



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO.17 OF 2015

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (6) (7) OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF GROSS VIOLATION OF ARTICLES 157 (10) & (11) OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 50 OF THE CONSTITUTION**

AND

**IN THE MATTER OF RULES 3,4,7,8,10,11,13,20,23,24 AND 26 OF THE CONSTITUTION OF
KENYA**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF EXERCISING SUPERVISORY JURISDICTION OVER CRIMINAL
PROCEEDINGS**

IN THE CHIEF MAGISTRATE COURT AT MERU ANTI CORRUPTION CASE NO. 3 OF 2013

BETWEEN

CLEOPHAS NAIBEL.....PETITIONER/APPLICANT

-VS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

HON ATTORNEY GENERAL.....2ND RESPONDENT

RULING

By a Notice of Motion application brought pursuant to **Article 165 (6) and 7 of the Constitution and Rules 3,4,7,8,10,11,13,20,23,24,26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, the applicant has sought the following orders:

1.spent
2.spent
3. **That the honourable court be pleased to stay proceedings in Meru Anticorruption Case No.3 of 2015 pending the hearing and determination of this petition and/or further orders of the court.**
4. **That the honourable court be pleased to call for the record of the proceedings in chief magistrate at Meru Anticorruption Case No.3 in which the applicant was charged by the 1st respondent and determine the legality of the said criminal proceedings and make such orders or directions as deemed fit to ensure fair administration of justice.**
5. **That the honorable court be pleased to issue further conservatory and/or interim orders as may meet the ends of justice in this matter.**
6. **That costs of this application be provided for.**

The said application is premised on the following grounds:

1. **The 1st respondent was prodded to act by EACC officials through their annexed email conversations and as such did not act independently in contravention of Articles 157 (10) & 11 of the constitution.**
2. **That the alleged consent to prosecute presented by the 1st respondent before the lower court is an uncertified piece of email conversation which in all standards smacks of illegalities in the applicant's trial process.**
3. **That the 1st respondent failed to act in a quasi-judicial way when charging the applicant by authorizing the applicant's prosecution without receiving and evaluating the physical file from EACC officials.**
4. **That the trial has offended the applicant's constitutional rights and rights to natural justice.**

Briefly the applicant's case was that on 27th May 2015, the applicant was charged with two counts namely; the offence of corruptly soliciting for a benefit contrary to **Section 39 (3) (a) as read with Section 48 (1) of the Anticorruption and Economic Crimes Act of 2003** and the offence of corruptly receiving a benefit contrary to **Section 39 (3) (a) as read with Section 48 (1) of the Anticorruption and Economic Crimes Act No.3 of 2003**.

The applicant contends that the Director of Public Prosecutions was prodded to act by EACC officials through email conversations, and that as such, did not act independently; that the intention of the complainant together with EACC officials was driven more by their quest to portray him as corrupt other than a genuine intention to have him face a criminal trial. The applicant further urged the court to safeguard the rule of law principle underpinning the discretion of the DPP to prosecute cases without undue influence, direction or control by any other authority.

Consequently, he contended that the actions of the 1st respondent had greatly contravened his fundamental rights and freedoms and that it was imperative that the proceedings against him in Meru Anticorruption case be stayed.

I have carefully considered this application, the affidavit in support thereof and the alleged email exchanges between the office of the DPP and officials from EACC. The 1st and the 2nd respondent did not file responses. The applicant in the main body of the Petition stated that the Petition is brought under **Articles 165 (6) and (7) of the Constitution and Rules 3,4,7,8,10,11,13,20,23,24 and 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. Save for a general citation of the above Constitutional provisions, the applicant has not stated which Constitutional rights and Fundamental Freedoms have been violated and the manner in which they have been violated as is required of him.

It is now well settled that a Constitutional Petition must state with reasonable precision the provisions of the Constitution that are alleged to have been contravened and the manner in which they are infringed. This was the holding of the court in the case of *Anarita Karimi Njeru v AG (1979) KLR 54*. The same position was adopted by the court in the case of *High Court Miscellaneous Application No.666 of 1990, Kenneth Njindo Stanley Matiba vs. the Attorney – General (unreported)*.

I am alive to the fact that these cases were decided prior to the enactment of the new Constitution (2010). However in a more recent case namely *Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others (2013) Eklr*, the Court of Appeal held inter alia that the Petition as brought before the High Court referred to **Articles 1,2,3,4,10,19 20 and 73 of the Constitution** in its title but provided little or no particulars as to the allegations and the manner of the alleged infringements and hence did not meet the principle in *Anarita's case (supra)*, requiring that Constitutional Petitions be pleaded with reasonable precision. The said case is therefore still good law and I do associate myself with the sentiments expressed by the Learned Judges of Appeal in Matemu's case. The above notwithstanding, the court will go ahead to consider the application and not terminate the petition at this stage just in the event that the applicant takes action to correct the defects.

The applicant further contended that the alleged consent to prosecute presented by the 1st respondent before the lower court is an uncertified piece of email conversation which by all standards smacks of illegalities in the applicant's trial process. **Section 35 of Anti Corruption and Economic Crimes Act** provides:

“35. Investigation report

- 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.”***

From the circumstances of this case it is apparent that the procedure laid out in Section 35 of the Act has not been complied with. The Court of Appeal in the case of *Nicholas Muriuki Kangangi –vs- Attorney General Civil Appeal No.331 of 2010 (2011) Eklr* observed as follows with regard to the above provisions:

“It is clear from the provisions of this section that under section 36 (2), the Attorney-General can reject a recommendation by the Commission that a person be prosecuted for corruption or economic crime. This is made even clearer under the provisions of section 37 which obliges the Attorney-General to prepare an annual report on prosecutions for corruption or economic crimes. Section 37 (1) and section 37 (6) obliges the Attorney-General to lay each annual report before the National Assembly within a specified period. Section 37 (4) specifically provides:-

“The annual report shall also indicate if a recommendation of the Commission to prosecute a person for corruption or economic crime was not accepted and shall set out succinctly the reasons for not accepting the recommendation.”

What clearly emerges from these provisions is that KACC must report its investigations to the Attorney-General and in the report it may recommend the prosecution of a person for corruption or economic crime. The Attorney-General may, in turn, either accept or reject the recommendation to prosecute and the only check on the power of the Attorney-General to accept or reject KACC’s recommendation to prosecute lies in the National Assembly. Where the Attorney General rejects the recommendation to prosecute his report to the National Assembly:-

“shall set out succinctly the reasons for not accepting the recommendation.”

The Act sets out the procedure to be followed. That procedure cannot be circumvented by KACC asking the Kenya Police to prosecute on its behalf. There is no such provision in the Act. In the case before us there is no evidence that this procedure was followed. Mr. Obiri, the State Counsel who represented the Republic before us submitted that whether a report was made or not made to the Attorney-General was as it were, a matter between the Attorney-General and KACC. That cannot be right. The procedure is set down in the statute which creates KACC; KACC cannot ignore that procedure and say it is a matter between it and the Attorney-General. As a creature of statute, it must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void. That is what the appellant contended before us. We accept that contention by the appellant.”

In the ***Kangangi case (supra)*** the Court of Appeal however declined to acquit the accused person stating as follows

“We can straight-away say that we cannot acquit the appellant on the charges he is facing in the Magistrate’s court. The merits of those charges have never been a matter before this Court or the courts below. What we have agreed with the appellant is that the process which was used to bring the charges before the Magistrate was faulty as not being in conformity with the provisions of the Act.”

With regard to the other prayer namely staying of Meru Anticorruption Case No.3 of 2015. Article 157 (10) of the Constitution of Kenya 2010 provides as follows:-

“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.”

Article 157 (11) provides that:-

“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.”

I have carefully perused the email exchanges between the office of the DPP and officials from the EACC. There is nothing in those exchanges that shows the office of the DPP was influenced or that his independence was interfered with in any way in arraigning the applicant in court. The DPP is only carrying out his constitutional mandate.

Even though the applicant was charged under the Anti Corruption and Economic Crimes Act, the Ethics and Anticorruption Commission Act has powers to investigate and recommend to the DPP for a person to be charged with economic crimes.

Section 11 (1) (d) provides as follows:

“In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—

(d) investigate and recommend to the Director of Public 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.”

Orders staying criminal proceedings are only issued in rare and exceptional circumstances. This was the holding of the Court of Appeal in the case of Goddy Mwakio & Another v Republic [2011] eKLR where it was stated:

“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances.”

This principle was recently restated by the Court of Appeal in the case of Manilal Jamnandas Ramji Gohl v Director Of Public Prosecutions Nairobi Criminal Appeal No. 57 Of 2013 where the Court of Appeal rendered itself thus:

“We are mindful that an order staying criminal proceedings would be granted only in the most exceptional circumstances.”

The above findings of the court notwithstanding and since the respondent did not comply with the provisions of **Section 35 of the Anti-Corruption and Economic Crimes Act**, I think that the order of stay is merited in order to avoid an injustice to the applicant. I therefore grant Prayer 3 of Notice of Motion, staying proceedings in **Meru Anti-Corruption case No. 3 of 2015** till the petition is heard and determined. The other orders are declined at this stage.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF FEBRUARY, 2016.

R.P.V. WENDOH

JUDGE

25/2/2016

PRESENT:

Mr. Musyoka for State

Mrs. Ntarangwi Holding Brief for Mr. Kiogora for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused