



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO. 53 OF 2011

**IN THE MATTER OF ARTICLES 3, 19, 20, 21 AND 23 OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER**

ARTICLES 1, 3, 27, 28, 40, 47 AND 50 OF THE CONSTITUTION

AND

**IN THE MATTER OF INVESTIGATION BY THE KENYA ANTI-CORRUPTION
COMMISSION TO THE PROCUREMENT/PURCHASE OF THE**

**CHANCERY AND AMBASSADOR'S RESIDENCE SITUATE AT 24 – YAKUMO – 3 – CHOME,
MEGURO-KU, TOKYO – JAPAN**

AND

**IN THE MATTER OF THE REPORT AND RECOMMENDATIONS OF THE
DEPARTMENTAL COMMITTEE OF PARLIAMENT ON**

**DEFENCE AND FOREIGN RELATIONS PURSUANT TO STANDING ORDERS NO. 152 AND
198**

AND

**IN THE MATTER OF THE INTERDICTION OF MR. ALLAN WAWERU MBURU IN
ACCORDANCE WITH REGULATIONS MADE PURSUANT TO SECTION 3 OF THE
SERVICE COMMISSIONS ACT, CAP 185 AND RECOMMENDATION OF THE
PARLIAMENTARY COMMITTEE ON DEFENCE AND FOREIGN RELATIONS**

AND

**IN THE MATTER OF INVESTIGATIONS BY THE KACC AND POSSIBLE PROSECUTION
CONCERNING THE PROCUREMENT/PURCHASE OF THE PURCHASE OF THE**

**CHANCERY AND AMBASSADOR’S RESIDENCE SITUATE AT 24 – YAKUMO – 3- CHOME,
MEGURO-KU, TOKYO – JAPAN**

BETWEEN

ALLAN WAWERU

MBURU.....PETITIONER

AND

**THE HON. ATTORNEY GENERAL1ST
RESPONDENT**

**THE KENYA ANTI-CORRUPTION COMMISSION2ND
RESPONDENT**

RULING

The petitioner/applicant filed an application by way of Chamber Summons dated 30th March, 2011 and brought under **Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** and the **Article 22 of the Constitution of Kenya, 2010**. He sought the following orders:

- “1. That this application be certified as urgent and be heard ex-parte at the first instance.**
- 2. That a conservatory order of stay be issued to stay the decision of the Acting Permanent Secretary, Ministry of Foreign Affairs contained in the letter dated 6th December, 2010 to interdict the applicant from exercising the powers and functions of his office with effect from 6th December, 2010 pending hearing and determination of this application/petition.**
- 3. That the honourable court be pleased to issue a conservatory order of injunction to restrain the respondents from initiating, instituting or maintaining the prosecution of the petitioner/applicant in relation to the procurement/purchase of Chancery and Ambassador’s Residence Situate at 24 – Yakumo – 3 – Chome, Meguro-Ku, Tokyo, Japan by the government of Kenya pending hearing and determination of this application/petition.**
- 4. That the honourable court be pleased to issue a conservatory order of prohibition to prohibit the respondents from initiating, instituting or maintaining and/or consenting to the prosecution of the petitioner/applicant in relation to the procurement/purchase of Chancery and Ambassador’s Residence Situate at 24 – Yakumo – 3 – Chome, Meguro-Ku, Tokyo, Japan by the Government of Kenya pending hearing and determination of this petition.**
- 5. That cost of this application be borne by the respondents.”**

The application was supported by a 13 pages affidavit sworn by the applicant. The contents of the lengthy affidavit may be summarized as hereunder.

The applicant was employed by the Public Service Commission of Kenya as an Assistant Secretary Cadet on 16th January, 1989. In September 2007 he was posted to the Kenyan Embassy in Japan as a First Counselor. At the time of his posting Mr. Dennis M.O. Awori was the Kenyan Ambassador to Japan and therefore the head of the Kenyan mission. The applicant was second in command. One of the issues that the Kenyan Embassy in Japan dealt with at the material time was search for premises to be purchased for purposes of establishing the Embassy Chancery and residence for the Ambassador. As at September 2007 the Chancery and the Ambassador’s house were located at 24-Yakumo-3-Chome, Meguro-KU, Tokyo, hereinafter referred to as **“the embassy premises”**. The said embassy premises were on lease and the

Kenyan Government was paying a monthly rent of Kshs.4 million. The premises were built to Kenyan specifications and Kenyan embassy had been in occupation thereof since 1989.

In 2006 the Ambassador informed **Mr. Thuita Mwangi**, the Permanent Secretary, Ministry of Foreign Affairs, that the landlord of the embassy premises had agreed to sell the premises at Japanese Yen (JPY) 2.2 Billion and a certain Japanese bank was willing to consider upto 90% financing. In early 2007 the Kenyan Embassy commissioned Messrs Koro Corporation to carry evaluation of the Kenyan Embassy premises. The firm valued the premises in the sum of JPY 1.09 Billion. However, the transaction did not materialize.

By a letter dated 17th July, 2008 the Ambassador forwarded a proposal to the Permanent Secretary concerning purchase of land for construction of a Chancery and residence. The identified plot was going to cost approximately 900 Million Yen (Kshs.603 Million). By a further letter dated 24th December, 2008 Ambassador Awori informed the Permanent Secretary that the Government of Japan had offered a different plot at a price of Kshs.1,054,095,500/=. The Ambassador strongly recommended that the Ministry accepts the offer. Thereafter some officers from the Ministry of Foreign Affairs travelled to Japan in January 2009 and together with the Ambassador and the applicant carried an inspection of the potential plots for purchase.

By a letter dated 3rd February, 2009 the applicant wrote to the Permanent Secretary and informed him of the final negotiations regarding the sale of the parcel of land on which the chancery and official residence of the Ambassador are located. The purchase price was Japanese Yen 1.75 Billion and the offer was valid for one month. The team that had been sent to Japan had recommended the purchase of these premises.

By a letter dated 16th March, 2009 addressed to the Permanent Secretary by **Mr. Joseph Kinyua**, the Permanent Secretary, Treasury, communicated Treasury's authority to purchase the property at a cost of Kshs.1,524,425,000/= to be funded through application of the proceeds from the sale of the Government Plot in Lagos, Nigeria, and the balance from the re-allocation of funds within the development vote of the Ministry of Foreign Affairs amounting to Kshs.215,290,920/=. The Kenyan embassy in Tokyo was informed of Treasury's authority as aforesaid.

On 31st March, 2009 a meeting was held between the Kenyan mission to Japan and owner of the residence where the Chancery and the Ambassador's residence are built, one **Mr. Nobuo Kuriyama**, who was officially informed of the Government's decision to purchase the property. During a meeting of the Ministerial Tender Committee held on 24th April, 2009 the use of direct procurement methods to acquire the Tokyo property was approved and on 12th May, 2009 the Kenya Government sent a negotiating team to Japan. Those negotiations culminated in the vendor agreeing to sell the property at Kshs.1.5 Billion.

Pursuant to the approval to purchase the embassy premises on 30th June, 2009 the Kenyan Embassy paid the vendor a sum of Japanese Yen 1,477,634,381 being 80% deposit on the purchase price. On 14th October, 2009 the title to the premises was transferred to the Government of Kenya.

In 2008 and 2009 the National Assembly approved the financial vote for the Ministry of Foreign Affairs which included provision for purchase of the Kenyan Embassy in Tokyo, Japan.

In the wake of allegations of impropriety in the purchase of the Embassy premises, sometimes in July 2010, Members of the **Parliamentary Committee on Defence and Foreign Relations**, hereinafter referred to as "**the Committee**" visited Japan for purposes of carrying an inspection visit to the Kenya Mission and ascertain the facts regarding purchase of the property. Thereafter the committee prepared a report and recommended, *inter alia*, that the applicant should step aside to allow investigations by the Kenya Anti-Corruption Commission (KACC) and that he be barred from holding public office conferred by the Republic of Kenya.

The applicant said that the recommendation that he should be barred from holding public office is both unconscionable and unlawful because, besides his innocence, there is no law that provides that a Civil

Servant implicated in wrongdoing by a Parliamentary Committee be barred from holding a public office.

The applicant was recalled from Tokyo and upon reporting to the Ministry headquarters at Nairobi was interdicted. He now argues that the interdiction is unlawful and unconstitutional as the Parliamentary Committee has no powers to recommend the interdiction of a Civil Servant and there is no legal basis for such recommendation under the Public Service Commission Regulations. Further, the letter of interdiction did not state that the Government was about to commence disciplinary proceedings against him, he added. The applicant further stated that the decision to interdict him was made in breach of the Government Guidelines on handling of cases of public officers suspected of involvement in corruption practices issued through a letter dated 24th May, 2010 addressed to the Attorney-General, among others, by the Head of Public Service.

The applicant complained that the decision to interdict him was done in utter disregard of the due process and in violation of his right to protection of law, equal treatment, human dignity and fair administrative action and fair hearing enshrined in **Articles 10, 27, 28, 47 and 50 of the Constitution of Kenya, 2010.**

As a result of the interdiction, the applicant stated, he was unable to apply for vacant positions in the Ministry of Foreign Affairs that were recently advertised.

The 1st respondent filed a replying affidavit that was sworn by **Ambassador Michael Okoth Oyugi**, the Acting Permanent Secretary, Ministry of Foreign Affairs. He stated that in the Committee's report, the applicant was adversely mentioned and the Committee recommended that he steps aside to allow investigations to be conducted. He was therefore interdicted in accordance with **Article 75 of the Constitution of Kenya, 2010** as well as **Sections 22(i) and 23(i) of the Public Service Regulations, 2005.** His interdiction was therefore lawful, the deponent added.

The 2nd respondent filed a replying affidavit sworn by **Julius Njire Muraya**, an Advocate employed as a Forensic Investigator by the 2nd respondent who is the investigating officer in this matter. He stated that the Commission received information that senior officials in the Ministry of Foreign Affairs manipulated the procurement process by concealing vital information as well as presenting false or misleading information to critical decision making committees of the said Ministry leading to losses by the Government of Kenya. KACC commenced investigations which are on-going. The investigations officer and another officer visited Kenyan mission in Tokyo, Japan, to undertake the investigations. The investigations by KACC were not instigated by the Parliamentary Committee's report, and neither has that report or the interdiction of the applicant compromised the investigations, the deponent stated.

Mr. Muraya further stated that the applicant had not demonstrated that KACC is bent on discriminatory or unfair treatment in its investigations. KACC cannot be prohibited from undertaking its statutory mandate to investigate all allegations of corruption and economic crimes. He further stated that the issue of interdiction is a contractual matter between an employer and an employee and cannot amount to a violation of one's constitutional rights as alleged.

The parties filed their written submissions which I have carefully considered. I will not reproduce the contents of the submissions. I will proceed to determine the major issues raised as hereunder:

The substantive relief being sought by the applicant is a conservatory order of prohibition to prohibit the respondents from initiating, instituting or maintaining and/or consenting to the prosecution of the applicant in relation to the purchase of the embassy premises in Japan pending hearing and determination of the petition filed herein. In the petition, the petitioner sought 15 declaratory orders, orders of certiorari and prohibition and compensation for loss and/or withdrawal of his Foreign Service allowances following his recall from Japan and eventual interdiction. His main contention is that there was no evidence to connect him to the alleged corruption in the purchase of the embassy premises and that the Parliamentary Committee on Defence and Foreign Affairs had no basis of recommending that he steps aside from his functions and to bar him from holding public office. He further argued that the Acting Permanent Secretary, Ministry of Foreign Affairs, acted unlawfully in interdicting him on the recommendations of the Parliamentary Committee and wants that interdiction stayed pending hearing and determination of the

Petition.

What is the mandate of the Committee? According to **Parliamentary Standing Order 198(3)**, the Committee is mandated to, *inter alia*, investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and Departments. The Committee is also mandated to scrutinize the budget of line ministries.

Following its visit to Japan, the Committee, in its detailed report, recommended action against the Minister for Foreign Affairs, The Permanent Secretary, the Deputy Director, Administration in the Ministry's Headquarters in Nairobi as well as the applicant.

In respect of the applicant, the Committee stated that he:

- (a) signed a sale agreement on behalf of the Government of Kenya without authority from the Minister contrary to Sections 2 and 4 of the Government Contracts Act, Cap 25 Laws Of Kenya.**
- (b) granted himself a power of attorney.**
- (c) discriminated against other bidders by bargaining and agreeing with the owner of the property on the purchase price before advertising for bids. When the advertisement was done it was in English newspapers which have limited coverage in Japan and the time for submitting bids was also limited.**
- (d) disregarded all professional advice and went ahead to purchase the property.**
- (e) falsely witnessed a second agreement for sale purportedly signed by Mr. Thuita Mwangi while knowing that he (the applicant) had already signed an agreement for sale for the said property.**
- (f) deliberately misled the Committee by feigning ignorance on the letter on town planning regulations and the letter from the Ministry of Foreign Affairs cautioning on overpricing of the property and need for a valuer.**

In view of the aforesaid allegations, the Committee recommended that:

- “(i) he should step aside to allow investigations on the transaction to be conducted.**
- (ii) the Kenya Anti-Corruption Commission (KACC) and other investigative arms of the Government should investigate the conduct of Mr. Allan Mburu in the purchase of the properties in Tokyo.**
- (iii) Mr. Allan Mburu should be barred from holding public office conferred by the Republic of Kenya.”**

I think the Parliamentary Committee was acting within its mandate in carrying out its investigations. The allegations made against the applicant are weighty and cannot be disregarded. It was proper for the Committee to request the Kenya Anti-Corruption Commission to investigate the matter thoroughly. When investigations into issues of corruption are on-going it is only proper that anyone who is the subject of those investigations steps aside to allow the investigations to be conducted without any perception that he is likely to hinder the same. One of the guiding principles of leadership and integrity spelt out under **Article 73(2) of the Constitution of Kenya, 2010** is honesty in the execution of public duties.

However, considering that the Committee's investigations were not conclusive and it had requested KACC and other investigative arms of the Government to conduct further investigations regarding the applicant's conduct in the purchase of the embassy premises, it was not proper for the Parliamentary Committee to conclude that the applicant should be barred from holding public office conferred by the Republic of Kenya. That kind of conclusion was rather premature unless the Committee was pre-

determining the outcome of the further investigations it had called for.

The Acting Permanent Secretary in the Ministry of Foreign Affairs rightly interdicted the applicant following receipt of the Parliamentary Committee as aforesaid. That was intended to facilitate investigations and possibly commence proceedings against him. The interdiction was not entirely based on the recommendation made by the Parliamentary Committee, the Permanent Secretary must have exercised his administrative jurisdiction upon perusal of the report and came to the conclusion that there was sufficient material to warrant interdiction of the applicant. He could have decided otherwise but he chose to interdict the applicant because he was satisfied that such an action was justified in the circumstances. **Section 23 of the Public Service Regulations, 2005** provides that:

“If in any case an authorized 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 exercising those powers and functions, provided proceedings which may lead to dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against him.”

A Permanent Secretary is one of the authorized officers who can order an interdiction. The interdiction was not made under the provisions of **Section 62(1) of the Anti-Corruption and Economic Crimes Act** which comes into effect after a public officer has been charged with corruption or economic crime. The Permanent Secretary was aware that KACC and other investigative arms of the government were undertaking investigations.

The applicant’s advocate submitted that it was wrong for the Parliamentary Committee to make the said recommendations without according an opportunity to the applicant to adduce material of probative value which could have caused the Committee to come to a different conclusion. He cited the case of **REPUBLIC vs ATTORNEY-GENERAL ex parte BIWOTT [2002] 1 KLR 688**, where the court referred to an English decision in **MAHON vs AIR NEW ZEALAND LIMITED & OTHERS [1084] 3 ALL ER** at page 201 where it was held:

“A tribunal making a finding in the exercise of an investigative jurisdiction (such as a royal commission) was required to base its decision on evidence that had some probative value, in the sense, that there had been some material that tended logically to show the existence of facts consistent with the findings and that the reasoning supporting the finding, if disclosed, was not self contradiction.”

In the same decision the court further held:

“A tribunal exercising an investigative jurisdiction was also required to listen fairly to any relevant evidence conflicting with, and any rational argument against a proposed finding that a person represented at the inquiry whose interests (including his career and reputation) might be affected by a decision to make a finding was entitled to be informed that there was a risk of the finding being made and to be given the opportunity to adduce additional material of probative value which might defer the tribunal from making that finding.”

I agree with the principles stated in the decision cited hereinabove. However, at **pages 55, 56, 57, 58 and 59** of the Committee’s report the views of the applicant are captured in considerable details. The Committee also interviewed several other persons before it compiled its report. At this juncture, that is, before the petition is heard, the court cannot say that the Committee did not accord the applicant a reasonable opportunity to make his representations before it made its recommendations. That seems to have been done.

It was submitted by the Attorney-General that the petitioner’s application as well as the petition itself, to the extent that it faults the report by the Committee, does not lie because the Parliamentary Service Commission had not been sued. The members of that Committee are not public servants and neither are they officers employed by the Public Service Commission. I agree that the members of the Committee are

not public servants. According to the **Government Proceedings Act** the Attorney-General can only be sued for wrongs occasioned by acts of public officers.

However, I do not think that Parliamentary Service Commission ought to have been sued or joined as a respondent. The Committee was not acting on behalf of the Parliamentary Service Commission. From the foregoing the Attorney-General cannot legally be sued on behalf of the Parliamentary Committee as that will be contrary to the law and also contrary to the doctrine of separation of powers.

Turning to the 2nd respondent's submissions, Mr. Bowry submitted that no specific allegation had been made against KACC which, in any event, is acting within its statutory mandate to investigate the allegation of corruption in acquisition of the embassy premises. The 2nd respondent had nothing to do with the interdiction of the applicant and neither did it have anything to do with the report by the Parliamentary Committee on Defence and Foreign Affairs. That submission was not challenged and I agree with the same.

The Kenya Anti-Corruption Commission is established under the Anti-Corruption and Economic Act, 2003. **Section 7(i)** of that **Act** gives the **Commission** mandate to, *inter alia*:

“(a) investigate any matter that, in the Commission’s opinion, raises suspicion that any of the following can occur or are about to occur –

(i) conduct constituting corruption or economic crime;

(ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime

(b) to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime”.

Section 7(2) of the said **Act** states that a matter may be investigated by the Commission at the request of the National Assembly, the Minister or the Attorney-General or on receipt of a complaint, or on its own initiative. To the extent that the 2nd respondent received a report from the Parliamentary Departmental Committee on Defence and Foreign Affairs alleging that there was corruption in the acquisition of the embassy premises, the 2nd respondent cannot be restrained from carrying on investigations and thereafter making appropriate recommendations to the Attorney-General.

A court cannot restrain a statutory body from carrying out its statutory mandate. If upon conclusion of investigations the Attorney-General forms the opinion that there is sufficient evidence to sustain a charge of corruption or any other related economic crime as against the applicant, he will proceed to have him charged accordingly. At this juncture the court cannot issue a conservatory order of prohibition to prohibit the Attorney-General from initiating, instituting, maintaining and/or consenting to the prosecution of the petitioner/applicant as prayed by the applicant. Neither can the court stay the applicant's interdiction.

The 2nd respondent is still conducting its investigations and any of the applicant's complaint that may be targeted against it are premature and unfounded in law.

Lastly, I do not think that the applicant's loss, if any, cannot be compensated by an award of damages. So far the applicant is still earning half of his monthly salary. If upon conclusion of investigations he is exonerated from the allegations made against him, he will be returned to work and will be entitled to all unpaid salaries and other lawful benefits. But if for any reason he is not paid, having been absorbed of any blame, he can file suit for recovery of all his entitlements. It cannot be said that the petition will be rendered nugatory unless the orders sought in the application are granted.

I do not think that the applicant has established that any of his constitutional rights have so far been violated by the respondents. For these reasons I dismiss the applicant's application with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – Court Clerk

Mr. Kibe Mungai for the Petitioner

Mr. Ngaa for the 2nd Respondent

No appearance for the 1st Respondent