

Agricultural Development Corporation (ADC) on 19th March, 2012, and consequently the legal pre-requisite set out in section 37 (2) of the NSSF Act would not apply to him.

3. ***That, in making the decision to enjoin the applicant as a co-accused in the said criminal case, the second respondent totally failed to consider the provisions of section 14 of the ADC Act (Cap 444 LOK) and consequently made a decision in error of law.***
4. ***That, the prosecution of the applicant in the clear circumstances of the case would amount to harassment and abuse of the due process.***
5. ***That, the prosecution of the applicant shall infringe on his constitutional rights.***
6. ***That, the prosecution of the applicant is only meant to exact pressure on the ADC to pay what is a civil debt and would therefore be oppressive and malicious.***

The foregoing grounds are based on the averments and annexures in the supporting affidavit dated 10th December, 2013 and the verifying affidavit and statement of particulars both dated 14th November, 2013 contained in the aforementioned ex-parte chamber summons for leave dated 14th November, 2013.

In line with the provisions of 0.53 Rule (4) of the Civil Procedure Rules, the reliefs sought in the present notice of motion tally with those sought in the statement of particulars. Normally, a failure to seek substantive judicial review orders in the statement of particulars would be fatal to an application such as the present one.

Be that as it may, the application was argued on behalf of the applicant by learned counsel, **Mr. Kiarie** and was opposed on behalf of the three respondents by the Learned Prosecution Counsel, **M/s. Limo**, on the basis of the averments in her affidavit dated 12th March, 2014 and the replying affidavit dated 7th March, 2014. The rival submissions have been given due consideration by this court which notes that the basic issue for determination is whether the applicant is entitled to the orders of certiorari and prohibition against the respondents.

The applicant essentially challenges the making of the decision to have him enjoined in an ongoing criminal case instituted by the second respondent and being prosecuted at the behest of the first respondent before the third respondent.

Basically, a judicial review process such as the present one provides exclusive means by which public matters can be challenged in the court.

The disputed decision was made on 20th August, 2013, in CMCC **No. 1436 of 2012.**

Such a decision can be quashed by an order of certiorari if it was made without or in excess of jurisdiction or for non-compliance with the rules of natural justice. The scope of certiorari thus extends to situations where a public body exceeds its mandate in law and operates outside or beyond its legal jurisdiction. Thus, a decision arrived at in contravention or in total disregard of the operating law may be quashed by an order of certiorari and in preventing a public body to continue proceedings which are in excess of jurisdiction or in contravention of the laws of the land, an order of prohibition may issue.

Herein, the substantive complaint by the applicant is the decision made by the respondents to have him enjoined as a co-accused in the aforementioned CMCC No. 1436 of 2012. He (applicant) contends that the decision was based on an erroneous application of the law in that it was made in total disregard of section 37 (1) and (2) of the National Social Security Fund Act (Cap 258 Laws of Kenya) and section 14 of the Agricultural Development Corporation Act (Cap 444 Laws of Kenya) in circumstances amounting to harassment and abuse of due process as well as infringement of the applicant's constitutional rights.

The applicant also contends that his intended prosecution would be oppressive and malicious in as much as it is intended to exact pressure on the Agricultural Development Corporation to pay what is a civil

debt.

In the material criminal case, the second respondent preferred a charge of failing to pay contribution contrary to section 36 (a) of the NSSF Act (Cap 258 LOK) against the ADC Sabwani and its manager Charles Werimo.

It is alleged that ADC Sabwani being a contributing employer No. 00083046, without lawful excuse failed to pay within the prescribed period contributions amounting to Ksh. 6,070,879/15 ct towards the National Social Security Fund for the period October, 1996 to March, 2012. Charles Werimo (the second accused) is said to be the manager in control and management of the affairs of the ADC Sabwani and hence his arraignment in court for the omissions of his employer.

When the case came up for hearing on the 20th August, 2013, before the chief magistrate at Kitale, the two accused were represented by an advocate, **Mr. Ademba**, while the prosecution was led by **Mr. Omuga**, on behalf of the second respondent.

The second respondent made an application to the trial court to have the charge sheet substituted for another which enjoined the applicant herein as a co-accused in his capacity as the Finance Manager of the ADC.

The application was not opposed by the defence and was readily allowed by the court. A fresh charge sheet was introduced and its effect was to have the applicant enjoined in the charge as the second accused in his capacity as the Finance Manager of ADC. The original second accused i.e. Charles Werimo, became the third accused in his capacity as farm manager, ADC Sabwani.

The court further ordered that the applicant be summoned to appear before it for plea on 4th September, 2013.

It is not clear what happened on the 4th September, 2013, but on 14th November, 2013, the applicant filed an application before this court for leave to file the present proceedings which leave was granted on 20th November, 2013 and the present application filed on 11th December, 2013.

With regard to the issue for determination, we have ground one of the application which is a contention that the decision to enjoin the applicant as a co-accused for offences allegedly committed upto eighteen (18) years ago was an error of the law and contrary to section 37 (1) of the NSSF Act.

In his submissions the applicant stated that he was employed by the ADC on 24th January, 2012 as a financial controller based at ADC headquarters Nairobi and was not a party to the criminal case when it commenced. He said that the charge covered the period beginning October, 1996 and ending March, 2012 while section 37 (1) of the NSSF Act requires that prosecution be undertaken within twelve (12) months from the date of the offence or within three (3) months if there is evidence to prosecute.

The applicant further submitted that since the NSSF contributions are made monthly, a default would be noted after the second month thereby giving rise to an offence. Therefore, the decision to charge him was unfair, unreasonable and made in error.

In that regard, the applicant relied on the English decision in **Association Provincial Picture Houses Ltd. Vs. Wednesbury Corporation (9147) 2 ALL ER 680.**

The applicant also relied on the **High Court Case Mis. Application No. JR115 of 2008** between **Isaac Gathungu Wanjohi & Others vs. Director of City Planning City Council of Nairobi & Another.**

In their rejoinder, the respondents contended that the application to enjoin the applicant as a co-accused was allowed through a court order and therefore the decision to enjoin the applicant was justified and lawful.

Further, the decision was converted into a court order which the applicant is not seeking to have it quashed and in any event the third respondent had the jurisdiction to make the order.

In their opposition to the application, the respondents relied on three decisions of the High Court namely, **R. VS. KENYA REVENUE AUTHORITY AND OTHER (2013) eKLR** and **JERALD WACHIRA GICHUKI VS. G. NORTH & SONS LTD & ANOTHER (2013) eKLR**.

Basically, section 37 (1) of the NSSF Act provides that proceedings under the Act may, notwithstanding anything in any law, to the contrary, be commenced at any time within the period of three months from the date on which evidence sufficient in the opinion of the Minister to justify a prosecution for the offence comes to his knowledge, or within the period of twelve months after the commission of the offence, whichever period last expires.

The understanding of this court is that the foregoing provisions of the law is silent on the period within which evidence should be availed to or come to the knowledge of the minister. This would therefore mean that if necessary evidence comes to the knowledge of the minister after several years such as eighteen (18) years, a prosecution could still lie within three months from the date of the knowledge.

Herein, the original charge was filed in court on 26th September, 2013, thereby implying that the necessary evidence came to the knowledge of the Minister in or before the month of July, 2013 and since the applicant was employed in the month of March, 2012, any liability attached to ADC prior to and from the time of his employment could indirectly and directly be attributed to him as the financial controller of the corporation for he was the person accountable for any financial transactions involving the corporation including payment of contributions to the NSSF. It is instructive to note the period specified in the charge also includes the month of March, 2012, when the applicant was employed by the ADC. He cannot therefore escape liabilities incurred by his employer as he is regarded as the paymaster.

Section 37 (2) of the NSSF Act, provides that where an offence is proved to have been committed with the consent or connivance of, or to be attributable to any negligence on the part of any director, manager, secretary or other officer of a body corporate, he as well as the body corporate shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

The ADC is a body corporate. It may therefore be safely stated that the decision to enjoin the applicant as a co-accused in the material criminal case was informed by his position as the overall financial manager of the ADC. But, whether or not the offence was committed with his consent or connivance or is attributable to his negligence is a matter for determination by the trial court.

In essence, the applicant has failed to show that the intended criminal proceedings against him are meant to achieve objectives other than the honest enforcement of the law or that they are an abuse of the court process. This would in the circumstances not be the right forum to tender justifications concerning the allegations against the applicant let alone test the nature and veracity of the allegations. The trial court is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Thus, judicial review ought not be used to usurp the functions of the trial court which in the material proceedings was bestowed with a duty to accept or refuse any application made to it by the contesting parties in accordance with the laws applicable. (See, **Thuita Mwangi & Others vs. EACC & others (2013) eKLR**).

The application by the second respondent under the control of the first respondent to amend the charge and include the applicant as a co-accused was lawfully made and allowed in the course of the trial. Indeed, there was no objection to the application by the advocate representing the accused ADC and its officers.

So, the first and second respondents in effect exercised discretionary power and what was required was for them to simply to establish a reasonable basis for the exercise of the power.

Under Article 157 (10) and (11) of the Constitution of Kenya, 2010, the Director of Public Prosecutions

does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions shall not be under the direction or control of any person or authority but 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.

Herein, the applicant has failed to show and satisfy this court that the decision to enjoin him in the material criminal case was unfair, unreasonable and made in error. The test provided in the **Wednesbury Corporation Case (supra)**, with regard to the concept of reasonableness was not achieved herein by the applicant in that he did not establish that the disputed decision was so unreasonable that no authority could have come to it, hence prompt interference by this court by way of judicial review.

For all the foregoing reasons, ground one and by extension ground two of the present application are unsustainable and so are grounds four, five and six which are more or less related to the first two grounds.

With regard to ground three of the application, section 14 (1) of the ADC Act provides for the appointment of the Managing Director of the corporation who shall be responsible for the execution of the policy of the corporation and for the control and management of its day to day business.

Accordingly, such officer would be the overall superintendent of the corporation and be responsible for co-ordinating, all other officers and employees of the corporation who fall directly or indirectly under him. The failure by those officers or employees would be attributed to the Managing Director who takes ultimate responsibility for the acts and omissions of the corporation and therefore stands to be sacked and/or arraigned in court. However, the managing director would not be the only officer within a corporation capable of being prosecuted for any unlawful acts or omissions in which the corporation is involved as a corporate body.

It is for the foregoing reasons that ground three of this application would also not be sustainable.

In sum, the ex-parte applicant has failed to satisfy this court that he is entitled to the orders of certiorari and prohibition against the respondents. He has failed to show that the decision complained of was tainted with illegality, irrationality and procedural impropriety. The alleged error of law, unreasonableness and unfairness on the part of the respondents in making the disputed decision was not established by the applicant.

Consequently, this application is devoid of merit and is hereby dismissed with costs to the respondents.

[Read and signed this 2nd day of April, 2014.]

J.R. KARANJA.

JUDGE.