



REPUBLIC OF KENYA



**Mogaka v Ethics and Anti-Corruption Commission & 2 others (Petition  
12A of 2023) [2024] KEHC 1324 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1324 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
PETITION 12A OF 2023  
EM MURIITHI, J  
FEBRUARY 15, 2024**

**BETWEEN**

**TERRAFIN NYABUTO MOGAKA ..... PETITIONER**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT AT ISIOLO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By an application under certificate of urgency dated 17/4/2023 pursuant to Articles 48 and 50 of the [Constitution](#), Rules 19 and 23 (1) & (2) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) and all enabling provisions of the law, the Petitioner seeks that:
  1. Spent
  2. Spent
  3. This Honorable Court be pleased to stay further proceedings in respect off the Petitioner/ Applicant in Isiolo Chief Magistrate's Court Criminal Case No E001 of 2023: Republic v Joel Kaunda Ontoya & 3 others pending the hearing and determination of the Petition herein.
  4. The costs of this application be provided for.

**The Petitioner's case**

2. The Petitioner is a Senior Accountant attached to the National Treasury. In 2015, he was serving as a District Accountant in Samburu East District, before his transfer to Kuria East District in 2016 and



later to Rarieda and Nyakach Districts. Following his transfer from Samburu East District, he duly handed over the functions of his office to his successor and there were no issues and/or complaints at all. On 22/3/2023, he was arrested from his official place of work by the 1<sup>st</sup> Respondent's officers on allegations of abuse of office purportedly committed on 17/12/2015. On 29/3/2023, he was arraigned before Isiolo Chief Magistrate's Court and to face charges of abuse of office and conspiracy to commit an economic crime. He avers that the unexplained delay of over 7 years in bringing the alleged charges is inordinate and the criminal proceedings are in violation of his right to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay under Article 50 (2) (e) of the Constitution. He verily believes that the criminal proceedings have been brought maliciously to embarrass him and it is fair that the orders sought are granted.

### **The 1st Respondent's case**

3. The 1<sup>st</sup> Respondent filed grounds of opposition on 28/4/2023 that, "The Petitioner has not demonstrated that there is actual violation of the cited Articles of the Constitution to warrant this Honorable Court to grant the conservatory orders to stay criminal proceedings; Section 193A of the Criminal Procedure Code, Cap. 75, Laws of Kenya (the CPC Act) provides that any matter in issue in criminal proceedings that is also directly or substantially in issue in any pending civil proceedings could not be used to stay, prohibit, or delay the criminal proceedings; According to Article 157 (1) of the Constitution, the ODPP is required to consider the public interest, the administration of justice and the need to prevent and avoid abuse of the legal process while exercising the powers provided by the provision; The Petitioner will not suffer any prejudice in the continuance of the criminal proceedings. Since he is presumed innocent until determination of the criminal proceedings which in any event is innocence or otherwise will be established; Any delay in hearing and determination of the criminal proceedings before the Isiolo Chief Magistrate's Court will prejudice the 1<sup>st</sup> Respondent in the event that the case is merited as against the Petitioner since justice will not be served timeously; The petition herein is premature and not merited since the petitioner has not raised any violation of his constitutional rights which is likely to be violated by criminal proceedings is be before the Anti-Corruption Court in Isiolo, a gazetted court nominated to hear and determine such disputes relating to corruption and economic crime which the petitioner is charged; This application is frivolous, vexatious and lacks merit and ought to be dismissed; The application is an abuse of precious judicial time and it is the interests of justice and fairness that the instant application be dismissed with costs to the Plaintiff/ Respondent."
4. Rose Callen Githinji, the Forensic Investigator of the 1<sup>st</sup> Respondent swore a replying affidavit on 13/11/2023. She avers that in her role as a forensic investigator, she is responsible for conducting thorough investigations into complaints of alleged corruption and economic crime received by the 1<sup>st</sup> Respondent and making appropriate recommendations to the 2<sup>nd</sup> Respondent. In January 2017, the 1<sup>st</sup> Respondent received a complaint alleging that the District Education Officer of Samburu East had embezzled funds allocated for the school feeding program in the district during the 2015/2016 and 2016/2017 financial years. The 1<sup>st</sup> Respondent is mandated under section 35 of the Anti-Corruption and Economic Crimes Act (ACECA) to submit a detailed report of its report to the 2<sup>nd</sup> Respondent. That requirement ensures that the 2<sup>nd</sup> Respondent is thoroughly informed of the findings and recommendations resulting from the 1<sup>st</sup> Respondent's investigations. The 1<sup>st</sup> Respondent meticulously prepared the investigative report in compliance after comprehensively reviewing and analyzing all the evidence gathered, ensuring the report provided to the 2<sup>nd</sup> Respondent is exhaustive and accurate for informed decision making. The collaboration of the Respondents as necessitated by the complexity of the case and the requirements of section 35 of ACECA, has contributed to the length of the investigation. The time taken in the investigative process, while causing a delay in the conclusion of the



investigation, was necessary to ensure that all the aspects of the case were thoroughly investigated and that the recommendations or decisions made were based on a complete and accurate understanding of the case.

### **The 2nd Respondent's case**

5. The 2<sup>nd</sup> Respondent opposed the application vide its grounds of opposition filed on 10/7/2023 that, “Corruption levels remain high and Chapter 6 of the Constitution, 2010 does set a high threshold for leadership and attendant structural and institutional changes to buttress the fight against corruption and promotion of ethics among public servants; Article 10 (2) (c) of the Constitution, 2010 the national values and principles of governance include good governance, integrity, transparency and accountability which binds all state organs, state officers and public officers; Pursuant to Article 73 (2) (c) (i) of the Constitution, 2010 the guiding principles on leadership and integrity include selfless service based solely on public interest, demonstrated by honesty in the execution of public duties; As set out under Article 201 (d) of the Constitution, 2010 on principles of public finance, public money shall be used in a prudent and responsible manner; In light of the aforementioned, the applicant was charged with the offence of abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003 and conspiracy to commit an economic crime contrary to Section 47A (3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003 to wit he was obligated to respect and abide by the Constitution, 2010 and the law; The decision to charge the applicant was not unreasonable as it was based on a factual basis in light of admissible, substantial and reliable evidence on record and not on any ulterior motive as alleged by the applicant; The applicant has not provided any evidence to prove that the 2<sup>nd</sup> respondent did not meet the expectations required of it under Article 157 (11) of the Constitution, 2010; Furthermore, Article 157 (10) of the Constitution, 2010 in the exercise of its powers or functions the 2<sup>nd</sup> respondent shall not be under the direction or control of any person or authority; There has been no inordinate delay to prefer charges as against the applicant that would make fair trial impossible. However, if this Honorable Court deems that, the applicant has been prejudiced by the unexplained delay of 7 years to prefer charges after the transactions having been done, we humbly pray that the same is remediable by an order for expedited hearing as an appropriate relief within the meaning of Article 23 (3) of the Constitution, 2010; The applicant has been duly informed and supplied with the evidence the prosecution intends to rely on. In addition, the applicant will have adequate time to prepare for the trial by virtue of Articles 25 and 50 of the Constitution, 2010. Thus, there is no apparent risk that the applicant will not face a fair trial; The applicant has not met the threshold for stay and/or striking out of his intended prosecution in respect of Isiolo Criminal Case No E001 of 2023; The application is without merit, an abuse of the court process and I humbly pray that it be dismissed, as the Petitioner/Applicant has not met the threshold set for grant of the orders sought therein.”

### **Analysis and Determination**

6. After critical consideration of the application together with the responses thereto, it is clear to this court that the pertinent issue for determination is whether the Respondents acted as required of them in charging the Petitioner with the offences of abuse of office and conspiracy to commit an economic crime.



7. This court has considered the principle of law involved in applications for stay of the prosecutorial power in *Republic v Director of Public Prosecution & another & Ex parte Joshua Kilonzo Mutisya* [2018] eKLR and held as follows:

“ 30. The principles upon which the Court shall interfere with the prosecutorial mandate of the DPP, the respondent herein, or with the antecedent investigatorial powers of the Police are now well settled. The applicant must show that the criminal process was being abused in an unreasonable, malicious manner to serve motives ulterior to the objectives of the criminal justice to investigate, prevent and punish crime, or that the prosecution is an infringement of the rights or fundamental freedoms of the individual or otherwise against public interest.”

8. The Petitioner contends that the criminal proceedings have been brought maliciously to embarrass him and the unreasonable and inordinate delay of 7 years in bringing the charges is a violation of his right to fair trial under Article 50 (2) (e) of the *Constitution*. The 1<sup>st</sup> Respondent contends that the decision to charge the Petitioner was informed by the thorough investigations which were undertaken following a complaint of embezzlement of funds allocated for the school feeding program in Samburu East District during the 2015/2016 and 2016/2017 financial years. The 2<sup>nd</sup> Respondent insists that the decision to charge the Petitioner was based on substantial and reliable evidence on record, and not on any ulterior motive. It is urged that the collaboration of the Respondents due to the complexity of the matter contributed to the delay in the completion of the investigations and therefore the 7 years period taken to charge the Petitioner is not inordinate.

9. It is clear that from the exhibited correspondences and in particular the letter dated 17/1/2020 referenced as EACC/FI/INQ/54/2017 that the Respondents have been in constant communication from 2019 all through to 2023. of more importance is the fact that the offences herein are alleged to have taken place between 2015 to 2017, and taking into account the time needed to undertake and complete the investigations, which would then inform the decision on who to charge, this court finds that the Respondents did not unreasonably and inordinately delay in charging the Petitioner. Those correspondences are indeed proof on a balance of probabilities that thorough investigations were done independently by the Respondents, which culminated in the charging of the Petitioner.

10. This court in *Shivji Jadva Parbat & 2 others v Attorney General & 2 others* [2017] eKLR held that,

“It is clear that the police have general powers of investigation of crime under Article 245 (4) (a) of the *Constitution* and the DPP a general power to prosecute offenders subject only to the *Constitution* and the requirements of public interest under Article 157 (11) of the *Constitution*. The test appears therefore to be whether there is demonstrated a reasonable justification to commence investigation and prosecution for a crime. Where however, it can be shown that the prosecution is being carried out some purpose ulterior to the objects of the criminal process to enforce the law and to prosecute offenders, as to amount to what the *Constitution* in Article 157 (11) calls abuse of the legal process, the court must intervene to halt such abuse.”

11. Applying the principles in the aforementioned cases, the question that lingers is whether the Petitioner has established that the charges herein were maliciously brought solely to embarrass him. The answer is in the negative.



12. In *Kuria & 3 others v Attorney General* [2002] 2 KLR 69, the court (Mulwa J) held as follows:

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being jealously guarded, whereas at the same time there is a private interest of the rights of the accused person to be protected. Given these bipolar considerations, it is imperative for the court to balance these considerations vis-a-vis the available evidence...It cannot be gainsaid that the court has the power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its processes do not degenerate into tools for personal score-setting or vilification on issues not pertaining to that which the system was even formed to perform...However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial.”

13. The court finds that the Petitioner has not established how the delay in charging him will adversely impact his right to a fair trial. Needless to state, the Petitioner was only charged on 29/3/2023 when the investigations were finalized. There is no dispute that the offences herein are alleged to have been committed between 2015 and 2017 and therefore, it would have been pointless to charge the Petitioner then, yet investigations had not been concluded and the evidence collated.

14. This Court finds that the Petitioner has not proved on prima facie basis that that the Respondents’ decision to charge him was unreasonable, oppressive, made in bad faith or intended to achieve an ulterior motive, to justify the stay sought.

15. In *Republic v CS, In Charge of Internal Security & 3 others Ex-Parte Jean Eleanor Margaritis Otto* [2015] eKLR, the Court (G. V. Odunga J as he then was) held as follows:

“Several decisions have been handed down which, in my view, correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. However, while applying the said principles to a particular case, the Court must always be cautious in its findings so as not to prejudice the intended or pending criminal proceedings so as not to transform itself into a trial court...This Court in determining the issues raised therefore ought not to usurp the Constitutional and statutory mandate of the Respondents to investigate and undertake prosecution in the exercise of the undoubted discretion conferred upon them.”

16. Without delving into the merits of the criminal charges which is the realm of the trial court, this court finds that justice will be done by allowing the trial herein to expeditiously proceed to its logical conclusion where the Petitioner may in a fair trial be convicted or acquitted. In the event of dissatisfaction with the ultimate outcome of the trial, the Petitioner can always lodge an appeal or file a civil claim for compensation for malicious prosecution.

17. The balance of the interests of the accused against the public interest in prosecution of crime calls for a fair trial within reasonable time, and in this case, it has not been shown, prima facie, that the trial is unreasonably delayed or that the prosecution is being pursued for any ulterior motives other than genuine interest in the prosecution and prevention of crime.



## **Orders**

18. Accordingly, for the reasons set out above, the applicant's application dated 17/4/2023 is without merit and it is accordingly dismissed.

19. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED THIS 15TH DAY of FEBRUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Ratemo for Petitioner.

Ms. Maina for the 1<sup>st</sup> Respondent.

Mr. Masila for the 2<sup>nd</sup> Respondent.

