewing the said report. The decision by the DPP to prosecute the Applicants therefore is within the law, and within his mandate and the Court is reticent to interfere with the Constitutional mandate of the DPP to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under **Article 157 of the Constitution**.

46. The protection of informers pursuant to **Section 65** of the **Anti-Corruption and Economic Crimes**

**Act** as alleged by the Applicant, is not ground enough for halting those proceedings by way of judicial review. judicial review proceedings are not concerned with the merits of the case but largely with the decision making process in that case. Even where the applicant has what he considers to be a good defence in the criminal case it is not a ground that ought to be relied upon by this Court to stop the criminal proceedings undertaken in good faith. That defence is open to the applicant in those criminal proceedings.

47. It is important to note that the law is clearly set out on circumstances in which a court can be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended, or pending criminal proceedings. Judicial review proceedings being concerned with the process rather than merits of the challenged decision or proceedings. This court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. Hence in determining the issues that have been raised herein the Court avoided the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.

48. Turning my mind to the first issue for determination and the eligibility of the Applicant to be granted the Orders sought, the Applicants sought Judicial Review orders of Certiorari to issue to quash the charges and the charge sheet before the Interested Party in **Eldoret ACC No. 2 of 2017**, instituted by the 1<sup>st</sup> Respondent against the Applicant herein. In this regard the Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** 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.”***

49. From the above finding, it is clear to the Court that the Applicant demonstrated which I find he has not, that the decision by the DPP to prosecute him on the allegations that were investigated by the EACC was made without jurisdiction, or in excess of jurisdiction, or that the rules of natural justice were not and had not been complied with so as to unfairly prejudice the Applicants by charging them. **Section 35** of the **ACECA** mandates the EACC to submit reports to the DPP with recommendations on the results of the investigation and the DPP shall make his own election whether or not to prosecute the case.

50. In my view however a charge or charge sheet being merely the expression of the intention to prosecute is not capable of being quashed. The said powers of the DPP to prosecute or not to prosecute are not however to be exercised arbitrarily, oppressively or contrary to public policy. The Court may intervene where it is shown that the intended criminal prosecution is instituted for other purposes other than the genuine enforcement of criminal law, or otherwise where there is an abuse of the court process.

51. 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.”***

52. The Applicant submitted that his criminal prosecution is an abuse of the Court process epitomized by selective prosecution by the DPP and it was a travesty of justice intended to manipulate, abused and/or misuse. The procedures and processes of the Court. I find no basis for this position. The Applicant having explained the chronology of events through his letter dated 3<sup>rd</sup> March 2017 hoping that the ODPP

would be persuaded to invoke its powers under Article 157 (6) (c) and discontinue the charges against him, it was not mandatory for the DPP would automatically agree with his position on the matter.

53. 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 is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court, the court will not hesitate to step in to stop it. See - Kuloba J in **Vincent Kibiego Saina vs Attorney General Misc Application No.839 of 1999**. I therefore find that a Judicial Review order to quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is not merited in this case.

54. On the second issue for determination the Applicant has also sought a Judicial Review order of Prohibition, to issue to prohibit the ongoing proceedings before the interested party against the Applicant.

55. It is trite that where a decision has been made, a party cannot seek to have it prohibited without having it quashed. However where the decision is in the process of being made and the only decision that has been taken is that the action in question should be undertaken, I do not see why the Court cannot in those circumstances prohibit the decision from being concluded even without quashing it.

56. In **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996**, where the Court gave an exposition of the order of prohibition 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...”*

57. In the above case the Court was clear that the remedy of prohibition is only lost where a decision has been made and not where the proceedings in question are still on going. Accordingly, since the applicant herein is seeking to stop the ongoing proceedings before the Interested party in **Eldoret ACC No. 2 of 2017** from continuing with his prosecution, the mere fact that a decision was made to prosecute them and the prosecution has in fact commenced, would not be a ground to decline to entertain an application seeking to prohibit the continuation of the said prosecution.

58. However, applying the principles raised above in the instant case, what the Applicant has presented before this Court, in my view, is what I would consider as his defense against the charges facing him at the criminal trial. The High Court is not the right forum to entertain that defense or justification concerning whether he should have been charged or not. To my mind, the applicant is asking this court to determine whether there is sufficient evidence to sustain the charges against them which question can only be ventilated before a trial court .

59. The High Court has the powers and the constitutional duty under **Article 165(6)** of the **Constitution** to supervise the exercise of the Respondents’ mandate whether constitutional or statutory so long as the challenge by an Applicant against any decision by the DPP and the Commission properly falls within the parameters of judicial review.

60. The Applicant has not placed any materials before the Court to demonstrate the illegality or otherwise of the conduct of the 1<sup>st</sup> Respondent during his investigation and arrest neither has he demonstrated that

the intended criminal proceedings are being instituted for other reasons other than the honest enforcement of the law. The Applicant has also failed to show the Court that he has a prima facie case and that if the prayers sought are not granted, the application would be rendered nugatory.

61. There is nothing before this Court to demonstrate that the 1<sup>st</sup> Respondent did not follow the Constitution in the course of its investigations and that both the DPP and the EACC were not independent and objective in the exercise of their mandate. The Applicants' contention that he was the one who disclosed and assisted the investigators in the allegations of misappropriation of funds through his letter dated 16<sup>th</sup> September, 2014 to the county Police Commander, and that subsequently cooperated hence be acquired immunity cannot also be determined by this Court. It is noteworthy that the investigations by the EACC revealed that the budget of the year 2014/2015 when the offence occurred which was annexed in the Affidavit of the Applicant, did not allocate any sum of money for members welfare and benevolence.

62. It follows that the allegation by the Applicant that there had always been a budgetary allocation in the office of the Speaker to cater for matters with regard to benevolence ranging from one million to ten million shillings is not supported by evidence. The recommendation by the EACC to the DPP to prosecute the Applicant and the decision by the DPP to prosecute him was therefore reasonable and only the trial Court can determine whether the facts and evidence as presented can sustain the charges.

63. The Applicant shall be afforded an opportunity to defend himself against the charges leveled against him during trial. If the Applicant is allowed at this stage to challenge the evidence in the possession of the DPP, this amounts to pre-empting the DPP's case by setting out the Applicants' defence and accepting it as true. In *William S.K Ruto & Another vs Attorney General Nairobi, High Court Civil Suit 1192 of 2005 (2010) eKLR* the court expressed itself on this issue 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”.***

It is not contended that the Applicant will not have a fair trial at the Magistrate's Court.

64. The third issue for determination is whether the Applicant has made a case for an order of Certiorari to issue to quash the letter dated 28<sup>th</sup> February, 2017 issued by the 1<sup>st</sup> Respondent purporting to direct the Chairman of the County Assembly Service Board of Trans Nzoia County Assembly to suspend the Applicant at half pay with effect from the date of the charge. In effect the question is whether the Court can issue a temporary order suspending the letter dated 20<sup>th</sup> February 2017 issued by the 1<sup>st</sup> Respondent purporting to direct the Chairman of the County Assembly Service Board of Trans Nzoia County Assembly to suspend the Applicant at half pay with effect of the date of charge. The court observes that the said letter is selectively discriminatory to the Applicant contrary to Article 27 of the Constitution as it purported to suspend the Applicant, the clerk and the driver but not other members of the County Assembly who were equally charged.

65. The act of the 1<sup>st</sup> Respondent isolating the Petitioner by requiring that he be suspended at half pay from the date of the charge in the Eldoret ACC No. 2 of 2017 and yet there were other members of the County Assembly who were accused of misappropriation together with him is tantamount to selective justice. This promotes discrimination as was decided in the case of **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others (2015) eKLR** where the court observed that:

***“Under Article 3(1) every person has an obligation to respect, uphold and defend the***

***Constitution. The said constitution also guarantees the equality of all persons before the law and equal protection and equal benefit of the law under Article 27 thereof. It is the said Article 27 (under the Bill of Rights) which binds all and clause 4 of Article 27 enacts that:***

***(4) the state shall not discriminate directly or indirectly against any person on any ground.***

66. That being said under **section 62 of the ACECA**, upon being charged with Economic crimes any public or states officer stands suspended with half pay. It is noted that the Applicant did not challenge the constitutionality of the said section and cannot therefore pray for the stay of the application thereof.

67. In conclusion it is the considered view of this court that to all the grounds raised by the Applicant touching on the issue of whether the DPP and the Commission exercised their powers within the four corners of the Constitution the answer is yes. The sufficiency of the evidence to sustain the charges however can only be determined in that context by the trial Court which is the Court designed to test the veracity of the evidence tendered against them.

68. Having carefully considered the rival arguments on each of the grounds raised by the Applicant, I find that the Applicant has not satisfied the threshold for this court to grant the leave sought. None of the grounds advanced can succeed to avail him the orders sought.

69. The application is found to be lacking in merit and having so concluded, it shall not be necessary for me to consider the next issue, namely whether leave should operate as stay. The application dated 10<sup>th</sup> April, 2017 is therefore dismissed with no orders as to costs.

**SIGNED DATED and DELIVERED** in open court this **27<sup>th</sup> day of June, 2017**.

.....

**L. A. ACHODE**

**JUDGE**