



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Petition 376 of 2011

HON. JAMES ONDICHO GESAMI..... PETITIONER

V E R S U S

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA ANTI-CORRUPTION COMMISSIONER...2ND RESPONDENT

COMMISSIONER OF POLICE..... 3RD RESPONDENT

JUDGMENT

Introduction

1. The facts of this case as they appear from the pleadings and submissions before me arise out of the alleged misappropriation of the Constituency Development Funds for West Mugirango Constituency. The petitioner is the Member of Parliament for West Mugirango Constituency. In 2010, one Thomas Mongare Moindi, the Chairman of the Millennium Forum for Unity and Development, filed High Court Miscellaneous Application No. 264 of 2010 (hereafter referred to as **JR 264/2010**) seeking various orders against the Constituency Development Fund Board. The 2nd respondent in this petition was an interested party in that case.

2. The petitioner was not made a party to **JR 264/2010**, but he swore an affidavit in support of the respondent, the Constituency Development Fund Board, opposing the application. The matter was heard by Musinga, J who in his decision dated the 8th of April 2011 issued the orders sought by the applicants in that case. Prayer (g) sought an order of ***‘Mandamus compelling the Respondent to restore the funds withdrawn from West Mugirango Constituency Development Fund account at the instance of the patron, Hon. Dr. James Ondicho Gesami, for personal use contrary to the provisions of the Constituency Development Fund Act’***.

3. The petitioner then filed an application dated 19th April 2011 seeking to set aside the orders of the court in **JR 264 of 2010**. The application has not yet been heard but the High Court did stay the execution of the orders pending the hearing of the application on condition that the petitioner in this case deposits the amount of Kshs 1,050, 000.00 in court.

4. Sometime in July 2011, as averred by the petitioner in his affidavit dated 11th July 2011, he learnt that the Resident Magistrate’s Court in Kisumu had issued warrants of arrest against him in Kisumu Criminal

Case Nos. 354 and 355 of 2011. This precipitated the filing of this petition.

The Pleadings

5. In his petition dated the 11th of July 2011, the petitioner sought the following orders:–

1. A declaration that the Petitioner has the right to protection and equal benefit of the law;

2. A declaration that the arrest, arraignment and the prosecution of the Petitioner on charges presented before the Resident Magistrates Court at Kisumu in Kisumu Criminal Case No. 354 of 2011 Republic versus Hon. James Ondicho Gesami and John Ongeru and Shellmith Wangui Mugo threatens to violate or violates the Petitioner's right to protection of the law, right to equality and freedom from discrimination, protection against inhuman and degrading treatment, right to fair administrative action and right to fair hearing guaranteed by the Constitution of Kenya;

3. A conservatory order of injunction restraining the arrest, arraignment and the prosecution of the Petitioner on charges presented before the Resident Magistrates Court at Kisumu in Kisumu Criminal Case No. 354 of 2011 Republic –Versus- Hon. James Ondicho Gesami and John Ongeru and Criminal Case No. 355 of 2011 Republic –versus Hon. James Ondicho Gesami and Shellmith Wangui Mugo pending the hearing and determination of the proceedings for setting aside the ruling of 8th April, 2011 in High Court Miscellaneous Civil Application (Judicial Review) No. 264 of 2010 Republic Vs Constituencies Development Board, Kenya Anti Corruption Commission (Interested Party) ex parte Thomas Mongare Moindi and Others;

4. A conservatory order for injunction restraining the Kenya Police and the Kenya Anti-Corruption officer from raiding, intimidating, harassing and/or threatening the Petitioner's personal liberty;

5. Any other relief the Honourable Court may see fit to grant;

6. The costs of the Petition.

Simultaneously with the petition the petitioner filed a chamber summons application for conservatory orders and an affidavit sworn by the petitioner, Hon. Dr. James Ondicho Gesami sworn on the 11th of July 2011.

6. The petition is opposed. The 2nd respondent filed Grounds of Opposition dated 29th September 2011 and a replying affidavit sworn by **Enoch Otiko** and filed on 26th July 2011. The 2nd respondent also filed a Notice of Preliminary Objection to the effect that the petition is incompetent for want of a supporting affidavit as required by rules 13 and 14 of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006.**

7. The petitioner filed written submissions dated 12th August 2011 and Further Submissions dated 7th October 2011. The 2nd respondent also filed written submissions and supplementary submissions dated 26th August 2011 and 10th October 2011 respectively. The application for conservatory orders was abandoned and the petition was argued before me on the 15th of November 2011.

The Petitioner's Case

8. Mr. Ochieng Oduol and Mr. Bwire appeared for the petitioner, with Mr. Ochieng Oduol presenting the case for the petitioner. It was the petitioner's case that his arrest, arraignment and prosecution before the Resident Magistrate's Court at Kisumu in Kisumu Criminal Case No. 354 and 355 of 2011 was in violation of his constitutional rights and in particular:

(a) The prosecution of the Petitioner violates the Petitioner's right to be free from discrimination

guaranteed by article 27 of the Constitution of Kenya.

(b) The prosecution of the Petitioner violates the Petitioner's right to be protected from inhuman and degrading treatment guaranteed by article 28 of the Constitution of Kenya.

(c) The prosecution of Petitioner violates the Petitioner's right to a fair administrative action guaranteed by article 47 of the Constitution of Kenya.

9. With regard to his right to a fair hearing, the petitioner argued that since the Resident Magistrate's Court is bound by decisions of the High Court in the doctrine of *stare decisis* and also in light of the provisions of sections 43 and 44 of the Evidence Act (Chapter 80 of the Laws of Kenya) the Resident Magistrate's Court will be bound by the decision of the High court in **JR 264 of 2010** on the question of the petitioner's culpability in respect of misappropriation of West Mugirango CDF funds and there was therefore a threat to his right to a fair trial.

10. His right to a fair hearing and fair administrative action guaranteed by article 47 would only be protected if the criminal proceedings in the Kisumu Resident Magistrate's Court are suspended pending hearing and determination of a challenge which he has raised to the decision of the High court in **JR 264/2010** on the question of his culpability with regard to West Mugirango CDF. There was even a stay granted in JR 264/2010 and the 2nd respondent was a party to the order granting the stay.

11. The petitioner also argued that the preferring of the Kisumu criminal cases subjected him to inhuman and degrading treatment in contravention of article 28 of the Constitution of Kenya. Further, he argued that the prosecution was in violation of his right to equality and freedom from discrimination guaranteed by article 27 of the Constitution

12. According to the petitioner, the issues in this petition arise over the operations of the Constituency Development Fund (CDF) under the Constituency Development Fund Act (CDF Act) which provides for the management of the CDF. A sitting member of Parliament is the Patron, but there is a Board with overall oversight over the fund. The Board is established under Section 5 of the Act, to be managed by persons named under section 5(3). The MP is not a member under section 5(3). When it comes to the CDF committee, the MP is just a member, and to argue that the MP is the alter ego of the Board is wrong. Under Section 23(1) the MP is only one member and should not be singled out for criminal prosecution. There has been failure of process and discrimination by singling out one individual for prosecution.

13. Mr. Ochieng submitted further that following various complaints and allegations regarding the West Mugirango CDF, JR 264/2010 was filed in Nairobi. The petitioner was not a party to the application which had the CDF Board and the Kenya Anti-corruption Commission 'KACC' as the respondent and interested party respectively. The Judicial Review application was heard by Musinga J and various orders which were adverse to the petitioner were made. As a result, the petitioner made an application to set aside the orders on account of breach of natural justice, excess of jurisdiction and being found and condemned of misappropriation of funds on a matter he was not a party.

14. The petitioner argues that in **JR 264/2010**, he was ordered to pay Kshs 1,050,000/= into court as there was an allegation by KACC that the sum had been misappropriated. While the application to set aside was pending, KACC embarked on charging him in two criminal cases in Kisumu. Criminal Case No.355/11 was based on the same allegations of misappropriation as were the subject matter in the **JR 264/2010** proceedings, arising out of the award of a contract.

15. The petitioner contends that there has been failure by KACC to abide by the mandatory provisions of the CDF Act, specifically Section 52 thereof, which requires disputes to be referred to the CDF Board. Before **JR 264/2010** was filed, there was a reference to the Board. While the petitioner is the patron of the CDF committee, he is not a signatory to the account nor is he charged with day to day running of the funds. Parliament had determined that CDF disputes should be channelled through the Board for good reason and that the funds should be audited by the Auditor-General. The Auditor-General had not given

his views on the state of the CDF accounts and it was the petitioner's contention that the provisions of the CDF Act are being abused to harass and intimidate him and both **JR 264/2010** and the criminal proceedings have been initiated by his adversaries to harass him and disqualify him from holding public office in light of Chapter 6 of the Constitution. He relied on the decision of Makhandia, J. sitting in Kisii in **Peter Ochara Anam, Petition No. 3 of 2010** in which the court considered Section 52 of the CDF Act and found that the applicants in the case were wrong to file a constitutional reference instead of following the dispute resolution mechanism in the CDF Act.

16. In the same way, according to the petitioner, **JR 264/2010** and the attempt by the respondents to charge him have not followed the procedure presented under the CDF Act. He urged the court to make a decision whether KACC can circumvent the provisions of Section 52 by investigating and charging for disputes arising under the CDF Act without the Board scrutinising the issue and without an audit by the Auditor-General. The core function of KACC is to investigate, and it should not do anything with regard to CDF unless requested by the Board. According to the petitioner, his argument was not that KACC cannot investigate or charge under the CDF Act. Rather, his argument was that they should wait for the Board to investigate and call them in.

17. Further, the petitioner contended that it was only the CDF Board which could call in KACC to investigate, and not just anyone. There must be a credible basis for any investigation, and misappropriation and misapplication of funds would all be complaints to be dealt with under section 52 of the CDF Act which sets out the duties and functions of the Board and the National Committee.

18. He conceded that criminal matters are not arbitrable but argued that issues to do with contracts would go to the Board and that only when the Auditor-General finds misappropriations can the matter go for investigation.

19. The petitioner also contended that the conduct of KACC shows there was bias, bad faith and malice and the court has jurisdiction to stop the abuse of the court process. The charging and investigations of the Kisumu cases will not lead to justice as the petitioner was a witness in a case against one Gilbert Ateyi Onsomu in **Nyamira Resident Magistrate's Court Criminal Case No. 190 of 2011 Republic –v- Gilbert Ateyi Onsomu** . The petitioner had complained about misappropriation of funds against Onsomu and he was a witness in the case against him, yet he was now being charged for the same amount in respect of which he is a witness. He submitted that the court has power to safeguard his rights and referred to the case of **Mitchell & Others -v- DPP & Another (1987) LRC 127** in support.

20. With regard to the technical objections raised by the Respondents that the petition was not supported by an affidavit as required, Mr. Ochieng submitted that the affidavit sworn by the petitioner in support of the application supports both the application and the petition and that in any event, in the new constitutional dispensation, the court was not to be bound by technicalities.

The 2nd Respondent's Case

21. Mr. Gikonyo presented the case for the 2nd respondent. He relied on the affidavit sworn by Enoch Otiko and filed on 26th July 2011 and the written submissions filed on the same day. He also relied on the supplementary submissions filed on 10th October 2011 as well as the list of authorities filed on the same day.

22. The 2nd respondent's case was two pronged. The first limb of the argument was that the petition was defective as it was not supported by an affidavit as required under the Gicheru Rules. Mr. Gikonyo relied on the case of **Patrick Ochieng Obachi –v-Kenya Anti Corruption Commission Petition No 615 of 2008** in support of this contention. He also argued that this court lacked jurisdiction as the subject matter of the petition was within the jurisdiction of the High Court in Kisumu.

23. The second limb of the 2nd respondent's case was that in the event that the court found for the petitioner on the technical issues relating to the petition and jurisdiction, the petitioner had not shown any

violation of his constitutional rights to merit the intervention of the court.

24. In this regard Mr Gikonyo addressed himself to the petitioner's arguments with regard to his membership of the CDF Committee. He submitted that it is wrong to say that an MP under the CDF Act is just a patron and not a member of the CDF Board. Membership of the MP in the CDF Board is mandatory, and he referred the court to section 23(1) of the CDF Act. The MP must be a member of the Committee and the Board in his constituency as he convenes and constitutes both. He cannot opt out. Under Section 23(5), he has an option not to be the Chair of the Committee. The intention of the Act, however, if one reads Section 23(1) and (5) is to make membership of the MP on the CDF Board mandatory. To suggest otherwise is wrong in law and a mis-statement of the CDF Act. He is the alter ego, the dominant will of the CDF Committee, and if there are any breaches of the Act or procurements, he is held to account under Section 51 of the CDF Act which sets out offences and penalties.

25. Mr. Gikonyo submitted further that misappropriation under Section 51 of the CDF Act is also corruption and misappropriation and an offence under the Anti-corruption and Economic Crimes Act. All offences under the Anti-Corruption and Economic Crimes Act are investigated by KACC and its successor, the Ethics and Anti-Corruption Commission.

26. Counsel argued that under Sect 52 of the CDF Act, titled 'Dispute Resolution,' subsection (1) provides for all complaints to be forwarded to the Board while 52(2) provides for dispute resolution. The two cannot be read in isolation in order to provide the context for the phrase '*all complaints*'. This is so as to avoid including in that context complaints outside the CDF Act. One would need to interpret the phrase '*all complaints*' in the light of the functions of the CDF Board.

27. He submitted further that section 6 of the CDF Act provides the functions of the CDF Board. There is nowhere in Section 6 or in the entire Act where the Board has the function of investigating corruption or economic crimes. That function is resident in KACC or its successor, the Ethics and Anti-corruption Commission. If that function cannot be exercised by the CDF Board, it is wrong to suggest that they must receive the complaint first.

28. Mr. Gikonyo submitted further that in the Anti-corruption and Economic Crimes Act, KACC is charged with the responsibility to investigate crimes on its own motion or on complaints by anyone. There is nothing to prevent investigation of crimes arising under the CDF Act. The referral alluded to by the petitioner is not known to law. He referred to paragraph 5 on page 4 in the case of **Peter Acharo Anam (supra)** relied on by the petitioner and submitted that in that case the court uses the word '**akin**' and argued that 'investigation' is not within the functions of the Board.

29. Mr. Gikonyo termed as strange the argument by the petitioner that section 52 of the CDF Act designates the Board the ultimate complainant with regard to CDF funds. Sources of complaints to KACC are many, and to adopt the petitioner's view would hamper investigations and fighting crime. Further, if any disputes were to be resolved by the CDF Board, such disputes are circumscribed to those which the Board can resolve and what can be resolved by arbitration. He referred to the case of **Nedarmar Technology B v Limited –v- KACC & Anor Petition No. 390 of 2006** and submitted that criminal matters are not arbitrable in Kenya and many other states. Investigation for establishing prosecution purposes cannot be dealt with under Section 52. They are not arbitrable and are outside the functions of the CDF Board.

30. With regard to the contention that the Auditor –General should have audited the accounts first, Mr. Gikonyo submitted that section 34 of the CDF Act only provides for audit and reporting by the Auditor-General. It simply restates the constitutional responsibility of the Auditor-General in respect of public funds but does not designate the Board as the ultimate complainant. For purposes of investigation for anti-corruption and economic crimes, the report of the Auditor-General becomes a source of information and the Auditor-General a witness. That is why Section 12 of the Anti-Corruption and Economic Crimes Act (now repealed) enjoins all organs or offices to co-operate with the KACC for purposes of investigation. The Board has no criminal jurisdiction.

31. With regard to JR 264/2010, Mr. Gikonyo submitted that the arguments made before this court are useful in the application to set aside the orders made in that case. Anything to support that application was not relevant in the present case. All the issues in JR 264/2010 are within the sui generis jurisdiction of the court. It does not include criminal jurisdiction. Determination of issues in the Judicial Review does not determine criminal issues and the orders are not in respect of criminal jurisdiction.

32. To suggest that the petitioner was tried in **JR 264/2010**, Mr. Gikonyo submitted, is untenable in law. The only limited connection between the case and the criminal case is that they draw from similar circumstances and can share evidence. In relation to **Criminal Case No. 354/2010**, part of the amount was alluded to in **JR 264/2010**. In **Criminal Case No. 355/2010**, the facts are totally different and were not alluded to in **JR 264/2010**. The orders in **JR 264/2010** are being used to shield the petitioner in respect of any investigations in respect of the CDF of West Mugirango. The orders in **JR 264 /2010** issued on 8th April, 2010 did not stay investigations or prosecution by the Director of Public Prosecutions (DPP). He argued, further, that the application to set aside made by the petitioner in **JR 264/2010** is limited to order no. (g) in the orders of Musinga, J. with regard to the restitution of lost funds of West Mugirango Constituency by the CDF Board. Those orders were issued against the CDF Board, not any other party.

33. The 2nd respondent denied the allegation of bad faith on its part. It submitted that it was a reputable organisation and the steps taken in the process of investigation were set out in the affidavit of Enock Otiko. Malice requires a high degree of proof by showing the acts that show malice, and no evidence has been availed to prove malice. Mr. Otiko as the investigating officer depones at paragraph 11 of his affidavit that he carried out the investigations and made certain findings and that

‘upon the conclusion of the aforesaid investigations, my team prepared a report which I forwarded as the Team Leader to the Senior Officer Asset Tracing, the Principal Forensic Investigator and the Assistant Director Investigations (who is also the Deputy Director of KACC) in that sequence for verification of the findings of my investigations.’

34. He depones further at paragraph 14-16 of his affidavit as follows:

14. THAT pursuant to the provisions of Section 35 of the Anti-Corruption and Economic Crimes Act, 2003 KACC then forwarded its report through the Director/Chief Executive Officer to the Honourable Attorney General with the recommendation that the persons named therein be charged with committing the offence disclosed therein.

15. THAT the process of investigations at KACC is transparent and the integrity of the process is maintained through elaborate internal checks involving as demonstrated hereinbove several officers working in different Directorates and Departments which process would have captured any personal bias of the kind that is alleged by the Petitioner.

16. THAT after going through the evidence gathered in the aforesaid report compiled by KACC, the Director of Public Prosecutions vide his letter dated 29th June, 2011 directed that the Applicants be charged with the offence disclosed in the said report. (Annexed hereto and marked KS 7 is a Photostat copy of the aforesaid letter)

35. The prosecution of the petitioner in Kisumu Criminal Case nos. 354 and 355 had therefore been undertaken independently by the DPP upon consideration of the evidence presented to his office and there was therefore no basis for the allegations of malice and bad faith against the 2nd respondent.

36. It was also the 2nd respondent's case that the stay orders issued in **JR 264/2010**, which were not issued with the consent of the 2nd respondent, were limited to order no (g) on the restitution of funds misappropriated from the West Mugirango CDF fund, did not stay investigations by KACC nor did it stop prosecution by the DPP. Further, the court in **JR 264/2010** did not determine the criminal culpability of any party and did not issue its orders against the petitioner but against the Constituency Development

Fund Board. The 2nd respondent relied on the decision of the High Court in the case of **William S.K Ruto & Another –v- The Attorney General High Court Civil Suit No. 1192 of 2005** for the proposition that this court cannot make a determination of the culpability or otherwise of the petitioner and that this should be left to the criminal court which has the responsibility of analysing evidence presented before it.

37. With regard to the claim by the petitioner that his fundamental rights under the constitution had been infringed, it was the 2nd respondent's case that this had not been established. Mr. Gikonyo referred the court to the case of **John Mutemwa Wambua –v-The Principal Magistrate's Court Kibera, Nairobi High Court Misc. Appl. No. 328 of 2000** (Unreported) in support of the contention that a magistrate cannot be prohibited from doing what the law requires him to do, to conduct a trial in accordance with the law in the absence of impropriety on the part of the magistrate. With regard to the purported ouster of the court's jurisdiction by section 52 of the Constituency Development Fund Act relied on by the petitioner, the respondent cited the decision of the court in **Republic –v- Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati Misc. Civ. Appl. 1260 of 2007**.

The 1st and 3rd Respondents' Case

38. Mr. Muli presented the case for the 1st and 3rd respondents. He relied on the grounds of opposition and submissions filed by the DPP and associated himself with the submissions made on behalf of the 2nd respondent. He argued that the matter raised by the petitioner from the defence in the criminal case and should be raised before the trial court. The criminal charges sought to be stayed were filed and are currently pending before the Resident Magistrate's Court in Kisumu where there is an operational High Court and for purposes of good order, it was only meet and proper that these proceedings should have been filed before the said court. In the circumstances, the High Court of Kenya in Nairobi lacks the jurisdiction to preside over this matter.

Issues

39. From the pleadings and submissions filed and highlighted before me, I believe that the court is called upon to determine three issues. The first is whether the petition is properly before me in the absence of an affidavit in support of the petition. The second relates to the question of jurisdiction in view of the fact that there is a functioning High Court in Kisumu within whose territorial jurisdiction the subject matter of this petition properly falls. Finally and more important I believe is the issue of whether or not the petitioner has established a violation or threatened violation of his constitutional rights by the respondents.

Jurisdiction

40. I will deal first with the issue of jurisdiction which I believe is easily disposed of. Article 165(3) (b) gives the High Court ***'jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened'***.

There is no territorial limit to this jurisdiction. However, for administrative purposes and for the convenience of parties, I am of the view that it is proper that constitutional petitions should be filed in the High Court within whose territorial jurisdiction a matter falls. This is particularly so in view of the fact that the state has now been divided by the constitution into counties for administrative purposes with the anticipation that a High Court may be established in all counties. This will also be important in pursuit of the goal of expeditious disposal of cases. However, the fact that this petition was filed in this court does not render it incompetent. What would have been proper was for the matter to be transferred immediately upon filing to the High Court within whose jurisdiction the matter fell. In view of the fact that more than a year has elapsed since the matter was filed, it would not be in the interests of justice to transfer the matter at this stage and it is proper that this court disposes of it.

Is the Petition Incompetent for Lack of a Supporting Affidavit?

41. In the case of **Patrick Ochieno Obachi –v-Kenya Anti Corruption Commission Petition No 615 of 2008**, relied on by the 2nd respondent, a three judge bench of the High Court stated with respect to the petition filed without a supporting affidavit contrary to the requirements of Rule 13 of the Gicheru Rules:

‘that is a fatal technicality as it determines the substance, namely the completeness of the petition. It follows that in terms of Rule 14, that petition contains allegations without the affidavit evidence intended to accompany the petition to support allegations in the petition and that makes the petition incompetent.’

The court also noted that for an affidavit to be found to be in support of a petition, it ought to have been dated the same date as, or earlier than, the petition, not later, and it should have been served contemporaneously with the petition.

42. I have looked at the affidavit sworn by the petitioner on the 11th of July 2011. At paragraph 19, the petitioner states that ***‘I swear this affidavit in support of the application and Petition filed herewith’.***

I cannot find anything in Rules 13 and 14 of the Gicheru Rules that bars reliance on one affidavit in support of both the petition and the application for conservatory orders, particularly when the deponent expressly states that that is the intention as in this case. I am also mindful of the constitutional provisions at Article 22(3) (b) and (d) with regard to keeping ***‘formalities relating to the proceedings, including commencement of the proceedings,’*** to a minimum, and not being ***‘unreasonably restricted by procedural technicalities’*** and the requirement at Article 159(2) (d) that ***‘justice shall be administered without undue regard to procedural technicalities.’*** I therefore find that the petition is competent and is properly before this court.

Has the Petitioner established a violation or threatened violation of his constitutional rights by the respondents?

43. It is the petitioner’s case that his arrest, arraignment and prosecution before the Resident Magistrate’s Court at Kisumu in Kisumu Criminal Case No. 354 of 2011 ***threatens to violate or violates his right to protection of the law, right to equality and freedom from discrimination, protection against inhuman and degrading treatment, right to fair administrative action and right to fair hearing guaranteed by the Constitution of Kenya.***

44. The petitioner allege that the violation of his rights arises in several respects. The first is that the charges against him have been instigated by the 2nd respondent without recourse to the provisions of the Constituency Development Fund Act. KACC, according to the petitioner, should not have investigated the case involving the alleged appropriation of West Mugirango CDF funds unless invited to do so by the CDF Board. In his view, section 52 of the CDF Act requires all disputes relating to CDF funds to be referred to the CDF Board and he has relied for support on the case of **Peter Ochara Anam (supra)** The petitioner argues that the CDF Act requires that CDF funds should be audited by the Controller and Auditor-General and only if the Controller and Auditor- General finds a misappropriation should the KACC move in to investigate.

45. Section 52 of the CDF Act provides as follows

(1) All Complaints shall be forwarded to the Board”

(2) Disputes shall be referred to the Board in the first instance and where necessary an arbitration panel shall be appointed by the Minister who shall consider and determine the matter before the same are referred to court.’

At section 34, the Act provides for the audit of funds as follows:

‘All funds received under this Act shall be audited and reported upon by the Controller and Auditor-General.’

46. I have considered the provisions of Section 52 of the CDF Act and the arguments put forward by the petitioner with regard thereto, and in my view, these arguments are untenable. As the organisation charged with the responsibility of investigating incidents of corruption in Kenya, KACC or its successor cannot sit and wait for another body to refer cases of corruption to it. Misappropriation of funds under the CDF Act is an offence under the Anti-Corruption and Economic Crimes Act. It does not, in my view, fall into the definition of a complaint or dispute as contemplated by Section 52 of the CDF Act. Taken in their plain and ordinary meaning, the terms ‘complaint’ and ‘dispute’ would refer to a statement expressing unhappiness or discontent about a situation and a disagreement about the validity or truth of something respectively. They cannot be taken to encompass situations where an offence or crime has been or is suspected to have been committed.

47. I agree with the 2nd respondent in its response to the argument that KACC should wait until it was invited by the Constituency Development Fund Board to investigate a complaint when it relies on the case of **Republic –v- Kenya Anti-Corruption Commission & 4 Others Ex-Parte Jackson Gichohi Mwangi & 5 Others High Court Misc. Appl. No. 123 of 2009** to support the contention that such an argument is totally untenable.

48. The powers of KACC are set out in Section 7 of the Anti-Corruption and Economic Crimes Act. The court observed in the above case with regard to the powers under the section that ***‘It seems the mandate of the Commission to investigate any offence relating to corruption is unfettered within the above section. The powers are very wide.’***

49. In that case, which dealt with a similar argument to the one in this case pertaining to the powers of the Director General of the Public Procurement Oversight Authority under section 102 of the Public Procurement and Disposal Act, the court further observed that ***‘From a reading of the above Section, the investigations by the Director General do not include criminal investigations because even if the director makes any preliminary findings which are criminal in nature, he would still refer the same to KACC which is charged with investigations relating to Corruption and Economic Crimes. In the instant case, a report of an alleged crime having been made directly to KACC, in my view, that would not limit the powers of the KACC to investigate. Besides section 102 PPD Act gives the Director General of PPOA discretionary powers, so that even if the director gets an investigation report, in his discretion, he may or may not refer the matter to KACC. The KACC which has general powers of investigations of public bodies and officers cannot be barred or limited from carrying out its mandate.’***

50. The powers of KACC to investigate alleged misappropriation of CDF funds are not limited to those instances where it is called in by the CDF Board. I also agree with the respondents that ‘disputes’ under Section 52 does not include criminal offences and the petitioner’s argument in this regard cannot stand.

51. It is also worth observing that section 52 of the Constituencies Development Fund (Amendment) Act 2007, even had it been deemed to have had the effect of limiting the powers of KACC to the cases where the CDF Board invites it to investigate as argued by the petitioner, may not have been applicable at the time the issues in this matter arose. According to section 1 of the Act, the Act was to commence on notice. However, it was not until December, 23rd December 2011 that the Minister for National Planning and National Development, through Gazette Notice No. 16174 contained in the Kenya Gazette of 23rd December 2011, gave notice that the Act had come into force. This notice may have been precipitated by the decision of Warsame, J in the case of ***Chrispin Ouma Onang’o & Dons Nyaboke Nyabera –v- Elizabeth Ongoro & Others JR Misc. App. No. 232 of 2011*** which pertained to disputes arising from the operations of the Kasarani Constituency CDF. In his decision delivered on 22nd November 2011, Warsame J. held that Act No. 16 of 2007, The Constituencies Development Fund (Amendment) Act 2007, had not been given a commencement date, ***“therefore it has not been operationalised by the relevant authority.”*** He went on to note that ***‘the lack of a commencement date means that Act No. 10 of 2003 remains intact without any alterations, additions and/or amendments.’***

52. The second instance of violation, according to the petitioner, arises with regard to the audit of funds by the Auditor-General. The petitioner argues that KACC should not have carried out investigations until the Auditor General had audited the CDF funds and found evidence of misappropriation. Like the

argument with regard to section 52 of the CDF Act, this argument, in my view, is also unsustainable. The Auditor-General is the office charged with the responsibility of auditing public funds. To argue that KACC can carry out investigations only when the Auditor-General has audited CDF funds and found misappropriation is again to seek to limit the powers of the anti - corruption body. To do this would be to fetter its powers and make the anti-corruption fight in Kenya totally impossible. Given the grave consequences of corruption in Kenya, such an interpretation of the law would be inimical to the public interest. To borrow the words of the constitutional court of South Africa in **Hugh Glenister -v- President of the Republic of South Africa Case CCT 48/10 [2011] ZACC 6** at paragraph 83:

“Corruption is a scourge that must be rooted out of our society. It has the potential to undermine the ability of the state to deliver on many of its obligations in the Bill of Rights, notably those relating to social and economic rights.”

In view of the above matters, I do not find anything that amounts to a violation of the law or the rights of the petitioner in the investigations by KACC of the use or misappropriation of CDF funds for West Mugirango Constituency.

Is there a violation of the right to a fair hearing and Fair Administrative Action?

53. The third instance of alleged violation of rights relates to the alleged violation of the petitioner’s right to a fair hearing and fair administrative action with regard to which he cites two instances. First, he argues that the investigations by KACC were spearheaded by an officer who is related to a former Member of Parliament for West Mugirango and that therefore the investigation and prosecution is biased. There is however, no indication in the affidavit of the basis on which this averment is made. Rule 6 of Order 19, Civil Procedure Rules, requires that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove unless it is based on information and belief the sources and grounds of which must be shown. This has not been done with regard to the averment at paragraph 14(k) of the petitioner’s affidavit and I therefore strike it out. More importantly, however, the 2nd respondent has set out in the replying affidavit of Enock Otiko the process of investigation, a process that has not been controverted by the petitioner. There does not in my view appear to be any room for influence by one officer of the process of investigation.

54. However, even more critical to note is that the prosecution in the criminal cases in Kisumu has been initiated by the Director of Public Prosecutions who has now the constitutional mandate to institute prosecutions in Kenya. Under Article 157 of the Constitution:

“The Director of Public Prosecutions 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;’

Article 157 (10) provides that-

“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.”

55. Under the current constitution, the DPP has the constitutional mandate to ***‘institute and undertake criminal proceedings against any person’*** in Kenya. The office of the DPP has now vested in it the role previously vested by the old constitution in the Attorney General with regard to whose powers the court observed in the case of **Republic –v- Kenya Anti-Corruption Commission & 4 Others Ex-parte Jackson Gichohi Mwangi & 5 Others(supra)** as follows:

“The Attorney General has inherent prosecutorial powers conferred by Section 26(3) of the Constitution, to prosecute all offences. The KACC submitted its investigation report to the Attorney General under Section 35 and the Attorney General after considering the report has decided to

prosecute the applicants. The Attorney General's powers can only be faulted if the applicants demonstrate that the Attorney General has acted maliciously, capriciously or for other purposes other than in accordance with the criminal justice system."

56. In this case, KACC forwarded its investigation to the DPP who, after considering the matter, and in exercise of his constitutional powers, made the decision to prosecute the petitioner. I do not therefore find anything before me that supports the petitioner's argument that his rights have been violated because of the prosecution by the DPP.

57. The petitioner also argues that he will not get a fair hearing at the criminal trial as the Resident Magistrate's Court will be bound by the decision of Musinga, J in **JR 264/2010** in which various orders which were adverse to him were made. At paragraph 19 of his affidavit sworn on 11th July, 2011, the petitioner avers that

"The High Court Miscellaneous Civil Application (Judicial Review) No. 264 of 2010 had already made a finding without hearing me that I had diverted funds of West Mugirango CDF for personal use. This ruling is under challenge and presently there is a stay on it."

58. At paragraph 2 of his petition, the Petitioner state that:-

"The High Court in High Court Miscellaneous Civil Application (Judicial Review) No. 264 of 2010 on 8th April, 2011 issued a ruling in which a finding was made that the Petitioner had diverted funds of West Mugirango CDF for personal use."

59. He repeats this assertion at paragraph 3 of his petition when he states-

"That the ruling of the High court in High Court Miscellaneous Civil Application (Judicial Review) No. 264 of 2010 was in culmination of judicial review proceedings in which the Petitioner did not participate in as a party neither was he accorded an opportunity to answer the allegations of misappropriation that were made by the applicants."

60. At paragraph 10 of the petition he argues that ***"The Resident Magistrate's Court is bound by the decision of the High Court in the doctrine of stare decisis, the Resident Magistrate's Court before which the charges are made against the accused person is bound by the decision of the High court in High Court Miscellaneous Civil Application (Judicial Review) No. 264 of 2010 in as far as the issue of culpability for misappropriation of West Mugirango CDF funds and consequently there is a direct threat to the petitioner's right to a fair trial protected by Article 50 of the Constitution of Kenya."***

61. He therefore impugns the decision of Musinga I and states that he made an application to set aside the orders on account of breach of natural justice, excess of jurisdiction and being found and condemned of misappropriation of funds on a matter he was not a party.

62. However, contrary to these assertions, the petitioner did participate in **JR 264/2010** and filed an affidavit which was considered by Musinga, J. in his ruling. At page 10 of the ruling, the court states-

"In his replying affidavit, the Hon. Dr. James Gesami stated that sometimes at the beginning of the year, 2010 he went through the statements of accounts of the committee and realised that there was evidence of misuse of funds. He realised, for example, that there was unexplained withdrawal of substantial amounts of money between November, 2009 and March, 2010. As a result he suspended Mr. Nicholas Onganga who was the Chairman, Pastor Sagwe, and Secretary and Mr. Aloyse Abuga, the Treasurer, who were the signatories to the account and reconstituted the committee."

..... The MP supported the position taken by the respondent that the applicants came to court prematurely before the provisions of Section 52(2) of the Constituencies Development Fund Act had been complied with."

63. At page 15 of his ruling, Justice Musinga observes as follows:-

“The area Member of Parliament was alleged to have withdrawn a sum of Kshs.1,050,000.00 from the CDF and deposited the same into his account. That is a serious allegation which ought to have elicited a specific response. I carefully perused his affidavit and did not see any denial of that allegation.”

64. The petitioner avers at paragraph 8 of the affidavit in support of his application in **JR 264/2010** that he was

“...asked to swear an affidavit in support of the Respondent’s position and I indeed swore the affidavit as guided by the said advocates and only in response to the particular issues that the advocate raised and asked of me.”

At paragraph 9 he states that-

“In swearing the Replying affidavit for the Respondent I knew and I was also advised by Messrs. Kaka Kamau advocates that I was not a Respondent to the proceedings, I thus did not have the free latitude to depose on all issues to the suit but rather I deponed hereinabove to only those issues that the advocate determine relevant as a defence to the Constituency Development Board.”

65. It seems strange that the petitioner made responses to the applicants’ affidavit but considered that he did not have **‘free latitude’** to respond to matters touching on him personally. I have read the petitioner’s affidavit in **JR 264 of 2010** sworn on the 14th of October 2010 in which he depones as follows:

1. THAT I am the member of Parliament West Mugirango Constituency and Patron of the constituency Development Fund Committee West Mugirango duly authorised by the respondent herein to swear this affidavit.

2. THAT I have carefully perused the Notice of Motion dated 18th August 2010, the verifying affidavit and the statement therein and wish to respond as follows:

He then depones at paragraph 9 as follows:

9. THAT indeed I know of my own knowledge that any person who misappropriates any funds or assets from the fund or assist or causes any person to misappropriate or apply the funds otherwise than in the manner provided in the Constituency Development Fund (amendment) Act 2007 is guilty of an offence punishable under our Law.

Clearly, the petitioner had read the allegations made against him in that application by the applicants, had understood them, yet chose not to respond to what was alleged against him. To then turn around and say that he was not heard in that case or that he did not have the latitude to respond to matters other than what he was asked to respond to by the respondent’s advocates is to stretch credulity somewhat.

66. Be that as it may, in my view, those are matters that the petitioner can best deal with in the application pending before the court in **JR 264/2010**. For the purposes of this petition, the question to address is whether the decision of Musinga J would lead to a denial of a fair hearing to the petitioner on the basis that he has already been found culpable in **JR 264/2010**.

67. I have carefully considered the decision of Musinga J in **JR 264/2010**. The court made a decision and issued orders directed at the Constituency Development Fund Board in an application for judicial review orders. While he did observe the failure by the petitioner to respond to the allegations of misappropriation specifically made against him, he did not in the entire ruling make a finding on the petitioner’s guilt or otherwise. The court was not presiding over a criminal trial. As the court observed in **William S.K Ruto & Another –v- The Attorney General** (supra) the responsibility for receiving and analysing evidence presented to it lies with the trial court. This court and indeed the court hearing the judicial review application cannot make a determination of the culpability or otherwise of the petitioner.

Has there been a failure of legal process and discrimination against the petitioner?

68. The petitioner also argues that there has been failure of legal process and discrimination against him as he has been singled out for prosecution yet under Section 23(1) of the CDF Act, the Member of Parliament is only one member and should not be singled out for criminal prosecution. He also argues that such failure of legal process is manifested by his prosecution for the same offence that he is a witness to in **Nyamira Criminal Case No 190 of 2011 Republic–v- Gilbert Ateyi Onsomu**.

69. With respect, I do not find anything discriminatory in the preferment of criminal charges against the petitioner. The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango Constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them.

70. Further, the existence of criminal charges in the Nyamira court against another accused person and the fact that the petitioner may be a witness in that case does not in itself render the charges against him in the Kisumu court unlawful. I would agree with the respondents in their submission that in law, it is possible for accomplices to be charged jointly or severally without violating any law.

Is there a violation of the right to freedom from inhuman and degrading treatment?

71. The petitioner contends that his arrest, arraignment and prosecution shall subject him to inhuman and degrading treatment in contravention to article 28 of the Constitution of Kenya. Article 28 provides that **“Every person has inherent dignity and the right to have that dignity respected and protected.”**

72. The terms **‘cruel, inhuman and degrading treatment’** have acquired a specific meaning in law. They have also been judicially considered in our courts-see for instance the decision of the court in **Republic – v-Minister For Home Affairs and Others ex parte Sitamze Nairobi HCCC NO. 1652 OF 2004 [2008] 2 EA 323** and **Dennis Mogambi Mong’are -v- The Attorney General & Others Petition No. 146 of 2011**. They do not refer to general discomfort or inconvenience arising out of the application of the ordinary legal process. In the case of **Republic v Minister for Home Affairs and Others ex parte Sitamze Nairobi**(supra)Justice Nyamu noted that **“Inhuman treatment” is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.’**

73. In my view, requiring that the petitioner subjects himself to the normal criminal prosecution process mandated by law where he has all the safeguards guaranteed by the Constitution does not in any way amount to an attack on his human dignity in violation of his constitutional rights.

74. Having considered all the matters before me, I do not find anything that amounts to a violation of the petitioner’s rights under any article of the constitution. His allegation that his arrest arraignment and prosecution shall subject him to inhuman and degrading treatment in contravention to article 28 of the Constitution of Kenya, shall violate his right to fair administration action guaranteed by Article 47, shall violate his right to equality and freedom against discrimination guaranteed by Article 27 have not been established. I therefore find no merit in this petition and hereby dismiss the same with costs.

75. I am grateful to the Counsel appearing for the parties in this matter for their industry and well researched arguments.

Dated and Delivered at Nairobi this 20th day of January, 2012

Mumbi Ngugi
Judge