



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

**MISCELLANEOUS CIVIL APPLICATION 123 OF 2009**

IN THE MATTER OF THE PUBLIC PROCUREMENT ACT NO.3 OF 2005 OF THE LAWS OF KENYA

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 OF THE LAWS OF KENYA  
IN THE MATTER OF THE POLICE ACT CAP 84 OF THE LAWS OF KENYA

IN THE MATTER OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, NO.3 OF THE LAWS OF KENYA

IN THE MATTER OF AN APPLICATION BY THE APPLICANT FOR JUDICIAL REVIEW PROCEEDINGS AGAINST THE  
KENYA, ANTI-CORRUPTION COMMISSION, COMMISSIONER OF POLICE, DIRECTOR OF C.I.D, AND THE HON.  
ATTORNEY GENERAL OF KENYA BY WAY OF ORDERS OF CERTIORARI, AND PROHIBITION

REPUBLIC..... APPLICANT

AND

KENYA ANTI-CORRUPTION COMMISSION..... 1<sup>ST</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL OF KENYA.....2<sup>ND</sup> RESPONDENT  
THE SPECIAL MAGISTRATE ANTI-CORRUPTION  
COURT OF KENYA NAIROBI REGISTRY.....3<sup>RD</sup> RESPONDENT  
COMMISSIONER OF POLICE..... 4<sup>TH</sup> RESPONDENT  
PUBLIC PROCUREMENT OVERSIGHT AUTHORITY..... 5<sup>TH</sup> RESPONDENT

*EX PARTE*

JACKSON GICHOHI MWANGI  
DR. MILDRED SHIESHIA ODWORI  
EDWARD BULUMA  
MERCY KASINA  
DORCAS KWAYERA  
DR. GEORGE WALUKANA

**J U D G M E N T**

This judgment relates to HMISC. 123/2009 where the ex parte applicants are Jackson Gichohi Mwangi, Dr, Mildred Shieshia Odwori, Edward Buluma, Mercy Karina, Dorcas Kwayera and Dr. George Walukana. It also relates to HMISC. 124/2009 in which the Applicant is Dr. Charles Kandie who are employees of Kenya Medical Supplies Agency (hereinafter referred to as KEMSA). They were chosen to take part in a Technical Evaluation committee of a tender advertised by KEMSA for supply of non-pharmaceutical products on or about 15<sup>th</sup> June, 2007. After the applicants finished their assignment and reported back to their various work stations, they were asked to go and record statements with Kenya Anti-Corruption Commission (hereinafter referred to as KACC), who has alleged that they awarded the tender irregularly. The applicants have challenged the decision of KACC, the Hon. The Attorney General, the Magistrate Anti-Corruption

Court, the Commissioner of Police and the Public Procurement Oversight Board to be barred from arresting, charging and prosecuting them for the impugned tender and they seek the decision to be quashed by an order of certiorari and the Respondent be prohibited from arresting, charging, or prosecuting them. The parties agreed that the judgment in HMISC 123/09 applies to 124/09 as the issues are the same.

Before the hearing of this matter, the parties agreed that the arguments made by both counsel on record in respect of this matter do apply to **HM.CC.123/09, REPUBLIC VS KACC & OTHERS EX-PARTE DR. CHARLES KANDIE** which arises from the same set of facts and involves same issues.

The respondents opposed the notice of motion and the issues that arise are : -

- (1) Whether the notice of motion is competent ;
- (2) Whether the decision of the respondent is illegal;
- (3) Whether the respondent's action is *ultra vires* the provisions of the Public Procurement and Disposal Act No.3 of 2005;
- (4) Whether the respondent is in breach of rules of natural justice;
- (5) Whether the decision is an abuse of power, unreasonable and founded on irrelevant considerations.
- (6) Whether the decision is an abuse of the court process.

The notice of motion is grounded on the verifying affidavit of Jackson Gichohi Mwangi, dated 23<sup>rd</sup> February, 2009 and a statement of facts dated 23<sup>rd</sup> February, 2009, skeleton arguments dated 19<sup>th</sup> May, 2009. The respondents opposed the motion. Stanley Kiptanui swore an affidavit dated 25<sup>th</sup> March, 2009 on behalf of the 1<sup>st</sup> respondent, whereas Patrick Omwenga Kiage, counsel, for the 2<sup>nd</sup> to 5<sup>th</sup> respondents also swore an affidavit dated 27<sup>th</sup> November, 2009. The 1<sup>st</sup> respondent also filed skeleton arguments dated 14<sup>th</sup> August, 2009.

Briefly the applicants were appointed to carry out a Technical Evaluation of a tender advertised by KEMSA. Their mandate was to check the presence of certain documents as per the template documents given. They filled the template as required and in about October 2007 they were required to write statements with KACC. After that, they got information that one of the bidders, a company by name Harleys Ltd had presented forged letterheads of a company. The contract was not awarded to Harley. The applicants contend that they were not in a position to tell who the owners of the sketches were and the name of the products. They learnt later that the suspect letterheads were not one of those they dealt with. That in any event, they are not the ones who awarded the tender. It was also deponed that the relevant authorities have not complained about the tender and the Public Procurement Oversight Board was not involved because any party dissatisfied with the tendering process has the right to complain to the Board within 14 days.

On 15<sup>th</sup> February 2009, the applicants were called by the CEO of KEMSA and informed that they would be charged for awarding the tender. That they have protested because procedurally, the KACC should have consulted with the Public Procurement Oversight Board first but that was disregarded. The applicants contend that the provisions of the Act have not been complied with and specifically Sections 3, 5, 9,30, and 102, and especially Section 105 of the Public Procurement Disposal Act whereby the Director General upon receipt of an investigation report, may submit findings to KACC and if satisfied that there has been a breach of the Act, may direct the procuring entity to take any of the steps listed thereunder e.g. cancel the contract, terminate the proceedings. Before making the representations, the procuring entity or any other person whose legal rights are affected may be given a chance to make representations. The applicants complain that their rights to be heard at that stage have been breached. It is also the applicants' complaint that the charges of fraud do not disclose any known offence in law.

In his affidavit, Kiptanui deponed that KACC received an anonymous complaint in October, 2007 upon which it started investigations on the award of tender by KEMSA. That KACC commenced investigations in compliance with its mandate under Section 35

of ACECA and forwarded its findings to the Attorney General's Chambers. The investigations revealed that there were irregularities leading to offences and the applicants were charged in absentia in Anti-corruption Case No.9 of 18<sup>th</sup> February, 2009 but instead of going to take the plea they came to this court for orders of judicial review. It is denied that the officers were picked up randomly to carry out the evaluation because the 3<sup>rd</sup> applicant, Buluma is the head of procurement Unit at KEMSA and failed to propose membership of the evaluation committee. That investigations revealed that the committee passed authorization letters and quality certificates submitted by Harleys Ltd which did not tally with the tender specifications. That the mandate of PPOA do not include criminal investigations and that KACC is not subordinate to the PPOA and there is no reason to stay the criminal case/proceedings.

Mr. Kiage deponed that the Attorney General's office only became involved with the issue at hand when the KACC sent to the Attorney General an investigation report under Section 35 of the Anti-Corruption & Economic Crimes Act (ACECA) and that the report recommended that the persons named therein be prosecuted. After studying the report it was decided that the suspects be charged and prosecuted. That this application raises issues that fall within the purview of the trial court and it will be a usurpation of the role of the trial court if this court were to embark on a detailed examination of the evidence contained in the affidavits. It is also counsel's contention that the existence of a parallel procedure for settlement of disputes relating to procurement does not immunize such matters from criminal inquiry and that the investigations carried out by KACC and the intended prosecution by the Attorney General are lawful exercise of the respondent's constitutional and statutory powers in the public interest.

**Whether the statement of facts should be struck out:**

Mr. Olola counsel for the 1<sup>st</sup> respondent submitted that the statutory statement contains matters of fact that should have been in the verifying affidavit and he urged the court to strike out paragraphs 7-53 of the statement for offending provisions of Order 53 Rule 1(2) of the Civil Procedure Rules. He relied on the case of *SILVANO ONEMA OWAKI VS COMMISSIONER KENYA REVENUE AUTHORITY C.A.45/00*, where the Court of Appeal in interpreting Order 53 Rule 1(2) of the Civil Procedure Rules, said that the facts should be contained in the verifying affidavit while the statement should only contain the names and description of the applicant, the relief sought and the grounds relied upon.

That rule provides as follows:

***“Order 53 Rule 1(2). An application for such leave as aforesaid shall be made ex-parte to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds upon which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving of security as he thinks fit.”***

It is true that the applicant has filed a very lengthy statement and I do concede that most of the paragraphs contain the facts of the case and specifically paragraphs 7 to 53. These facts should have been in the affidavit. Paragraph 1 to 6 describe the applicants whilst paragraphs 54 to the end contain the reliefs sought and the grounds upon which the application was filed. Paragraphs 7 to 53 are misplaced and they are hereby struck out. However, the striking out of these paragraphs does not render the statement incompetent. What is left of the statement is sufficient to be relied upon as a statement of facts.

**Whether the decision of KACC is illegal: -**

The KACC is a creature of the Anti-Corruption and Economic Crimes Act, 2003. The preamble to the Act provides as follows:

***“An act of Parliament to provide for the prevention, investigations and prosecution of corruption, economic crime and related offences and for matters incidental thereto and connected therewith”.***

The Commission of the set up under Section 6 thereof and its functions are set out under Section 7 of the act.

Section 7 reads as follows:

**“7(1) The Commission shall have the following functions: -**

- (a) To investigate any matter that, in the Commission’s opinion, raises suspicion that any of the following have occurred 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 inclined to corruption or economic crime;**
  - (c) To assist any law enforcement agency of Kenya in the investigation of corruption or economic.**
  - (d) At the request of any person, to advise and assist the person on ways in which the person may eliminate corrupt practices.**
  - (e) ...**
  - (f) ...**
  - (g) ...**
  - (h) ...**
  - (i) ...**
  - (j) ...**
- (2) A matter may be investigated by the Commission under Sub-section (1) at the request of the National Assembly, the public or the Attorney General, or on receipt of a complaint, or on its own initiative.**
- (3) The Commission may refer any offence that comes to its notice in the course of an investigation under Sub-section (1) to any other appropriate person or body.”**

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. The question then is whether the 1<sup>st</sup> respondent’s powers are subject to the provisions of the Public Procurement and Disposal Act. It is the applicant’s contention that the respondent could not have ignored the provisions of the Public Procurement and Disposal Act (PPD Act) in relation to investigations, privileges of officers undertaking procurement and the modes of relaying grievances by a party dissatisfied with the procurement process. I will therefore consider the various Sections of the PPD Act that were relied upon. Under Section 100 of the PPD Act, an aggrieved party has a right to judicial review for the decision of the Review Board which is set up under Sections 93-99 of the Act. In my view, this Section would not be available to a party alleged to have committed a crime or corruption. An application under that Section will be of a civil nature. The applicants are alleged to have committed a crime. The applicants also invoke Section 3 of the PPD Act as providing for the remedy that could have been sought. Section 30 prohibits any procuring entity from structuring two or more procurements for purposes of using the procurement procedure. Any contravention of that Section amounts to an offence punishable by law. The applicants have however not told the court that Section 30 is relevant to what the applicants are accused of doing. I have seen the charge sheet filed by the police before the CM’s Court. Charles Kandie and Edward are charged with failure to comply with procurement law under Sections 45(2) and 48(1) of the KACC Act and in count II, the other five applicants are charged with the same offence in the alternative an offence of abuse of office under Section 46 of the KACC Act. These do not fall under Section 30 of the PDD Act.

Section 9 of the PPD Act sets up the Public Procurement Oversight Authority (PPOA) as a body corporate whose functions are inter alia, to ensure that the procurement procedures under the Act are complied with, it monitors public procurement system and report on its functioning, provides advice to procuring entities, makes policy in relation to public procurement etc. The body has a Director General and a Chief Executive Officer. Section 102 of the PPD Act gives the PPOA investigatory powers into the procurement process. The investigator then hands over the report to the Director and the Director after considering the report, if satisfied that there is a breach, may: -

**“1.(a) Direct the procuring authority to take such actions as are necessary to rectify the contravention;**

- (b) Cancel the procurement contract if any;**
- (c) Terminate the procurement proceedings;**
- (d) prepare and submit a summary of the investigations, findings and recommendation of the procuring entity to the Kenya Anti-Corruption commission;**
- (2) Before making an order under sub-section (1) the Director General, shall give the following persons an opportunity to make representation:-**
  - (a) The procuring entity; and**
  - (b) Any other person whose legal rights the Director General believes may be adversely affected by the Order.”**

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 105 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.

The applicants also rely on Section 5 of the PPD Act which provides that if there is a conflict between this Act or Regulations made under the Act and any other Act or regulations in matters relating to procurement and disposal, the PPD Act will prevail.

The issue at hand does directly relate to procurement and disposal but there is nowhere in the Act that makes provision for the manner in which an alleged criminal Act will be dealt with. If it is a Criminal Act, it will end up being dealt with under the Criminal Justice System which involves investigations and prosecution of the crime. In the instant case, the Director General of the PPOA had not acted on any complaint and this court has no idea whether the said Director had received any complaint that the procurement procedure had been breached. The procedure under Section 105 (2) could therefore not be followed because it is not the Director who commenced the investigations. The KACC conducted investigations on the complaint made to it and forwarded their report to the Attorney General pursuant to Section 35 of the ACECA. The KACC made a report of its findings to the Attorney General with a recommendation that the applicants be charged with the offences. In my considered view, the KACC acted within its mandate both under ACECA Act and the PPD Act and cannot be faulted in any way.

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. No such allegation has been made and proved against any of the officers of the 2<sup>nd</sup> respondent.

Judicial Review is not concerned with the merits of the respondents decision but the fairness of the process by which the decision to investigate and charge the applicants was arrived at. Therefore this court is not concerned with the sufficiency of the evidence gathered by the KACC which the 2<sup>nd</sup> respondent has relied upon to prefer charges against the applicants. I find and hold that the 2<sup>nd</sup> respondent has acted within its mandate and the applicants' allegations that it was the first time that they were involved in procurement or that their mandate was limited to filling in the template and giving points on the documents of bidders or that documentary evidence is the preserve of regular

police and document examiners or that they did not obtain any benefit from the tender is a matter for the trial court. That court will review the evidence of both sides and determine whether or not an offence was committed. In our Criminal justice system, one is presumed innocent until they are proved otherwise and the criminal procedure code does provide for an accused person being given a hearing. Since this process was commenced by KACC and not the PPOA, the applicants will still have a chance to be heard and will cross-examine witnesses and if necessary they will be asked to explain in their defences.

**Whether the charges disclose any known offence:**

The applicants are of the view that the charges do not disclose any known offence. Under Section 89(5) of the Criminal Procedure Code, the trial court has the mandate to deal with such a complaint. That Section reads: -

***“89(5) When the magistrate is of the opinion that a complaint or a formal charge made or presented under this Section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reason for that order.”***

The applicants were charged in absentia and moved this court for judicial review orders. No plea has been taken to date. The applicants can raise the above complaint before the magistrate who will consider whether or not the charges are proper because in my view that goes to the merit of the case. It is premature for the applicants to complain before this court about a defective charge.

It is also contended that there is no complainant before the court and for that reason the charge sheet is defective. Under the CPC the definition of complainant is very wide.

Section 89 read as follows: -

***“89(1) proceedings may be instituted by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.***

***(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.***

***(3) A complaint may be made orally or in writing but, if made orally, shall be reduced to writing by the magistrate and, in either case, shall be signed by the complainant and the magistrate.”***

The above provision does not limit the complainant to one who has a direct interest in the case. Anyone who believes from a reasonable and probable cause that an offence has been committed by another is a complainant. In this case, anybody could have complained. It will be KACC, to whom the complaint was made, who can disclose who the complainant is. That need not be done in the judicial review application but in the trial court. That being the case, the charges cannot be defective for want of a complainant. In any event the Attorney General represents the public interest and would be a complainant.

**Of legitimate expectation:**

There are allegations that the decision to investigate or charge the applicants was unreasonable and in breach of the applicants legitimate expectation. Legitimate expectation is all about fairness, that the party against whom a decision is made should be treated fairly. The fact that procedure under the PPD Act was not followed does not in any way breach the applicants' legitimate expectation. KACC and the Attorney General have acted within their mandate. As to whether the applicants were trained in procurement or not or that their employer should have defended them is not a matter for this court. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have acted within the law and cannot be faulted for the actions or decisions taken. There is no evidence of unfair treatment.

The third respondent is the trial magistrate. The charges were filed before that court by the 2<sup>nd</sup> respondent. The trial magistrate has not even taken plea and cannot be in breach of any of the grounds relied upon. None of the orders sought would lie against the 3<sup>rd</sup> respondent.

The prayers for an order of certiorari and prohibition were generally sought against all the respondents. In prayer 2, it is prayed that the decision of the respondents to arrest, charge, prosecute all of the applicants be quashed. The 5 respondents are all charged with different mandates and it was not proper for the applicants to lump them together or have an omnibus prayer for certiorari. As earlier observed, the 1<sup>st</sup> respondent only investigates. 2<sup>nd</sup> respondent is the one who arrests and prosecutes. The 3<sup>rd</sup> respondent hears the case and determines whether an offence has been committed. It is not disclosed what decision the five respondents made that could be subject of quashing as prayed. The 2<sup>nd</sup> prayer of prohibition seeks to prohibit all the respondents from arresting, charging the applicants with the offences contained in the charge sheet. Again, not all the respondents are charged with the duties of arresting and charging and the order of prohibition cannot be made in vain. The 4<sup>th</sup> prayer is unknown in judicial review. It seeks the barring of the respondents from instituting any other proceedings against the applicants in respect of the questioned tender. In judicial review only three remedies are available under Section 8 of the Law Reform Act, and Order 53 of the Civil Procedure Rules and they are mandamus, prohibition and certiorari. The 4<sup>th</sup> prayer is framed like an injunction which this court has no jurisdiction to grant.

From all the foregoing observations, it is my considered view that the applicants are not entitled to the prayers sought in the notice of motion dated 4<sup>th</sup> March, 2009, but should go ahead and submit themselves to the jurisdiction of the criminal court where their pleas will be taken and the case heard and determined on merit. Each party to bear their own costs. These orders apply to HCMis.124/09. Orders accordingly.

**Dated and delivered this 26<sup>th</sup> day of February 2010.**

**R.P.V. WENDOH  
JUDGE**

**Present:**

Mr. Makau for Applicant

Mr. Nzioki for 1<sup>st</sup> Respondent

Muturi - Court Clerk