



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.310 OF 2014

BETWEEN

DR. ALFRED N. MUTUA..... PETITIONER

AND

THE ETHICS & ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC ROSECUTIONS.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE SERVICE3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

AND

SENATOR JOHNSTONE MUTHAMAINTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner, Dr Alfred N. Mutua, is the Governor of Machakos County having been elected as such in the General Election held on 4th March 2013. He subsequently took oath of office on 28th March 2013.
2. Sometime in April 2013, the Petitioner and his County Executive Committee formulated a policy for the purchase of motor vehicles for his use and that of the members of his County Executive Committee. As a result, a Tender Committee was allegedly convened by the Interim County Secretary for that purpose. The said Secretary allegedly provided technical advise on the purchase of quality pre-used motor vehicles that could serve the transportation needs of the Petitioner and the members of the County Executive Committee. Following the said advice, the Tender Committee made a resolution to purchase the aforesaid motor vehicles. Subsequently, the Interim County Secretary entered into an agreement for the purchase of the said motor vehicles on 24th April 2014 and the vehicles were thereafter delivered to the said County Government.
3. According to the Petitioner, following a complaint that had been lodged by the Senator of Machakos County (the Interested Party herein), Johnstone Muthama, with the 1st Respondent, the **Ethics and Anti-**

Corruption Commission (EACC) regarding the procurement of the said motor vehicles, EACC initiated an inquiry into the same. The Petitioner was therefore requested to appear before EACC for purposes of recording his statement on 17th June 2014 but he did actually appear on 23rd July 2014. Subsequently, on 7th April 2015, EACC summoned him to its offices and a charge and caution statement was read to him. The charges and cautionary statement in respect of which he was summoned for purposes of being arraigned in Court related to two counts, namely; offence of abuse of contrary to **Section 56** as read with **Section 48(1)** of the **Anti-Corruption and Economic Crimes Act (ACECA)** and the offence of wilful failure to comply with the law relating to procurement contrary to **Section 45(2)** as read with **Section 48(1)** of ACECA.

4. He was required to appear in Court on 13th April 2015, having been released on a cash bail of Ksh.100,000.00. However, he obtained an order from the Court of Appeal on 6th May 2016 suspending the charges and his arraignment in Court.

5. This Petition relates therefore to the intended charges the Petitioner faces in relation to the procurement of the motor vehicles aforesaid and in that regard, he faults the intended prosecution on the basis that it is illegitimate and violates the **Constitution** and statutory law on county financial management accountability.

The Petitioner's case

6. The Petitioner's case is straightforward as contained in his Amended Petition dated 2nd June 2016, affidavit sworn on the same date and further affidavit sworn on 25th May 2016, written submissions dated 14th July 2015 and further written submissions dated 9th June 2016. His case as submitted by Counsels, Mr. Nyaoga and Mr. Nyamu is as herebelow;

7. That despite clear provisions of statute and the **Constitution** delinking the Petitioner and Deputy Governor on matters of procurement of goods and services, the Respondents have insisted on dragging the Petitioner into the allegations regarding the same. It is his contention therefore that the failure of the Respondents to inform him of the nature of his involvement in the procurement of the aforesaid motor vehicles is a violation of his right to fair administrative action as stipulated under **Article 47** of the **Constitution**.

8. It is also his contention that the Respondents' decision to prosecute him based on the views he expressed in a cabinet meeting of the Machakos County Executive of which he is the Chairman is unconstitutional as it violates his right to freedom of expression as provided for under **Article 33(1)** of the **Constitution**.

9. It is also the Petitioner's case that the decision to procure the motor vehicles aforesaid was approved by the County Assembly on 30th July 2013 and therefore the decision to prosecute him has been made contrary to the powers and privileges of the County Assembly as provided under **Section 17** of **County Government Act**. That prior to making the decision to prosecute him, the Respondents ought to have taken statements from the Speaker of the County Assembly and failure to do so violates **Article 47** of the **Constitution** and that the Respondents acted in bad faith in deciding to mount criminal charges against him by ignoring favourable evidence.

10. It is therefore his case that that the said decision to prosecute him is unreasonable and not proportional and amounts to an abuse of the Court process. On that submission reliance was placed on the decision in **Ronald Leposo Musengi v Director of Public Prosecutions and 3 Others Petition No.436 of 2014 e KLR (2015)** where Odunga J held that the Director of Public Prosecutions (DPP) had a duty to show that his decision to prosecute any person is justified.

11. It is the Petitioner's further position that the Respondents in preparing to mount charges against him have violated the Constitution in various instances. Firstly, he contends that his intended prosecution is a violation of **Article 157** of the **Constitution** and that he ought not to be dragged into matters of

procurement as he is not an accounting officer and therefore not in control of procurement and public finance matters at the County. Secondly, that the Respondents have abdicated their duty by failing to appreciate that under the provisions of **Article 189** of the **Constitution**, the Petitioner is in charge of formulating policy as the head of a County Government just as the President would as the Head of State.

12. According to the Petitioner therefore, he should not be questioned on matters of implementation of policies as that is the duty of the County's accounting officer and that under **Section 148** of the **Public Finance Management Act**, he is not an accounting officer. In that regard, he relies on the case of **The Council of Governors v The Senate e KLR (2015)** where it was held that Governors were not accounting officers in the financial affairs of Counties.

13. Thirdly, that the Respondents have violated **Article 249(c)** of the **Constitution** by failing to appreciate that the Transition Authority and its officers were in-charge of establishing systems in the County at the material time and therefore responsible for public finance and procurement including the procurement of the motor vehicles in question. Fourthly, that the decision to charge the Petitioner violates the national values and principles as stated under **Article 10** of the **Constitution** and that the steps taken by the Respondents are a witch-hunt bent on soiling his reputation and the integrity he has built over the years. He contends therefore that his right to hold office is likely to be infringed without justification as he is being charged with an offence in relation to which there exists no nexus with him under the **Constitution** and the statute. That his prosecution may also have far reaching implications including suspension from office.

14. In any event, he claims that no money has been lost in the procurement of the motor vehicles and instead the same has been saved for public gain. Further, he has, together with the members of the County Executive Committee, sacrificed their entitlement to brand new and luxurious motor vehicles for the development of the agenda and welfare of the women, children and entire citizenry of Machakos County and he should not be punished for that sacrifice for the above reasons.

15. He has therefore sought the following orders;

(a) A declaration that resonating from the fundamental rights under the Constitution of Kenya 2010 particularly the rights to information under Article 35 and right to fair administrative action under Article 47 of the Constitution, the decision of the 1st Respondent to deny the Petitioner information requested, for purposes of statement taking and or interview, the 1st respondent is in violation of the Petitioner's fundamental rights under the Constitution of Kenya, 2010.

(b) A declaration that resonating from the provisions of the Constitution on transition and the role of the Transition Authority under the Sixth Schedule of the Constitution and statutes made thereunder the decision of the 1st Respondent requiring the Petitioner to be interviewed and or to take his statement in relation to procurement and or public finance during the transition period is unconstitutional and therefore null and void.

(c) An order for injunction restraining any of the Respondents from in any way preferring any charges or interfering with the Petitioner's fundamental rights and freedoms based on any investigations whether commenced, on going or concluded relating to the purchase of motor vehicles subject of inquiry NO. EACC/FI/INQ/51/2014.

(d) A declaration that the Petitioner cannot be held liable in economic or anti-corruption courts for acts or omissions of county accounting officers in charge of county entities in exercise of functions under Article 226, 227 of the Constitution, Section 148 and 149 of the Public Finance Management Act and County Government Public Finance Management Act.

(e) An order of certiorari to quash the 1st and 2nd Respondents decision to charge the Petitioner with the offences of abuse of office contrary to section 56 as read with section 48(1) of the ACECA and willful failure to comply with the law relating to procurement contrary to section 45

(2) as read with Section 48(1) of the ACECA.

(f) This Honourable Court be pleased to issue an order of prohibition, prohibiting the Respondents from causing the apprehension of the Petitioner considering and/or preferring any criminal charges against the Petitioner in any court based on the procurement process of motor vehicle purchased pursuant to the County of Machakos Tender Committee Resolution made on 19th April 2010.

(g) This Honourable Court do issue an order of prohibition, prohibiting the 1st Respondent from applying their constitutional or statutory powers on the Petitioner until they have furnished him with particulars and information as may enable him understand in what context they endeavour to interview or take his statement.

(h) Any other relief that this Honourable Court may deem fit and just to grant in the interests of justice.

(i) Costs of the Petition.

The 1st Respondent's case

16. The 1st Respondent, EACC in response to the Petition filed an affidavit sworn by Ignatius Wekesa on 17th July 2014 and a further affidavit sworn on 6th June 2016 by Arthur Opili. Both deponents are Investigators with the 1st Respondent.

17. Mr. Wekesa depones that upon receiving a complaint touching on irregular procurement processes at Machakos County, he opened an inquiry on that complaint. Together with a team of other investigators, he collected relevant documents and took statements from officers of the County Government and that at the end of his investigations, he discovered that;

(a) The acquisition of the motor vehicles did not abide with any of the statutory procurement methods.

(b) The purchase of these vehicles was not only initiated by the Petitioner but the vehicles were sourced and pricing settled by him well before the matter was placed before the Tender Committee.

(c) The vehicles were supplied even before the Tender Committee approved both the procurement as well as direct procurement method as the appropriate method of procurement.

(d) The vehicles were delivered long before an order was placed for them.

(e) Despite the fact that the procurement was for a common item in the market namely, used motor vehicles, the same was never advertised as is the law.

18. He states further that all the evidence gathered indicated that the Petitioner had violated the law hence the charges intended to be preferred against him and adds that the Petitioner cannot purport to claim that he was not given information relating to the investigation. In fact that the Petitioner was involved at all stages of the investigation and its nature and scope.

19. Mr. Opili on his part has stated that the evidence he obtained during investigations revealed that the Petitioner chaired a cabinet Meeting for Machakos County Government on 16th April 2013 and in that meeting, the Petitioner proposed the purchase, brand name and price of the motor vehicles and that the acquisition of the motor vehicles did not abide by any of the statutory procurement methods known to Kenyan Law and was therefore unlawful.

20. Mr. Opili added that the motor vehicle purchase was also not approved by the Machakos County Assembly as alleged by the Petitioner and that the County Assembly only debated and approved a motion to purchase reconditioned cars long after the vehicles, subject of this Petition, had been acquired. That the said Motion was therefore irrelevant to the unlawful acquisition made much earlier.

21. He further states that the Petitioner recorded his first statement with EACC on 23rd July 2014 and a further statement on 7th August 2014 and it is therefore his contention that EACC observed the rights of the Petitioner as required by law.

22. In her Submissions Miss Lunyolo for EACC stated that the Petitioner's right to information has not been violated in any way and that the Petitioner had the required information as well as the context and scope of the investigations undertaken against him. In addition, she contended that the Petitioner was involved in all stages of the investigations as he was the one in charge of all the documents handed over to the investigators.

23. It was her further submission that the EACC has the mandate to investigate and recommend to the DPP the prosecution of any unlawful acts and in that context, the Petitioner had failed to demonstrate that EACC acted in contravention of the **Constitution** and applicable laws. She also submits that this Court can only interfere with the EACC's and DPP's mandate where it is demonstrated that they had acted in contravention of the Constitution. For that submission she relied on the cases of; **Paul Ng'ang'a and 2 others v Attorney General and 3 Others Petition No.518 of 2012, Total Kenya Ltd and 9 Others v Director of Criminal Investigations Department and 3 Others Petition No.478 of 2012** and the case of **James Ondicho Gesami v Attorney General and 2 Others Petition No.376 of 2011**.

24. It was her submission therefore that EACC acted with due regard to public interest and in the interest of administration of justice and that it did not act in abuse of the Court process either. That EACC did not also act at the instance of the Interested Party as alleged it being an independent commission and in executing its mandate it does not act under the direction or control of any person or authority. She added that it is in the interest of the public to have complaints lodged and investigated and if sufficient evidence is gathered, to recommend to the DPP for the prosecution the alleged act of corruption.

25. It was Miss Lunyolo's other submission that under **Section 121** of the **Public Finance Management Act** and **Section 30(3) (f)** of the **County Government Act**, the Petitioner is accountable for the management of County resources and it was her position that it is not for this Court to determine whether the Petitioner is to be held liable for the alleged economic crimes or not and on that submission she relied on the decision of **Francis Mbugua v Commissioner of police and 2 Others Petition No.79 of 2012** where it was held that a judge has no powers to investigate crimes. Lastly, she urged the Court to dismiss the Amended Petition with costs as it lacked merit.

The 2nd Respondent's case

26. The 2nd Respondent, the DPP, in response to the Amended Petition filed replying affidavits sworn by Miss Spira Laura, a Prosecution Counsel in his office, sworn on 7th July 2015, 8th January 2016 and 3rd June 2016, respectively.

27. It is her contention that upon receiving the entire evidence gathered during investigations by the EACC, the DPP was satisfied about the sufficiency of the evidence in the inquiry file leading to the intended charging of the Petitioner in the Chief Magistrate's Court at Machakos in **ACC No. 1 of 2015** where other suspects had already been charged.

28. She further claims that under the provisions of **Section 30(3)(f)** of the **County Government Act** **Petition No.79 of 2012**, the Petitioner is accountable for the management and use of County resources and that he breached this requirement by originating the idea of purchasing motor vehicles without prior request for specification being made. That he later obtained endorsement of the purchase by his Cabinet through misrepresentations and concealment of material facts and facilitated the purchase of the pre-used

motor vehicles through single sourcing and at higher than market prices and he presided over the distribution and allocation of the motor vehicles without ensuring that they had been inspected to ensure that the County of Machakos received value for its money.

29. It is her other contention that the DPP lawfully exercised his powers under **Article 157** of the **Constitution** in intending to charge the Petitioner and the said action does not in any way violate the fundamental rights and freedoms of the Petitioner under **Article 33(1)** of the **Constitution** as alleged. That the Petitioner has in fact failed to demonstrate that the decision to charge him is unlawful, procedurally unfair, oppressive and an abuse of the Court process. It is also her position that the DPP has the mandate to determine which offence to charge a suspect with and he is independent and has the discretion to prefer any charge and or offence under any written law and that the offences the Petitioner may be charged with are clearly spelt out in respective statutes.

30. Mrs. Obuo in her submissions added that while the Petitioner is a principal offender, his accomplices have already been charged in the Chief Magistrate's Court at Machakos in **ACC No.1 of 2015** and there is no lawful reason why he is still free of those charges.

31. It is her further submission that all the matters of fact and evidence presented in this Court by the Petitioner are matters of evidence for consideration by the trial Court which is the appropriate forum for such issues to be raised and on that submission she placed reliance on the case of **Meixner and Another v Attorney General Civil appeal No.131 of 2005**.

32. She further submitted that the Petitioner has failed to demonstrate that the DPP acted in excess of his powers and added that the decision to prosecute the Petitioner was undertaken within the law.

33. In any event, she submitted that the Petitioner, as the Governor of Machakos County, is answerable to the Senate for the portion of the national resources that have been allocated to the County and is also responsible for financial prudence in the County and should be held culpable if he breaches the law in that regard.

34. She concluded by stating that the Petition lacks merit and ought to be dismissed.

The 3rd and 4th Respondents' case

35. The 3rd and 4th Respondents in opposing the Amended Petition filed Grounds of Opposition dated 10th June 2016 and in summary they oppose it on the grounds firstly, that it does not disclose any violation of the **Constitution**. Secondly, that the Petitioner has failed to show with credible evidence that the DPP, the EACC and the National Police Service, in prosecuting him, are driven by malice, ulterior motive or unreasonableness so as to warrant intervention by this Court. Lastly, that **Article 227** of the **Constitution** stipulates that any public entity contracting for goods and services must do so within a system that is fair, equitable, transparent and cost effective and it is within the mandate of the trial Court to ascertain for itself that the charges preferred by the Respondents meet that threshold. That therefore the Petition is without merit and ought to be dismissed.

The Interested Party's case

36. The Interested Party, Johnstone Muthama is the Senator of Machakos County having been elected in the same general election as the Petitioner. He was enjoined to these proceedings by an order made on 14th August 2015 and he filed a Replying Affidavit sworn on 12th May 2016 and his case as is in that affidavit and submissions dated 20th May 2016. His case as presented by Mr. Oluoch is straightforward and is as hereunder.

37. That the Petitioner single sourced and personally supervised the purchase of the motor vehicles subject of these proceedings in breach of the **Public Procurement and Disposal Act, Public Finance Management Act** and the **County Government Act**. That the purchases were also in breach of the

Government regulations on second hand motor vehicles.

38. It is also his case that the office of Governor bears an onerous responsibility of accounting for public resources in every County and therefore the intended prosecution of the Petitioner is in the public interest. That conversely the Petition was not filed in public interest but to avoid criminal responsibility. He claims that the Petitioner has a duty to demonstrate that his prosecution is undertaken in abuse of the Court Process and the discretion of the DPP has been used improperly which he has failed to do.

39. It is his case furthermore that there are sufficient safeguards within the criminal justice system to ensure that all the rights of an accused persons are safeguarded and he therefore urged the Court to dismiss the Amended Petition with costs.

Determination

40. At the outset, I must state that the Petitioner filed the present Petition at the time the Respondents were undertaking investigations into the purchase of the motor vehicles aforesaid. The investigations into that issue have now been completed and the DPP has revealed his intention to prosecute the Petitioner and therefore the central issue for determination is whether the decision of the DPP is within the law and whether this Court should intervene to stop the intended prosecution on the basis that the Petitioner's fundamental right to fair administrative action and information was violated. The other question that would flow from such a determination is whether the Petitioner can be held accountable for the actions of the accounting officer of Machakos County.

Whether the DPP's decision to prosecute the Petitioner is in violation of the Constitution

41. There is no doubt that the State's prosecutorial powers are vested in the DPP under **Article 157** of the **Constitution**. The relevant part provides as follows;

“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.”

The decision to institute criminal proceedings by the DPP while discretionary is also not subject to the direction or control of 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, shall not be under the direction or control of any person or authority.”

These provisions are also replicated in **Section 6** of the **Office of the Director of Public Prosecutions Act** in the following terms;

“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.”

42. It is also not contested that the EACC is mandated under **Section 11(1)(d)** of the **ACECA** to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to **Chapter Six** of the

Constitution. Further, under the provisions of **Section 35** of **ACECA** as read with the provisions of **Section 11(1) (d) of Ethics and Anti-Corruption Commission Act**, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not.

43. There is enough case law from this Court and the Court of Appeal to the effect that the Court can only interfere with the powers of the DPP if there is sufficient evidence that he acted in contravention of the **Constitution** – See for example the cases of **Paul Ng’ang’a and 2 Others v Attorney General Petition No.518 of 2012**, and **Meixner and Another v Attorney General Civil Appeal No.131 of 2005**.

44. The Petitioner in this case has alleged that the DPP acted in contravention of the **Constitution** in four instances. Firstly, that he violated **Article 157** of the **Constitution** and he ought not to have dragged the Petitioner into procurement matters as he is not the accounting officer of his County. Related to this contention is the second grievance pointed out by the Petitioner that the DPP has violated **Article 189** of the **Constitution** and claims, that he as Governor in charge of formulation of policy, cannot therefore be questioned on matters of implementation of policy. I will determine these two contentions together.

45. The question as to who is the accounting officer of a County Government has been determined in the cases of **International Legal Consultancy v The Senate and Another Kerugoya Constitutional Petition No.8 of 2014** and also in the case of **Council of Governors v the Senate Petition No.413 of 2014**. In the **Council of Governors Case**, the Court held that an accounting officer of a County Government is the person so appointed and designated as such by the County Executive Committee Member for Finance under **Section 148** of the **Public Finance Management Act**. The Court therefore found that a Governor was not an accounting officer of a County Government and in the present Petition, the Petitioner’s complaint is that he ought not to be dragged into procurement matters as he is not the accounting officer aforesaid.

46. While I wholly agree with the Petitioner’s understanding of the decision in the **Council of Governor’s Case**, in the same case, the Court was emphatic that the “*buck stops with the Governor in the management of County resources*” and therefore where there is sufficient evidence that mismanagement of such resources including financial resources occurred as a result of criminal or other acts or omissions of a Governor, the defence that he is not an accounting officer is best left to the circumstances of each case and whether in fact as such non-accounting officer, a governor is not criminally or otherwise culpable.

47. In the circumstances and not seized of the specific and all the evidence to be tendered in respect of the alleged unlawful process, this Court would itself be acting unlawfully if it purported to analyse whatever evidence by way of Affidavit placed before it and without the benefit of cross-examination declare the Petitioner innocent of the intended charges.

48. The above finding would also apply to the argument made by the Petitioner that he is only in charge of formulation of policy in the County. In that regard, the **Constitution** at **Article 201(d)** stipulates that public money shall be used in a prudent and responsible way and therefore a Governor must necessarily ensure that the policies he and his Executive so formulate meet the constitutional threshold of prudence use of public money.

49. As to whether he is culpable or not in financial impropriety or failing to follow the law including the procurement law and therefore resulting in the wastage of public money entrusted to the Governor as the Chief Executive Officer of his County, that, with respect, is not an issue to be determined in this Petition. To my mind that issue can only be determined by the trial Court which would properly be seized of the facts and all the evidence against him. I say so because in the case of **Michael Monari and another v The Commissioner of Police and 3 Others Misc. Application No.68 of 2011** it was held as follows;

“It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any

evidence to be tendered against an accused person. It would be improper for this court to try and or attempt to determine the intended criminal case which is not before it. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment”.

Similarly, the Court of Appeal in the **Meixner case (supra)** held that;

“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court”.

50. I am in agreement with the law as espoused above and in my view therefore, all the grounds raised by the Petitioner and touching on the issue whether he is responsible for violation of procurement law can only be determined by the trial court as that is the Court designed to test the veracity and sufficiency of the evidence for and against the Petitioner.

51. I should also add that this Court is not to be concerned with the sufficiency of the evidence available to support the intended charges against the Petitioner as that is at the core of the criminal trial. At this point, all that the 1st and 2nd Respondents are entitled to demonstrate is that they have a reasonable basis to believe that an offence has been committed and the Petitioner should therefore stand trial - See **William S. K. Ruto & Another v Attorney General (2011) e KLR**. The Petitioner on his part has the burden of proving that the Respondents have violated the Constitution in making the decision to prosecute him and that he may not have a fair trial if the case as framed against him proceeds for trial, which burden, in my view, he has failed to discharge.

52. I say this and with tremendous respect to the submission by Mr. Nyaoga that the *actus and mens rea* of the intended charge cannot be proved because whatever views this Court may have on that subject are irrelevant as it is not the trial Court. Once the Petition has been unable to show that pursuant to **Article 157(11) of the Constitution**, the DPP in deciding to prosecute him failed 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*”, all such submissions would be wholly unhelpful to the Court. In saying so, I am aware of the decision of Odunga J. in **R v DPP and Others ex-parte Shamilla and Others [2016] e KLR** where the learned Judge relied on the National Prosecution is mounted and the same has no reasonable chance of succeeding, the High Court can prohibit such a prosecution. I am unable to say so in the present case with the material placed before me by way of affidavits only and without the benefit of cross-examination of their deponents.

53. The third issue raised by the Petitioner is that **Article 249(c) of the Constitution** has been violated. It is his contention in that regard that the officers of the Transition Authority were in charge and responsible for public finance and procurement at the material time of procuring the motor vehicles and therefore he is not responsible for any criminal actions in that regard. In the **Council of Governors Case**, the Court having considered the provisions of the **Sixth Schedule to the Constitution** and of the **Transition to Devolved Government Act** held that the **Transition Authority** was the body responsible for facilitating and co-ordinating the transition from the National Government to County Government at the advent of the **Constitution 2010**. The Court went on to observe that County Governments would become responsible for the fiscal management and planning of County Government matters immediately after the **Transition Authority** had handed over the assets and liabilities of Local Governments to the County Governments.

54. The relevant issue before me is whether the Petitioner can properly be responsible for procuring the motor vehicles during the period under review. That question in my view can only be answered by the trial Court and I say so guardedly and without assuming the jurisdiction of that Court because the role of the Petitioner is not clear in the whole procurement process. On the one hand he claims that he originated the idea to purchase the motor vehicles and the idea was approved by his Cabinet and the County

Assembly while on the other hand he claims that the Transition Authority was and is solely responsible for the procurement and purchase of the motor vehicles. As stated elsewhere above, the veracity of those allegations can only be tested in a trial with the requisite evidence. The trial court would also be the appropriate forum to determine whether the County Assembly did approve the purchase and if so the probative value of such a decision in the context of the trial.

55. Lastly, on this aspect of the Petition, I heard the Petitioner to claim that the DPP in charging him has violated the provisions of **Article 10** of the **Constitution** and that his intended prosecution is a witch-hunt to soil his reputation and his political career. In that regard, it must not be forgotten that at this stage of the criminal process, the Petitioner has the constitutional right to be presumed innocent until proven otherwise in a public trial at which he would have all the necessary safeguards to present his defence. It is also a principle of criminal law that criminal conduct must be prosecuted, a wrong doer is convicted and thereafter punished. It follows from this that balancing the rights of an accused person and the public interest, it is in the public interest to prosecute crimes where there is sufficient evidence that a crime has been committed. I did not hear him to claim that he will not have a fair trial in that context and how so.

56. With that understanding in mind, it would in fact be for the benefit of the Petitioner if he stands trial and clears his name within known legal avenues. As I see it now, he has literally jumped the gun because he has basically presented what I see as his possible defences of innocence not before the trial Court but in this Court, a mistake on his part.

Whether the intended prosecution is a violation of the Petitioner's fundamental rights and freedoms

Freedom of expression

57. I also heard the Petitioner to claim that his intended prosecution is a violation of his fundamental right to freedom of expression and right to information.

58. Freedom of expression is guaranteed under **Article 33** of the **Constitution** in the following terms;

“(1) Every person has the right to freedom of expression,

which includes—

(a) freedom to seek, receive or impart information or ideas;

(b) freedom of artistic creativity; and

(c) academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to—

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that—

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm;
or

(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”

59. There is no doubt that freedom of expression i.e freedom to give ideas is important in a democratic society – See the cases of **Print Media South Africa and Anor v Minister of Home Affairs and Another (CCT 113/11) [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC)**, **Charles Onyango-Obbo and Anor v Attorney General (Uganda Constitutional Appeal No.2 of 2002)** and **Coalition for Reform and Democracy and 2 Others v Attorney General Petition No.628 of 2014 as consolidated with Petition No.630 of 2014**. The question in that context is whether the Petitioner can be charged in a criminal case for originating an idea. That question is abstract and can only be determined in its context and it must be demonstrated that a nexus exists between the idea and the intended charges. I do not have sufficient material before me to answer that question and the best place to raise it is the trial Court which has a similar obligation as this Court to uphold the Bill of Rights including **Article 33**, in all its proceedings.

Right to access information

60. I now turn to determine whether the Petitioner’s right to information has been violated. The right to information is provided for under **Article 35** of the **Constitution** as follows;

(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

61. The law would therefore be that the Petitioner has a right to obtain information held by the State (in this case the Respondents). The Petitioner however has an obligation to request for that information and the State has an obligation to disclose to the Petitioner the information unless there exist sufficient reasons for non-disclosure of the information such as those that which would cause substantial harm to the legitimate claim – See the cases of **Okiya Omtatah Okoiti v Attorney General Petition No.78 of 2014** and **Nairobi Law Monthly v Kenya Electricity Generating Company Petition No.278 of 2011**.

62. The Petitioner further claims that his right to information was violated because he was not informed of the nature and scope of the investigations undertaken against him and in that regard, **Article 35** on the access to information is not absolute. It can be limited in appropriate cases.

63. In the present case and as can be seen in the affidavit of Mr. Wekesa, aforesaid, the Petitioner was involved in the investigations regarding the procurement of the motor vehicles subject of this Petition and that he was the one at some stage, with the help of his Cabinet, who prepared documents that would form the back bone of that investigation. Mr. Wekesa in fact deponed that the Petitioner interacted with the issues and processes concerning the investigation and was updated at all times on the progress of investigations. That prior to his statement under caution, he undertook an interview with the EACC and recorded a statement and upon the conclusion of the investigations, he recorded the Statement under caution. With those facts in mind I am satisfied that he was informed of the nature and scope of the investigation and his right to access information was not violated.

Conclusion and disposition

64. I have addressed all the issues I set out to in the beginning of this Judgment and it is obvious by now that I do not see any merit in the Petition.

65. Elsewhere above I have reproduced verbatim the prayers the Petitioner has sought in this Court. It is clear that the Petition having failed none of those prayers can issue. In the circumstances, I shall dismiss the Petition with an order that each party should bear its own costs.

66. The Parties are entitled to an apology for the short delay in delivery of this Judgment which was caused by exigencies of duty.

67. Orders accordingly.

DATED, AND SIGNED AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2016

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 23rd DAY OF SEPTEMBER, 2016

EDWARD MURIITHI

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Nyamu for Petitioner and holding brief for Mr. Nyaga also for Interested Party

Miss Lunyolo for 1st respondent

Mr. Aluoch for Interested Party

Mr. Kuria for 3rd and 4th Respondent

Court

Judgment delivered.

EDWARD MURIITHI

JUDGE