



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 95 OF 2011**

BETWEEN

CHARLES OKELLO MWANDA .....PETITIONER

AND

THE ATTORNEY GENERAL .....1<sup>ST</sup>RESPONDENT

THE ETHICS & ANTI CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. At all times material to this case the petitioner was the Director of Regional Development in the Ministry of Regional Development Authorities. He has been a civil servant for a period of over 26 years. He commenced his duties as the Director on 6<sup>th</sup> May 2009. He complaint relates to investigations by the 2<sup>nd</sup> respondent which led to his interdiction.

**Petitioner’s Case**

2. The petitioner’s claim is contained in the further amended petition dated on 3<sup>rd</sup>October 2011. In the petition, the petitioner seeks the following reliefs;

*(aa) A declaration that the ongoing investigations by the 2<sup>nd</sup> defendant are discriminatory, unlawful and a gross violation of the petitioner’s constitutional rights.*

*(a) A declaration that the intended arraignment, prosecution and filing of charges against the petitioner by the 3<sup>rd</sup> defendant is discriminatory, unlawful, unconstitutional and designed for a purpose other than vindication of justice;*

*(b) A declaration that the suspension and subsequent interdiction of the petitioner from his employment with the Ministry of Regional Authorities is unconstitutional, contra-statute, discriminatory and an abuse of power by the Ministry of Regional Authorities.*

- (c) *A declaration that the direct procurement of equipment used in the Rehabilitation of the Tana Delta Irrigation Project (TDIP) was a lawful process that conformed with the provisions of The Public Procurement and Disposal Act (2005) and the rules made hereunder to wit the Public Procurement and Disposal Regulations (2006) and the petitioner cannot be faulted for carrying out the express duties given to him by the Inter-Ministerial Technical Co-ordinating (TCC) and the TDIP Tender Committee;*
- (d) *A declaration that the petitioner acted within the confines of his power as Director of Regional Development in the Ministry of Regional Development Authorities, and did not give an undue advantage to any company awarded contracts by Tana and Athi Rivers Development Authority.*
- (e) *A declaration that the petitioner's constitutional and fundamental rights have been contravened. Consequently a declaration that any proceedings that may be instituted against him are a nullity;*
- (f) *An order for a prohibitory order barring the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents or their agents from arresting, arraigning in court, preferring any charges or detaining the petitioner;*
- (g) *An order for stay of investigation and prosecution by the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> respondent respectively, that may be based on these facts;*
- (h) *A declaration that the petitioner was unlawfully suspended from office and interdicted and an order for his immediate and unconditional reinstatement to his former position as Director for Regional Development in the Ministry of Regional Development Authorities and*
- (i) *Costs of the petition.*

3. The amended petition is supported by the petitioner's affidavit sworn on 3<sup>rd</sup> October 2011. Counsel also relied on the written submissions dated 26<sup>th</sup> August 2011 and those dated 15<sup>th</sup> March 2012.

4. The petitioner avers that as Director of Regional Development, he had overall responsibility for the implementation of among other projects, the Tana Delta Irrigation Project (TDIP) as part of the Economic Stimulus Programme. He avers that his problems began when he wrote a letter dated 24<sup>th</sup> August 2009 to the Managing Director of Tana & Athi Development Authority (TARDA) expressing concern that some of the contractors on site had not been issued with contracts yet the contracts had been approved by the Tender Committee. The petitioner avers that he wrote this letter after visiting the project site where he found contractors machinery on site but could not start work as contracts had not been issued.

5. By a letter dated 12<sup>th</sup> April 2011 written by the Permanent Secretary, Ministry of Regional Development Authorities, the petitioner was suspended on the basis of a complaint of irregularities in the procurement of heavy machinery and misappropriation of public funds at TARDA during the 2009/2010 Financial year.

6. The letter alleged that the petitioner instructed the Managing Director of TARDA to issue three firms tenders for hire of heavy machinery and equipment to be used in land preparation and they were paid over Kshs.50 million. He thus gave undue advantage and circumvented the competitive procurement process contrary to **section 45(2)(b)** of the **Anti Corruption and Economic Crimes, Act No. 3 of 2003** (hereinafter "ACECA").

7. Barely a month thereafter, the petitioner received another letter dated 4<sup>th</sup> May 2011 from the Permanent Secretary, stating that he would be deemed interdicted from exercising the duties of his office with effect from 12<sup>th</sup> April 2011 pending full investigations being undertaken in the case. In his letter dated 8<sup>th</sup> May 2011, the petitioner denied that he was liable as alleged or at all as he was only implementing the decision of the Tender Committee that had awarded the tenders. He asserted that no money was lost and the interdiction was unfair and unjust and against the rules of natural justice and contravened **Article 236** of the Constitution.

8. According to Mr Kariuki, counsel who argued his case, the evidence was clear that there was no basis upon which to investigate the petitioner. There was no undue advantage afforded to him since a competitive process had been followed. Furthermore, an audit by the Auditor General dated 23<sup>rd</sup> March 2011 into the accounts of TARDA for the year ended 30<sup>th</sup> June 2010 did not reveal any irregularities or concerns as to the award of tenders for supply of machinery used at the TDIP site.

9. Counsel contended that apart from the lack of evidence of the irregularities, the action against the petitioner was discriminatory as he was the only one singled out yet the contracts were approved by a tender committee. He emphasised the investigation process is being used to harass and oppress his client. Counsel referred to the case of ***Tirop v Attorney General***[2002] 2 KLR 165 where the Court held that the court could intervene to stop criminal proceedings where the trial was said to be unfair and oppressive.

10. According to the petitioner, his constitutional rights have been violated. In his petition, the petitioner sets out violation of **Articles 19, 20, 21, 25, 27, 28, 29(9), 35(2), 37, 50 and 236** of the Constitution. The petitioner also avers that his investigation is oppressive, unfair and is maintained against public policy and this Court should issue a stay of any further proceedings or investigation.

### **The 1<sup>st</sup> Respondent's Case**

11. The 1<sup>st</sup> respondent, represented by Mr Kipkogei relied on the grounds of opposition dated 16<sup>th</sup> June 2011 which he adopted for purposes of his submissions. The grounds of opposition are as follows;

- (1) *That the application and entire petition lacks merit and is an abuse of the court process.*
- (2) *That the petitioner from the documents submitted clearly flouted the **Public Procurement and Disposal Act**.*
- (3) *That the interdiction of the petitioner is provided for by statute to facilitate investigation into his conduct and that of the entire procurement Committee.*
- (4) *That the interdiction of the petitioner is not based on the fact that he has been formally charged but is based on the fact that it meant to facilitate impartial investigations which will not be possible if he is still in office.*
- (5) *That the petitioner has not been discriminated in any manner as alleged.*
- (6) *That the application is an abuse of the court process.*

### **2<sup>nd</sup> Respondent's Case**

12. The 2<sup>nd</sup> respondent relied on two replying affidavits. The first one was sworn by Gideon Mokaya on 22<sup>nd</sup> November 2011 and another by Weldon Rotich sworn on 26<sup>th</sup> September 2011. The 2<sup>nd</sup> respondent also relies on written submissions dated 16<sup>th</sup> March 2012. Mr Rinkanya, on behalf of the 2<sup>nd</sup> respondent, urged the Court to dismiss the case on four broad grounds.

13. Firstly, he submitted that petitioner had been the subject of investigations and this was under the mandate of **ACECA** particularly **section 7(1)** which entitle the Commission to investigate the conduct of any person, that in the opinion of the Commission, is conducive to corruption or economic crime. There was nothing to show that the investigation was being conducted in an unconstitutional manner and no basis had been laid for this Court to intervene in an otherwise lawful process.

14. Secondly, as regards prosecution, Mr Rinkanya submitted that the petitioner's plea to stop prosecution was premature. Under **section 11(1)(d)** of **ACECA**, the 2<sup>nd</sup> respondent may investigate and recommend prosecution of any acts of corruption but no such recommendation has been made as

investigations by the 2<sup>nd</sup> respondent are ongoing. The 2<sup>nd</sup> respondent's position is that the 3<sup>rd</sup> respondent was not even aware of any investigation until these proceedings were lodged and process served on it. In the circumstances, counsel argued that any prohibitory orders must be rejected particularly where they seek to interfere with the powers of the Director of Public Prosecution to institute and undertake proceedings under **Article 157(6)** of the Constitution. Counsel referred to the case of ***Berkeley Hackett & Others v Attorney General Nairobi HC Misc. No. 448 of 2003 (Unreported)***.

15. As regards interdiction, the 2<sup>nd</sup> respondent avers that this was not effected in accordance with **section 62(1)** of **ACECA** which provides that a public officer who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge. Since the petitioner has not been charged, the Act does not apply. Counsel contended that if anything matters of employment was not a matter for this Court but one for the Industrial Court as such this was not a proper forum for impugning the interdiction.

16. Lastly, the 2<sup>nd</sup> respondent argued that there was no breach of the petitioner's fundamental rights and freedoms. Counsel stated that the petitioner had failed to set out or identify with a reasonable degree of precision the specific rights infringed in relation to him and the matter he believes they have been infringed. In this respect, counsel referred to the case of ***Cyprian Kubai v Stanley Kaiyongi Mwenda Nairobi HC Misc No 612 of 2002 (Unreported)***.

17. Counsel contended that this case is on fours with the case of ***Hon. James Ondicho Gisami v The Attorney General & Others Nairobi Petition No. 376 of 2011 (Unreported)*** where the court declined to case seeking to stop investigations on grounds of discrimination. Counsel urged the Court to dismiss these proceedings.

### **3<sup>rd</sup> Respondent's Case**

18. The 3<sup>rd</sup> respondent was represented by Mr Mule who adopted the submissions by the 2<sup>nd</sup> respondent. He stated that these proceedings were premature as no file with recommendations for prosecution had been forwarded to the Office of the Director of Public Prosecutions for action in terms of **section 11(1)** of **ACECA**. He urged the court to dismiss these proceedings.

### **Issues for determination**

19. The matter before the Court is one for the enforcement of fundamental rights and freedoms under the Constitution. **Article 22** is a special jurisdiction that entitles a party who alleges that his rights have been threatened, infringed or violated to move the Court without any hindrance. Since it is a special jurisdiction for enforcement of fundamental rights, it follows that a party who invokes **Article 22** must set out with due particularity the nature of his claim by identifying the specific right violated and how it is violated in relation to him. Conversely, this special jurisdiction is not intended for determination of general questions of law or fact unless such matters are incidental to the determination of breach of fundamental rights and freedoms protected under the Bill of Rights.

20. The petitioner has particularised several articles which he contends are violated at paragraph 21 of the petition; **Articles 19, 20, 21, 25, 27, 28, 29(9), 35(2), 37, 50 and 236** of the Constitution.

21. Chapter Four of the Constitution which deals with the Bill of Rights. **Articles 19 to 25** are contained in **Part 1** which is titled, **"General Provisions relating to the Bill of Rights."** The provisions are not in themselves justiciable rights but provide the foundation and principles of general application in respect of the specific rights set out in **Part 2 Articles 26 to 51**. For example **Article 20(1)** states that the Bill of Rights applies to all law and binds all State organs and all persons. This provision is not of itself a justiciable right but simply states the application of the bill of rights applies to all persons.

22. The courts inquiry will therefore be limited to the provisions of **Article 27, 28, 29(a), 35(2), 37 and 56** of the Constitution which are the specific rights in the Bill of Rights and which are pleaded in the

Constitution.

### **Equality and Discrimination**

23. **Article 27** protects the right of equality and prohibits discrimination. **Article 27** provides as follows;

- 27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**
- (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.**
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.**
- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.**

24. As I understand, the petitioner's argument is that none of the members of the Tender Committee that authorised the procurement have been investigated, interdicted or suspended and the action against him is discriminatory and that this investigation will dilute his rights to a fair trial and equality before the law.

25. I think this argument was disposed of in the case of *Hon. James Ondicho Gesami v The Attorney General (Supra)* and others where the Court stated, "*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 201 Republic –vs- Gilbert Ateyi Onsomu. 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.*"

26. I also do not find any discrimination on any of the grounds prohibited in **Article 27(4)** of the Constitution.

### **Right to Human Dignity**

27. The petitioner has not shown how his dignity has been denied or infringed. The petitioner is the

subject of an investigation which is authorised by law. Furthermore, he has been interdicted and is being paid half his salary. In the totality of circumstances, there is no infringement of **Article 28**.

### **Freedom and Security of the Person**

28. **Article 29** provides as follows;

29. *Every person has the right to freedom and security of the person, which includes the right not to be—*

- (a) deprived of freedom arbitrarily or without just cause;*
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;*
- (c) subjected to any form of violence from either public or private sources;*
- (d) subjected to torture in any manner, whether physical or psychological;*
- (e) subjected to corporal punishment; or*
- (f) treated or punished in a cruel, inhuman or degrading manner.*

29. The purpose of **Article 29** is to protect the physical and psychological integrity of the person. Neither the pleadings nor depositions show or demonstrate how this right was breached. There is neither allegation nor evidence that the petitioner has been arbitrarily deprived of his freedom, detained without trial, subjected to violence, torture corporal punishment or treated or punished in a cruel inhuman or degrading manner.

30. The mere fact that a person is undergoing what is a lawful process of investigation authorised by statute cannot of itself constitute a breach of **Article 29**. I therefore find that the petitioner's rights under **Article 29** have not been breached.

### **Access to information**

31. The right of access to information is to be found at **Article 35** of the Constitution which provides;

35. (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.*

*(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*

*(3) The State shall publish and publicise any important information affecting the nation.*

32. The petitioner has invoked **Article 35(2)**. It has not been demonstrated how this provision has been infringed. In the case of *Dry Associates Limited v Capital Markets Authority Nairobi Petition No. 328 of 2011 (Unreported)* the court held that, “[107] **Article 35(2) is not intended to interfere with normal regulatory and adjudicatory processes. The right to correction or deletion of untrue or misleading statements is also achieved through the normal forensic processes established by law.**”

33. In my view the investigation, conducted fairly and in accordance with the standards established by

the Constitution, will achieve the effects of **Article 35(2)**.

### **Right of Assembly**

34. Article 37 provides as follows;

**37. Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.**

35. There is no allegation in the petition or affidavit that the petitioner's right to assembly has been infringed in any manner.

### **Right to Fair hearing**

36. **Article 50** is the right to a fair hearing. **Article 50(1)** deals with the right. **Article 50(2)** provides for the rights of **"every accused."** It is common ground that the matters alleged in this case are still of the subject of investigations. The petitioner can only be charged after a recommendation has been made to that effect under the provisions of **section 11(1)** of **ACECA**.

37. The case of **Tirop v Attorney General (Supra)** relied upon by the petitioner is not applicable as concerned the trial. As I have found that **Article 50(2)** is not applicable to the facts of this case and I also hold that the petitioner's rights under **Article 50** have not been infringed.

### **Protection of Public Officers**

38. The petitioner avers that as a result of the investigation there has been a breach of **Article 236** of the Constitution. **Article 236** provides as follows;

**236. A public officer shall not be—**

**(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or**

**(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.**

39. The provisions of **Article 236** provide additional protection to a public officer. In my view these protections are secured by the ordinary laws concerning the discipline, promotion and demotion of public officers. For example, the **Public Service Commission Regulations, 2005** provides due process rights but settling out clearly the circumstances when a public officer may be interdicted.

40. **Regulation 23(1)** of the **Public Service Commission Regulations, 2005** provides as follows;

**23(1) If in any case an authorised officer is satisfied that the public interest requires that a public officer should cease forthwith to exercise the powers and functions of his public office, he may interdict the public officer from the exercise of those powers and functions, provided proceedings which may lead to his dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against him.**

41. I agree with the 2<sup>nd</sup> respondent's submissions the interdiction may be effected when proceedings which may lead to his dismissal are being taken or are about to be taken or that criminal proceedings are being instituted. In my view investigations such as those commenced under the provisions of **ACECA** are proceedings that may lead to dismissal.

42. I do not read **Article 236** to provide immunity to the petitioner from investigations where an offence under **ACECA** has been alleged. As the facts in this case shows, the investigations are still in the

primordial stage. The Commission is bound to act fairly, that is consider all matters including giving the petitioner an opportunity to present his evidence before it comes to any conclusion. This is part of the due process contemplated under **Article 236(2)**.

43. I also do not read **Article 236** as entitling this Court to restrain the performance by the **ACECA** of its statutory mandate and substituting itself as the decision maker to determine whether indeed a case has been made out for investigations. It is for this reason that I have exercised restraint in commenting on or making any definitive that would otherwise prejudice the outcome of the investigation.

44. On the whole therefore, I do not find a breach of **Article 236** of the Constitution as such. I reject prayers (b) of the amended petition.

#### **Prohibitory order barring arresting or charging the petitioner**

45. I agree that this prayer is rather premature as the investigation is not yet complete for action by the Office of the Director of Public Prosecutions to commence its part in the process under **section 11(1)** of **ACECA**.

46. Further and in light of **Article 157** which deals with the powers of the Director of Public Prosecutions to prosecute criminal offences independently and without interference, I decline to grant prayers (f) and (g) of the petition.

#### **Disposition**

47. Having considered the material placed before me, I have come to the conclusion that the petitioner's fundamental rights and freedoms protected under the Constitution have not been infringed in the circumstances.

48. I therefore dismiss the amended petition but with no order as to costs.

**DATED** and **DELIVERED** at **NAIROBI** this 30<sup>th</sup> day of March 2012.

**D.S. MAJANJA**

#### **JUDGE**

Mr Kariuki with him Mr Njenga instructed by Gichuki King'ara & Company Advocates for the petitioner.

Mr Kipkoge, Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup> respondent.

Mr E Rinkanya instructed by the Anti-Corruption and Ethics Commission

Mr Mule, State Counsel, instructed by the Director of Public Prosecutions.