



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA, AT NAIROBI**  
**ANTI-CORRUPTION & ECONOMICS CRIME DIVISION**  
**MISC. APPLICATION NO. 24 OF 2016**

**DR. WILLIAM N. OKEDI .....APPLICANT**

**VERSUS**

**ETHICS & ANTI-CORRUPTION COMMISSION &**

**ANOTHER (DPP) .....RESPONDENT**

**RULING**

1. The Applicant filed the Chamber Summons dated 9<sup>th</sup> August 2016. The same is brought under Order 53 Rule 1, Civil Procedure Rules 2010, Section 8 (2) and 9 of the Law Reform Act Cap. 26 Laws of Kenya.

In the application, the Applicant is seeking;

1. Leave to apply for;

a. An Order of Prohibition, prohibiting the Respondents by themselves, agents and/or servants from commencing, proceeding with, charging and/or prosecuting the Applicant in any pretended corruption/criminal proceeding arising from the 2013 procurement of consultancy services for management of funding to Civil Society Organizations under the Alcoholic Drink Control Act, 2010.

b. An order of *Certiorari* to remove and bring to this Hon. Court for purposes quashing, the decision of the Respondent to prosecute the Applicant contained in the Charge Sheet referred as Criminal No. 148 /17/2016 presented to Court on 3<sup>rd</sup> August, 2016 under court file No. 10 of 2016.

c. An Order of *Mandamus* compelling the Respondents to investigate the charge and prosecute the persons responsible for Nacada's loss of Kshs.68,000,000/= arising from the irregular engagement of media services during the 2013/2014 Financial Year.

2. That the grant of leave herein does operate to stay the intended charging and prosecution of the Applicant by the Respondents.

2. The Application is supported by several grounds in which the Applicant gives a long history of this matter and the process of procurement in the acquisition of Consultancy Services for Management of the

Funding to Civil Society Organizations as required under the Alcohol Drinks Control Act. 2010.

The Applicant also filed a statutory statement and a verifying affidavit. In the statement, he states that the Charge Sheet dated 3<sup>rd</sup> August, 2016 confirms that the intended charges are malicious, ill-conceived and an abuse of statutory and constitutional power by the 1<sup>st</sup> Respondent with the sole intention of removing him from office.

3. The 1<sup>st</sup> Respondent filed a 46 paragraph Replying Affidavit by Anthony Kahiga who is a member of the team that conducted investigations in respect of this matter. In it, he states that investigations were commenced following complaints regarding alleged irregular procurement of Ernst and Young at a cost of Kshs.17.5 million. That as a result of this irregular procurement, Kshs.99 million was disbursed to non-existent Civil Society groups not registered with the NGO co-ordination board.

4. He further states that as a result of the investigations in which the Applicant was accorded a hearing, the Applicant and 5 others are facing charges for willfully failing to comply with the law relating to procurement.

5. The 2<sup>nd</sup> Respondent filed a 43 paragraph Replying Affidavit by Joseph G. Riungu, a Prosecution Counsel in the office of the 2<sup>nd</sup> Respondent. In it, he states that the 2<sup>nd</sup> Respondent independently and thoroughly reviewed the evidence contained in the duplicate inquiry file no. EACC/F1/INQ/99/2015 and agreed with the recommendations of the 1<sup>st</sup> Respondent and directed that prosecution should ensue.

6. Both the Applicant and the Respondents annexed numerous documents to their supporting and replying affidavits.

7. In arguing the application, Mr. Agwara for the Applicant urged the Court to find merit in the Application and grant the Applicant the prayers sought as he had established a *prima facie* case. It was his submission that the Nacada Board Chairman and the Applicant have had issues and the said Chairman was using the charges to get at the Applicant. That it was the Nacada Chairman who had written to the 1<sup>st</sup> Respondent asking them to investigate and prosecute the Applicant.

8. He further submitted that the intended charges were based on repealed provisions of the law and cannot therefore stand. That the 1<sup>st</sup> Respondent was usurping the functions of the Authority under the Public Procurement and Asset Disposal Act. Upon being granted leave, he submitted that the said leave should operate as stay as the Respondents who have been investigating this matter now for two years would not suffer any prejudice.

9. On *Mandamus*, he submitted that during the Applicant's suspension, Kshs.66 million had been misappropriated. As the CEO, he had written twice to the 1<sup>st</sup> Respondent requesting for investigations but nothing had been done. He would therefore wish to have the 1<sup>st</sup> Respondent compelled to carry out investigations in respect to the Kshs.66 million. Failure to carry out the investigation, showed the malice against the Applicant, he said.

He referred the Court to several authorities to support the Applicant's position.

10. M/s Ocharo begun her submissions by setting out the mandate of the 1<sup>st</sup> Respondent as provided for in Article 252 (1) and (2) of the Constitution and Section 11 of the Ethics & Anti-Corruption Commission Act. She submitted that they acted within that mandate which was neither unreasonable nor illegal. That investigations into the alleged misappropriation of Kshs.99 million was ongoing.

11. It was her submission that although the Applicant was condemning them for relying on the repealed Public Procurement & Asset Disposal Act, 2005, he was still relying on the said Act to support his case. She further stated that what the Applicant had raised before this Court was for the trial court to deal.

12. Mr. Riungu for the 2<sup>nd</sup> Respondent associated himself with the submissions on behalf of the 1<sup>st</sup> Respondent. He submitted that the office of the 2<sup>nd</sup> Respondent is established under Article 157 of the Constitution and their duty is to review evidence presented to them for action.

13. He referred to the various annexures saying the Applicant had flouted the guidelines on procurement. He opposed the request for leave to operate as stay since that would interfere with the process at the Magistrate's Court criminal trial.

14. In reply, Mr. Agwara submitted that there was misdirection on the facts and the law by the 2<sup>nd</sup> Respondent. That there was no basis for the charges as no investigative report had been presented to the court. He further submitted that the whole exercise by the Respondents was based on malice.

15. The Application before me is for leave to file Judicial Review for three specific Orders as provided for by Order 53 Rule 1 (1) Civil Procedure Rules which provides;

***“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.”***

Order 53 Rule 1 (2) Civil Procedure Rules provides for how the said application for leave should be made. It states as follows;

***“An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”***

16. When the Applicant filed this application on 10<sup>th</sup> August, 2016, the duty Judge exercising his discretion under Order 53 Rule 1 (4) Civil Procedure Rules directed that the Respondents be served for hearing hence their filing of the grounds of opposition and Replying Affidavits.

17. Mr. Agwara for the Applicant argued that the material revealed through the supporting affidavit, statement of facts and annexures confirmed that the Respondents were acting maliciously against the Applicant in having him charged.

18. M/s Ocharo and Mr. Riungu for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively argued that the Respondent had the requisite mandate to investigate and charge the Applicant.

19. Mr. Agwara referred to the cases of ***PRAKIDIS NAMONI SAISI (exparte applicant) in Nairobi Misc. Application NO. 502 of 2015; QUANTAI v. CHIEF MAGISTRATE NAIROBI [2007]2 EA 170;*** whose ruling/judgement were made after the hearing of the substantive Notice of Motion. They are not therefore applicable here. The circumstances prevailing in the cases of ***GIRO COMMERCIAL BANK (exparte) Nairobi JR No. 9 of 2013*** and ***JAMES OPIYO WANDAYI (exparte) Nairobi JR No. 258 of 2016*** are so different from the present case.

The ***Wandayi case*** dealt with the issue of individual rights and public interest, and an organ acting outside its mandate.

In the ***Giro Commercial Bank case***, the 1<sup>st</sup> Respondent (DPP) and interested party did not oppose the Orders sought.

20. In the present case, the Orders sought have been opposed by the Respondents who argue that they acted within their Constitutional and Statutory mandate. They have also stated that the Applicant was heard and even produced documents to them.

Whether this is true or not, can only be determined after hearing the substantive application.

21. It is not disputed that the 1<sup>st</sup> Respondent has investigated the Applicant and made recommendations for his being charged. It's also not disputed that the 2<sup>nd</sup> Respondent supported the recommendations by the 1<sup>st</sup> Respondent to have the Applicant charged.

It is this decision to have him charged that the Applicant is challenging citing malice, based on vendetta.

22. The issue is whether the Respondents acted lawfully and rationally in arriving at that decision. This is an issue that can only be determined in the substantive motion. What this Court needs to determine at this stage is whether the Applicant has made out a *prima facie* case to warrant the grant of the leave sought.

23. Under Order 53 Rule 1 Civil Procedure Rules, the Court will mainly consider the statement of facts, grounds and prayers sought, plus any responses by the Respondent to make a determination on the issue of leave.

I have considered this application plus the Replying Affidavits and submissions made and find that the Application is not frivolous. Leave shall therefore be granted.

24. Having so found, I will now deal with the issue as to whether the leave should operate as stay pending the determination of the Judicial Review Application.

25. Among the annexures in the Applicant's Application at page 444 – 447, is a Charge Sheet with several counts. The charges are against the Applicant and five others. The Applicant is urging this Court to issue Orders staying his plea taking until the Judicial Review Application is heard and determined. The reason he cited is that the investigations culminating in these charges have been ongoing for two years now and the Respondents would not suffer any prejudice if such orders were issued.

Secondly, that the charges are malicious and based on vendetta.

Thirdly, that the Applicant would be prejudiced since he will be suspended and placed on half pay yet he is due to retire in April 2017. He also says he is innocent over those matters in the lower court.

26. In response to this, the Respondents counsel submitted that the proceedings in the criminal court would not render this application nugatory, as he would be granted his dues in the event of an acquittal. That the stay will not remedy his reputation or ridicule.

27. The Applicant is pleading innocence over the charges in the lower court. This Court is not seized of the material facts and evidence involving those charges. This also, would not be the forum to discuss his innocence or otherwise.

Secondly, this Court at this stage cannot deal with the merits or otherwise of the Judicial Review Application, as at this point, it has not been shown that the Respondents investigated and charged the Applicant without the requisite mandate. In the case of ***MEIXNER & ANOTHER v. A. G. [2005] 2 KLR 189*** the Court of Appeal expressed itself as hereunder on this;

***“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under Section 26 (3) (a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26 (8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly, the right to the protection by law enshrined in section 77 of the Constitution... Judicial Review is concerned with the decision making process and not the merits of the decisions itself. Judicial Review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error***

*of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of the trial court.”*

I agree with this finding and state that this Court cannot interfere with the Respondent’s mandate at this *ex parte* stage.

28. The issue of malice in the decision making process by the Respondents can only be dealt with in the Judicial Review Application. The Applicant is complaining of problems he has had with the Chairperson of Nacada Mr. Mututho. It is not the said that the Chairperson of Nacada who investigated or charged him and neither were the Respondents bound by the Chairperson’s complaint or request. It has to be shown that the Respondents did not carry out independent investigations but just relied on what the Chairperson of Nacada had told them. This has not been demonstrated in the present application.

29. It is the duty of this Court to ensure that the *Ex parte* Applicants’ Application is not rendered nugatory by the acts of the Respondent during the pendency of the Judicial Review Application. See ***TAIB v. THE MINISTER FOR LOCAL GOVERNMENT & 3 OTHERS MISC. CIVIL APPLICATION NO. 158 OF 2006 MOMBASA HIGH COURT***

The taking of plea by the Applicant will not render the Judicial Review Application nugatory as claimed by the Applicant since no determination will be made through the plea taking. The criminal case may also not be heard very soon. In fact, the Judicial Review Application is most likely to be heard and determined much earlier than the criminal case.

30. I have not been convinced of any serious prejudice that will be suffered by the Applicant if the plea in the criminal charges is taken before the Judicial Review Application is heard and determined. I therefore decline to order that the leave operates as stay to the taking of plea by the Applicant. I therefore allow prayer No. 2 of the Chamber Summons dated 9<sup>th</sup> August, 2016.

- i. The Substantive Motion to be filed and served within 15 days.
- ii. Respondents to file and serve their responses within 15 days of service of the Notice of Motion.
- iii. The Applicant to file and serve further affidavit (if need be) within 7 days of the service of the Responses.
- vi. before the Deputy Registrar to confirm compliance on 6<sup>th</sup> October, 2016 before a hearing date is fixed.
- v. Prayer 3 is disallowed.
- vi Costs of this application shall be in the cause.

**Date and delivered** this 18<sup>th</sup> day of August, 2016 at **NAIROBI**

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**HEDWIG I. ONG'UDI**  
**HIGH COURT JUDGE**