



**Winston International Ltd v Director of Public Prosecutions & 2
others; Mamura & 9 others (Interested Parties) (Petition E011 of 2021)
[2023] KEHC 1046 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E011 OF 2021
RN NYAKUNDI, J
FEBRUARY 15, 2023**

BETWEEN

WINSTON INTERNATIONAL LTD PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

JOSEPH EMATHE MAMURA INTERESTED PARTY

RICHARD EMORU OBOO INTERESTED PARTY

MARK EWESI EWOI INTERESTED PARTY

FRANCIS ESIMIT EDAPAL INTERESTED PARTY

SHAKESPEARE LOMOE INTERESTED PARTY

PETER LOBALI INTERESTED PARTY

ANTHONY APALIA EKAKORION INTERESTED PARTY

JAMES EKARAN INTERESTED PARTY

MOHAMMED AKRAM KHAN INTERESTED PARTY

NAWEED AKRAM KHAN INTERESTED PARTY



JUDGMENT

Background

1. The Petitioner is a body corporate incorporated under the *Companies Act*, Chapter 486 of the Laws of Kenya. The Petitioner is in the procurement business, supply and delivery of specialized vehicles throughout the country.
2. The 1st to the 10th Interested parties are co-accused with the Petitioner in Eldoret Chief Magistrate's Court ACC No. E002 of 2021.
3. The Petitioner vide the petition dated 3rd June, 2021 prays for the following orders;
 1. An order of Certiorari do issue calling into the High Court ACC No. E002 of 2021 in Eldoret Chief Magistrate's Court for the purpose of quashing the said case against the Petitioner and the ten Interested parties.
 2. An order in terms of permanent injunction do issue restraining the Respondents by themselves, agents, servants or howsoever from charging the Petitioner with corruption offences and/ or infringing on their right to pursue happiness until the matter is adjudicated.
 3. A declaration do issue declaring that the rights of the Petitioner have been violated, denied, threatened, infringed and/or threatened by the conduct of the Respondents.
 4. An order ordering of compensation of the Petitioner for violating his fundamental rights and freedoms protected by *the Constitution*.
 5. Any other order, declaration, writ or remedy or redress the Honourable Court may deem fit and convenient taking all the exceptional circumstances of this case into account.
 6. Costs of the suit be provided for.
4. The petition is opposed by the 1st Respondent and the 2nd Respondent vide their respective Replying Affidavits both dated 21st June, 2021. The 2nd to the 7th Interested parties also filed their Replying Affidavit dated 21st June, 2021, in support of the Petitioner's Case

The Petitioner's Case

5. The Petitioner's case is that it legitimately applied and won a public procurement contract to supply and deliver a firefighting truck Tender Number: (TCG/L&UP/160/2015-2016) in accordance with the specification of Kshs.42,561, 560/=.
6. The Petitioner maintains that the mode of procurement was done in an open, transparent and accountable manner.
7. The Petitioner deposed that the County Government Turkana vide Nairobi High Court Civil Case No. 384 of 2018 and obtained an ex-parte judgment in which it sought to have the Petitioner return the advance payment of Kshs.20,180,050/= plus interest. That the Court made a determination that the Petitioner refund the contract amount of Kshs.20, 180,050/=.
8. The Petitioner further maintains that the High Court also determined that there were no criminal aspects in the transaction and that it acted in good faith.



9. The Petitioner further deposed that on or about 26th May, 2021, it requested for the account details for Turkana County Government so as to enable it implement the Court degree that had been issued in Civil Case No. 384 of 2018. Further that the County subsequently supplied it with the account details and it transferred Kshs.20,180,050/= to the County Government.
10. The Petitioner claims that vide a letter dated 31st March, 201, the County Government of Turkana confirmed that on 28th May, 2021 it had received Kshs.20,180,050/= through Exchequer Account No. 1140763687 held at Kenya Commercial Bank (KCB) Lodwar Branch. That the County Government of Turkana also attached a bank statement certified by the manager (KCB) Lodwar showing that the money had been refunded by the Petitioner.
11. In view of the foregoing, the Petitioner contends that Respondents on 7th June, 2021 preferred criminal charges against them in Eldoret Chief Magistrates Court ACC No. E002 of 2021.
12. The Petitioner further deposed that the charges preferred against them therein are;
 - I. Conspiracy to commit an offence of economic crime contrary to Section 47(a)(3) as read together with Section 48(1) of the [Anti-Corruption and Economic Crimes Act](#), 2003.
 - II. Unlawful acquisition of public property contrary to Section 45 (1) (a) as read with Section 48(1) of the [Anti-Corruption and Economic Crimes Act](#), 2003.
 - III. Engaging in a fraudulent practice in procurement contrary to Section 41(1) as read with Section 41(4) of the Public Procurement and Disposal Act, 2005.
13. The Petitioner further maintains that this is in violation of the applicable procedure and law and total disregard of the rule of law.
14. The Petitioner further deposed that vide a letter dated 6th April, 2021 it wrote to the 1st Respondent seeking to have the matter be resolved through alternative dispute resolution mechanisms as envisaged under Article 252 of [the Constitution](#) of Kenya. That vide letters dated 19th April, 2021 and 28th April, 2021, the 1st Respondent directed that the Senior Assistant Director of Public Prosecutions and Regional Coordinator North Rift to deal with the issues raised.
15. According to the Petitioner, it has actively sought to the engage the Respondents with the view to resolve the matter that is purely civil in nature.
16. The Petitioner contends that as result of the Respondents' actions its right to legitimate expectation under Article 10 of [the Constitution](#) has been violated as it has already refunded the entire amount that had been advanced to it in accordance with the direction issued in Nairobi High Civil Case No. 384 of 2019. That Article 47 of [the Constitution](#) grants every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Petitioner contends that the Respondents have also filed to accord it an opportunity to be heard before making the decision of deportation.

The 1st Respondent's Case

17. The petition was opposed by 1st Respondent vide the Replying Affidavit dated 21st June, 2021 sworn by Mark K. Mugun, a Prosecution Counsel who deposed that the Ethics and Ant-Corruption Commission, 2nd Respondent herein is charged with powers to inter alia: investigate loss of public funds, recover and protect public property under Ethics and Anti-Corruption Act.



18. The 1st Respondent maintains that in accordance with its mandate the 2nd Respondent investigated allegations that the Petitioner together with the Interested parties were involved in procurement irregularities that resulted in the County Government of Turkana loosing approximately Kshs.20,000,000/= in a tender for the purchase of a fire engine.
19. The 1st Respondent further deposed that the investigations further revealed that the Petitioner herein together with the Interested parties were indeed involved in procurement irregularities. Consequently, thereafter the 2nd Respondent recommended the matter to the 1st Respondent to institute criminal proceedings against the Petitioner and the Interested parties.
20. Upon reviewing the evidence that had been gathered, the 1st Respondent recommended that the Petitioner together with the Interested parties be charged.
21. The 1st Respondent maintains that on 7th April, 2021 when the Petitioner together with the Interested parties were arraigned before the Eldoret Chief Magistrate's Court for plea taking in Eldoret Chief Magistrate's Court Anti-Corruption Case Number E002 of 2021; Republic V Joseph Emathe Namuar & Others, they successfully sought for deferment of plea for reasons that included seeking time to initiate a plea bargain with it which decision is yet to be made.
22. The 1st Respondent further deposed that the plea was according deferred to 15th April, 2021 when Petitioner and his co-accused were expected to take pleas. The 1st Respondent maintains that before plea could be taken on the 15th April, 2021 as had been agreed the Interested parties moved the High Court at Kapenguria vide Kapenguria High Court Misc Civil Application No. E002 of 2021; Richard Emoru & 4 Others Vs. The DPP; wherein they sought orders inter alia; interim orders and stay of plea taking. That Hon. Justice Bwong'ong'a declined to issue interim orders of stay.
23. The 1st Respondent contends that as result of the aforementioned, the Interested parties herein chose not to appeal against the said decision but instead chose to file a similar application in Eldoret High Court Misc Civil Application No. E044 of 2021; Richard Emoru & 4 Others Vs. The DPP where Hon. Lady Justice Hellen Omondi granted orders of stay pending the interpartes hearing.
24. The 1st Respondent maintains that when this clear act of forum shopping and abuse of Court process was brought to the attention of the two Courts, the Interested parties hastily withdrew the two respective applications.
25. The 1st Respondent contends that at all material times before the two aforementioned Courts, the Petitioner herein sought audience as an Interested part and was represented and addressed the Court as an Interested party. The 1st Respondent further contends that despite knowing that its interests were at stake, at no particular point did the Petitioner herein who appeared as an Interested party in the two respective application raise an objection to them being withdrawn and thus an indication that it was satisfied with the outcome of both courts.
26. The 1st Respondent maintains that if at all any payment was made to the County Government of Turkana, the same was in compliance with the judgment and decree issued in Nairobi High Court Civil Case No. 384 of 2018 where the Petitioner had been sued for recovery of embezzled money.
27. According to the 1st Respondent, Nairobi High Court Civil Case No. 384 of 2018 was civil nature; limited to matters that were purely commercial in nature. The 1st Respondent contends that the question of whether or not procurement laws were flouted were never raised and could thus not be determined by the said Court. Therefore, the Respondent claims it is thus highly pretentious of the Applicant to intimate that they were vindicated by the said Court.



28. The 1st Respondent further maintains that there was no order that was issued by Court in Nairobi High Court Civil Case No.384 of 2018 that barred it from instituting criminal proceedings against the Petitioner and the Interested parties for monies that had been lost due procurement irregularities. Further, the 1st Respondent contends that Section 193 of the Criminal Procedure Code expressly bars this Court from staying, prohibiting or delaying any criminal case merely because there is a pending civil case that is directly or substantially in issue as the criminal case.
29. In addition, the 1st Respondent contends that the mere fact that the Petitioner has refunded the looted sums of money which proof he has not availed is not an automatic bar to subsequent criminal proceedings.
30. The 1st Respondent maintains that the decision to charge the Applicant and the Interested parties in Eldoret Chief Magistrate's Court ACC No. E002 of 2021 (Republic V Joseph Emathe Namuar & Other) was made in the interest of administration of justice having regard to public interest and the need to deter wanton misuse of public resources.
31. The 1st Respondent urged that the Court that this petition is frivolous, vexatious and abuse of Court process. The 1st Respondent maintains that the same is designed with the sole intention of delaying justice and deferring plea ad infinitum.

The 2nd Respondent's Case

32. The 2nd Respondent vide the Replying Affidavit dated 21st June, 2021, sworn by Mark C. Ndiema, an investigator opposed the petition.
33. The 2nd Respondent deposed that it is empowered by the law to investigate the conduct of any person and/or body which in its opinion constitutes corruption or economic crime and unethical conduct pursuant to the provisions of Chapter Six of *the Constitution* of Kenya, the Anti-Corruption & Economic Crimes Act, Cap 65, the Ethics & Anti-Corruption Commission Act, Cap 65A and the *Leadership and Integrity Act*, Cap 182 Laws of Kenya.
34. The 2nd Respondent further deposed that it is mandated under Section 11(1) (d) of the *Ethics and Anti-Corruption Commission Act* to investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter described under these Acts or any other law enacted pursuant to Chapter Six of *the Constitution*.
35. The 2nd Respondent further deposed that it is mandated under Article 252 of and Chapter Six of *the Constitution* of Kenya to conduct investigations on its own initiative or on a complaint made by any member of the public against a state or public officer. The 2nd Respondent maintains that it conducts its investigations independently without any illegality, irrationality, procedural impropriety, unreasonableness or mala fides.
36. According to the 2nd Respondent, where there is devoid of malice, illegality, irrationality, procedural impropriety or unreasonableness on its part in exercising its mandate, then orders being sought to quash the charges in Eldoret Chief Magistrate's Court ACC No. E002 of 2021 cannot issue as prayed.
37. The 2nd Respondent contends that investigating corruption and economic crimes pursuant to its mandate does not amount to infringement of any person's rights including the Petitioner herein.
38. The 2nd Respondent's position is that as much as Article 258(1) of *the Constitution*, provides that every person has the right to institute Court proceeding s, claiming that this Constitution has been



contravened or is threatened with contravention, the threat of contravention must be real and not imagined and that the Petitioner must provide evidence to that effect.

39. The 2nd Respondent deposed that that sometime in September, 2019 it received a complaint of alleged procurement irregularities in the purchase of a firefighting engine by the County Government of Turkana in Tender Number: (TCG/L&UP/160/2015-2016) and consequently it commenced its investigations independently and pursuant to the law.
40. The 2nd Respondent maintains that in the conduct of its investigations it invited the Petitioner through its directors Mohammed Akram Khan and Naweed Akram Kham who appeared in its offices to record their statements regarding the allegations that had been made against them. Similarly, the 2nd Respondent deposed that the Interested parties herein who are co-accused with the Petitioner in were also given the opportunity to respond the issues touching them.
41. The 2nd Respondent contends that the investigations that were carried out revealed that the Petitioner together with the Interested parties herein through corrupt conduct were involved in procurement irregularities that led to the County Government of Turkana losing approximately Kshs.20,000,000/= to the detriment of the public, in particular the residents of Turkana County.
42. Having completed its investigations, the 2nd Respondent then forwarded the investigation file to the 1st Respondent with the recommendation that criminal charges be preferred against the Petitioner and the Interested parties. Upon review of the evidence that had been tendered by the 2nd Respondent, the 1st Respondent recommended that the Petitioner together with the Interested parties be charged. Accordingly, the Petitioner and the Interested parties were then charged on 7th April, 2021 in Eldoret Chief Magistrate's Court ACC No. E002 of 2021 wherein they moved the Court to defer their plea taking on the basis that they were pursuing a plea bargain with 1st Respondent and the 2nd Respondent respectively. An intention that the 2nd Respondent contends that was never communicated to it.
43. In view of the foregoing, the 2nd Respondent deposed that the plea taking was then deferred to 15th April, 2021 but before plea could be taken, the Interested parties filed Judicial Review Misc Civil Application No. E002 of 2021 before the High Court in Kapenguria seeking inter alia: interim orders to stay ACC No. E002 of 2020 which orders were denied. That instead of filing an appeal against the said order, the Interested parties now proceeded to file and Judicial Misc Application No. E044 of 2021 at the High in Eldoret without disclosing to the Court that there was another matter pending in Court seeking the same orders, which orders were granted but the Interested parties quickly withdrew the two matters.
44. The 2nd Respondent maintains that prior to its investigations, the County Government of Turkana had instituted civil proceedings in Nairobi High Court Civil Case No. 384 of 2018 against the Petitioner herein where it sought to recover the sums of monies that had been issued to the Petitioner pursuant to Tender Number (TCG/L&UP/160/2015-2016).
45. The 2nd Respondent contends that the said case only addressed issues of civil nature that arose from the said transaction but did not address the criminal conduct which the subject matter in Eldoret Chief Magistrate's Court ACC No. E002 of 2021. The 2nd Respondent further contends that it was never a party to the said proceedings.
46. According to the 2nd Respondent if there any proof that the Petitioner has since refunded the amount owing to the County Government of Turkana. The same was not voluntarily but in accordance with the decree issued in in Nairobi High Court Civil Case No. 384 of 2018. The 2nd Respondent maintains that such payment however, does not vindicate the Petitioner from any criminal charges and criminal and civil matter are different in nature and cannot be adjudicated upon in different forums.



47. In addition, the 2nd Respondent maintains that Eldoret Chief Magistrate's Court ACC No. E002 of 2021; relates to the loss of public funds, a matter which is of public interest and it is therefore crucial that the said case be heard and determined to conclusion.
48. The 2nd Respondent contends that the Petitioner has not demonstrated any specific rights that have been violated or breached to warrant this Court's intervention.
49. The 2nd Respondent maintains that it duly observed the rights of the Petitioner in the course of its investigation and provided for in *the Constitution*. That the Petitioner has not demonstrated that it has in this case acted contrary to the said provisions.

The Interested Parties' Case

50. The Interested Parties vide the Replying Affidavit dated 21st June, 2021, sworn by Joseph Emathe Namuar, deposed that if the orders sought in the Petition are not issued then they stand to suffer irreparable loss that cannot be compensated by an award of damages. The Interested parties maintain that their reputation and societal values are at the verge of being destroyed without taking into account the amount of time that has been spent in building the same.
51. The Interested parties maintain that they have since been charged in Eldoret Chief Magistrate's Court ACC No. E002 of 2021 on various counts and that they are schedule for plea taking.
52. The Interested parties maintain that in the financial year 2014/2015, the County Assembly of Turkana allocated Kshs.50,000,000/= for the procurement of a fire engine upon request as per the procurement plan. That the said engine however, was not procured during the said financial year owing to some uncertainty regarding the user department and the ministry that was procure it on behalf of the County.
53. The Interested parties maintain that sometimes in the year 2016, the County Government of Turkana through the department of land and urban planning having established the availability of funds prepared the evaluation criteria, technical aspects and the tender documents as required by the law for the procurement of a fire fighting truck.
54. The Interested parties further deposed that the tender for the supply of firefighting truck was thereafter advertised with required specifications as well as closing and submission dates.
55. Upon receipt of the various bids from various bidders, the Interested parties maintain that the evaluation committee then carried out evaluation and prepared an evaluation report wherein it indicated the successful bidder be recommended for the contract award. That the successful bidder recommended to be awarded the tender as per the minutes of the evaluation committee was Wiston International Limited, the Petitioner herein.
56. The Interested parties maintain that the procurement process was done in accordance with the *Public Procurement and Asset Disposal Act*, 2015 to the latter and that there no contravention of the law.
57. The Interested parties deposed that subsequently, on 20th May, 2016 the County Government of Turkana signed a contractual agreement with the successful bidder, the Petitioner herein for the supply of the said engine. Further that according to the agreement the Petitioner was to supply the engine at the cost of Kshs.42,561,560/= and that the user was to spend the balance of Kshs.7,438,440/= to set up a fire station.
58. The Interested parties further deposed that as per the terms and conditions of the contract the Petitioner was to deliver the fire truck before the end of October, 2016. The Interested parties further



- maintain that the Petitioner was to be paid 50% of the total cost and the balance thereof was to be paid upon the delivery of the firefighting truck. In that regard the Interested parties deposed that the Petitioner was paid Kshs.21,280,780/= on condition that the balance was to be paid after the truck had been delivered.
59. The Interested parties contend that in total contravention of the contractual agreement the Petitioner failed to deliver the truck as agreed before the end of October, 2016. As a result of the Petitioner's failure to deliver the truck, the Interested parties maintain various activities were set in motion with the view of seeking an explanation to as why the Petitioner had failed to observe the contractual terms and for the recovery of the money already issued to it.
 60. The Interested parties deposed that following the said breach of agreement by the Petitioner, the County Government of Turkana then instituted civil proceedings for breach of contract by the Petitioner Nairobi HCCC No. 384 of 2018; County Government of Turkana Vs. Winston International Limited; in which they sought for inter alia; rescission of the contract, refund of the sum of Kshs.21,280, 780/= with compound interest thereon at the rate of 13% p.a and liquidated damages pursuant to the provisions of Section 140 (b) of the Public Procurement and Assets Disposal Act, 2015.
 61. According to the Interested parties, the Petitioner herein through its Advocate on record on numerous occasions wrote to the County Government of Turkana seeking to have its account details so as to refund the amount that had been advanced to it.
 62. The Interested parties further deposed that on 27th May, 2021, the County Government of Turkana wrote a letter to the Petitioner its accounts details and upon receipt of the bank details the Petitioner herein through its Advocates wrote another letter to the County Government of Turkana forwarding the transmission report from the bank which the County acknowledged receipt of vide its letter dated 31st May, 2021.
 63. The Interested parties contend that the criminal case being Eldoret Chief Magistrate's Court ACC No. E002 of 2021 was filed in total disregard of the fact that the money owed to the County Government of Turkana being Kshs.20,180,050/= had been paid back in compliance with the directions that had been issued by the Court in Nairobi in HCCC No. 384 of 2018.
 64. The Interested parties maintain that they have since written a letter to the 1st Respondent seeking for deferment of prosecution of the accused persons in the aforementioned criminal case on account that the monies owed have since been repaid and the issue in contention has since been settled.
 65. The Interested parties maintain that they do not owe the County Government of Turkana any monies and thus proceeding with the criminal case will only be waste of judicial time and an abuse of Court process.
 66. According to the Interested parties the Court in Milimani vide its ruling delivered on 17th August, 2020 in County Government of Turkana V Winston International Limited [2020] acknowledged the fact that the issue in dispute was a breach of contract that was made on 20th May, 2016 and thus not a corruption issue.
 67. The Interested parties maintain that no public money has been lost under their watch and hence no point of proceeding with the criminal case which they contend is only aimed at exposing them to unnecessary mental torture.
 68. The Interested parties urge the Court to suspend the said criminal proceedings.



69. The Application was canvassed vide written submissions. The Petitioner together with the 10th Interested party filed submissions dated 20th May, 2022, the 1st Respondent filed submissions dated 15th July, 2022, the 2nd Respondent filed submissions dated 18th July, 2022, the 3rd Respondent filed submissions dated 12th October, 2022 and lastly the 1st to the 8th Interested parties also filed submissions dated 19th July, 2022.

The Petitioner's Submissions

70. The Petitioner's Counsel Mr. Ondieki, submitted that Article 27 (1), (2), (3) and (4) of *the Constitution* protects everyone against discrimination. Counsel argued that it will be double jeopardy and extremely unfair for the Petitioner to be charged after refunding Kshs.20,180,050/= being the amount owing to the County Government of Turkana. Counsel contended that the right to human dignity is recognized and protected under Article 28 of *the Constitution* and that the state ought to respect and protect this right.
71. Counsel further submitted that Article 47(1) of *the Constitution* provides for the right to fair administrative action, one which is expedient, efficient, lawful, reasonable and procedurally fair. That Article 252 (1) (b) of *the Constitution* denotes powers to the 2nd Respondent to negotiate, mediate and do conciliation as alternative modes of dispute resolution.
72. Counsel also maintained that under Article 2(5)(6) of *the Constitution* courts are obligated to apply international treaties and conventions, signed by Kenya, as part of the Kenyan law. That Article 1, 2, 3, 5 and 6 of the Universal Declaration on Human Rights provides for the right to fair trial and that suspects rights have to be respected and protected. Further that Article 2,4,6,9 and 14 of the United Nations International Convention on Social and Political rights, provides for the right to protection by the law. Counsel further submitted that Article 3,6, 11 and 14 of the United Nations International Convention on Socio-Cultural Rights recognizes that social, cultural and economic rights of individuals must be respected. That Article 2, 5, 7, 8 and 11 of the African Charter on People's Rights obligates states to take progressive measures to protect, promote and fulfil the individual's rights.
73. Counsel relied on the following cases in buttress of his submissions; Republic V Director of Public Prosecutions & Another Ex parte Chamanlal Vraijal Kamani & 2 Others [2015] eKLR, Director of Public Prosecutions V Martin Maina & 4 Others [2017] eKLR and finally the case of Joram Mwenda Guantai V The Chief Magistrate [2007] 2 E. A 170.

The 1st Respondent's Submissions

74. The 1st Respondent Counsel, Mr. Mugun, argued the Petitioner has failed to adduced evidence of violation of it rights and the manner in which the said rights were violated. further argued that although the Petitioner cited various provisions of *the constitution* and International instruments, the Petitioner did not attempt to specify or elucidate how those very many rights were violated.
75. Counsel relied on the following cases to buttress its argument; Anarita Karimi Njeru V Republic [1976-1980] and the case of Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
76. Counsel further submitted that Article 157 of Constitution and Section 23 of the Office of the Director of Public Prosecution Act gives it power to institute and undertake criminal proceedings. Counsel contended that Courts can only interfere with the 1st Respondent's power in exceptional circumstances. He relied on the following cases; Cyrus Shakhlangwa Khwa Jirongo V Soy Limited &



9 Others, Midlands Ltd & 2 Others V DPP & 7 Others [2015], Robert Waweru Maina & 3 Others V The Director of Public Prosecutions & 3 Others [2022].

77. Counsel maintained that the act committed by the Petitioner and the Interested parties before the alleged refund is the basis of the criminal charges. That the act of refunding the money in itself constitutes a guilty mind which then lays the parameters of the offences that they were charged with.
78. Regarding the matter having been dispensed off vide HCCC No. 384 of 2018, the Counsel argued that the civil suit was determined long before the criminal proceedings were commenced. Counsel argued that the pending criminal case being Eldoret ACC No. E002/2021 intends to address and punish how the funds in question were embezzled and to deter any future embezzlement of funds. Counsel maintained that Section 193A of the Criminal Procedure Code provides that, notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceeding is also directly or substantially in issue in any pending civil proceeding shall not be a ground for any stay, prohibition or delay of criminal proceedings. Counsel relied on the following cases to buttress his arguments; Republic V Attorney General & 4 Others Ex parte Diamond Hashim Lalji and Ahmed Hashim Lalji [2018] eKLR, Meixner & Another V Attorney General [2005] eKLR and the case of Bernard Mwikya Mulinge V Director of Public Prosecutions & 3 Others [2019].

The 2nd Respondent's Submissions

79. The 2nd Respondent's Counsel, Mr. Githinji, submitted that although the Petitioner has alluded to a myriad of Constitutional provisions that it claims have violated. the Petitioner has not described with specificity and precision how the actions of the 2nd Respondent have infringed on the said rights. Counsel relied on the following cases to buttress his argument; Anarita Karimi Njeru V Republic [1976-1980] and the case of Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
80. Counsel further submitted that the 2nd Respondent is mandated under Section 119(1) of the EACC Act to investigate and recommend to the 1st Respondent, the prosecution of any acts of corruption or violation of codes ethics or other matters prescribed under legislation. That Section 35 of the Anti-Corruption and economic Crimes Act provides that following an investigation, the 2nd Respondent shall report of the 1st Respondent on the results of its investigations. Counsel further submitted that in carrying out the said investigations, the 2nd Respondent is required to do so independently, impartially, objectively in good faith and with the confines of the law as enshrined under Article 10, 232, 249 of *the Constitution*. Counsel argued that Courts can only interfere when it shown that the 2nd Respondent acted unlawfully or ultra vires to its powers. Counsel relied on the following cases to support his arguments; Paul Ng'ang'a Nyaga & 2 Others V Attorney General & 3 Others [2013] eKLR, Benson Muteti Masila & 5 Others V Chief Magistrate Milimani Law Courts & 4 Others [2020] eKLR and Republic V Inspector General of Police & Another Ex parte Patrick Macharia Nderitu [2015] eKLR.
81. Counsel further submitted that Section 193A of the Criminal Procedure Code provides that, notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceeding is also directly or substantially in issue in any pending civil proceeding shall not be a ground for any stay, prohibition or delay of criminal proceedings. Counsel argued that the Civil proceedings herein were instituted by the County Government of Turkana for purposes of recovering funds that were paid to the Petitioner as a result of a contract which was breached by the Petitioner. That the criminal aspects being the subject matter in Eldoret ACC No. 2 of 2021 were not dealt with. Counsel relied on the case of Vincent Onyando & 2 Others V Republic [2021] eKLR to buttress his argument.



The 3rd Respondent's Submissions

82. The 3rd Respondent's Counsel, Ms. Cheruiyot, submitted that the Petitioner has not particularized in the facts adduced, the manner in which the said Articles of *the Constitution* were infringed. Counsel further argued that the Petitioner has merely raised allegations that have not evidentiary backing. Counsel on the following cases to buttress its argument; Anarita Karimi Njeru V Republic [1976-1980] and the case of Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.

The Interested Parties' Submissions

83. The Interested Parties Counsel, Mr. Omwenga, submitted that in view of the County Government of Turkana having acknowledge receipt of the amount owing to it. The Interested parties herein wrote to the 1st Respondent seeking deferment of prosecution of the accused persons in Eldoret ACC NO. E002 of 2021 on account that the issue in contention has already been settled.
84. Counsel argued that Section 56 of the *Anti-Corruption and Economic Crimes Act* as read together with Articles 159 (c) and Article 252(1)(a) and (b) of *the Constitution* sets out alternative dispute resolution mechanisms in matters related to Anti-Corruption and economic related disputes. That Article 157 (11) of *the Constitution* of Kenya, 2010, provides that 1st Respondent shall have regard to the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. That the Petitioner and the interested parties have already been subjected to due process of law and cannot be tried over the same crime already determined.
85. Counsel relied on the following cases; Njuguna S. Ndung'u V Ethics & Anti- Corruption Commission & 3 Others [2014] eKLR, Regina V Ittoshat [1970] 10 CRNS and Thuita Mwangi & 2 Others V Ethics & Anti-Corruption Commission & 3 Others.
86. Counsel argued that Article 19(2) provides for the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. Counsel further argued that Section 25 of the ODPP Act empowers the 1st Respondent to discontinue criminal proceedings.
87. Counsel argued that in HCCC No. 384 of 2018, the Judge acknowledged the fact that the dispute in question was a breach of contract and thus not a corruption issue. Counsel contended that the interested parties herein do not owe the County Government of Turkana any monies. Counsel maintained proceeding with the criminal case will be a waste of judicial time.
88. With regard to the petition being properly drafted, Counsel argued that the petition herein has been properly drafted. That it clearly demonstrates the contravened, violated and infringed constitutional rights of the Petitioner and the Interested parties herein. Counsel further argued that Article 159 (2) (d) of *the Constitution* of Kenya provides that justice shall be administered without undue regard to procedural technicalities.
89. Counsel further submitted that by instituting criminal charges against the Interested parties, the Respondents acted maliciously and thus ought to compensate the Interested parties for violating their Constitutional rights.
90. Lastly, Counsel submitted that it is trite law that Courts should be guided by the overriding objective as envisaged under Sections 1A and 1B of the *Civil Procedure Act*. Counsel argued that striking out of pleadings should be the last resort. Counsel relied on the case of Trust Bank Ltd V Amalo Co. Ltd [2009] KLR 63; to support his argument.



Determination

91. I have considered this petition, responses thereto; submissions by all parties and the authorities relied on. This petition, in a nutshell, is challenging the prosecution of the Petitioner together with the Interested parties in Eldoret Chief Magistrate's Court ACC No. E002 of 2021. There are only two issues for determination. This is a petition revolving around on the canons of constitutional supremacy which dictates that the rules of *the constitution* are binding on all branches of the government and have priority over any other rules made by the government. Therefore any law, action or contact which is not in consonant with *the constitution* either for procedural or substantive reasons we therefore not have the force of law. (See Executive Council of the Western Cape Legislature President of the Republic of South Africa 1995 (4) SA 877 (CC) para 62)
92. This is what the constitutional Court of South Africa had to speak to in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) as follows:-
- “It is a requirement of the rule of law that the exercised of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purposes for which the power was given. Otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries mut at least comply with this requirement. If it does not, it falls short of the standards demanded by our constitution for such action”
93. It is significant to note that the rule of law as a norm of general application entails both procedural and substantive components. It therefore calls for this organs of *the constitution* may not act capriciously or arbitrarily. The question placed before this court where the petitioner is on the reach of Bill of right under chapter 4 of *the constitution* which overrides ordinary law that must be respected whenever public body is ordained to interpret the ordinary law as it relates indirectly or directly to those rights ring-fenced by *the constitution*. The burden of proof is on the petitioner to proof that an infringement of a right in the Bill of rights has taken place for the court to uphold the law to remedy the defect in the decision making process of that impugned body. The petitioner's case and its affidavit evidence appears to set out that the investigative agency and the Director of Public Prosecution acted ultra-vires the provisions of *the constitution* and the statute law. So far as the concerns relate to investigation there was a failure to distil the issue affecting the petitioner hence the need for constitutional protection. Therefore, the decision sought to be reviewed is a decision not to investigate. This involves consideration of the manner in which the various lines of inquiries have been followed with regard to the complaint in question. In those circumstances, the principles in the case of *Republic vs. commissioner of Police and another ex parte Michael Monari & another* (2012) eKLR held:
- “the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitution mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trail court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility for making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.” (See also *Kipoki Oreu Tasur vs. Inspector general of Police & 5 Others* (2014) eKLR.



94. Generally speaking, context of this petition is crucial as it touches on the text of the constitutional provisions which requires the court to give a purpose of approach to its interpretation. The investigatory powers of the 2nd and 3rd Respondent are both anchored in *the constitution* and enabling statute i.e the *National Police Service Act* and *Ethics and Anti-corruption commission Act*. This a case where the evidence is to be found in the locus in quo of the tendering process which a repository of all the tender documents under inquiry or investigation. The theme of the petition can be translated into a concrete question as to where if at all in the legislation by Parliament donating powers to the National Police Service and the Ethics and Anti-Corruption commission is there provision or provisions of which the decision to investigate the petitioner was an overreach and against *the constitution*.
95. The twin respondent in this petition is the Director of Public Prosecution. The petitioner draws attention in relation to these issues on procurement and tendering in Turkana County touching on the supply of Fire engine. It is the submission by the petitioner that the prosecution cannot proof that the property was derived from the contact of a kind which was criminal. It is therefore an infringement or violation of his fundamental rights and freedoms to make an attempt of converting a purely contractual obligations into a criminal element. This is one area of law which is mostly litigated in our courts as to the powers of the police, the Director of Criminal Investigation, the Ethics and Anti-Corruption Commission and that of the Director Public Prosecution. As for the Director of Public Prosecution, Article 157(6)(7)(8) and (10) of *the constitution* spells out the mandate and functions which are not subject to any other person control or direction. The position as regards that constitutional dictate is where the articulated in the case of *Diamond Hasham Laji & Another v A.G & 4 others (2018) eKLR*

“It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2) (d) (ii) of *the Constitution* ordains. However, the doctrine of separation of power should be respected and the courts should not insatiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia failing to exercise his/her own independent discretion, by acting under the control and direction of another person: failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the Legal Process, and by acting in breach of fundamental rights and freedoms of an individual.

The DPP is entitled to make error within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law (*Matululu and Anor v DPP (2003) 4 LRC 712*). Further, authority show that courts are generally reluctant to interfere with prosecutorial decision made within jurisdiction.”

96. I entertain considerable reservation to the propriety of this court to entertain an application challenging the decision to investigate or prosecute the petitioner as framed in the petition. On this I am fortified by the decision in the case of *Hill v Chief Constable of West Yorkshire (1988) 2 ALL ER 238 at 240-241. (1989) AC 53 at 59* where the court held for the Director that absent bad faith or other exceptional circumstances a decision to investigate or not to investigate an allegation of crime is not subject to review. That is not quite right. It looks like an argument to limit the court’s jurisdiction of judicial review, but the jurisdiction is as wide or as narrow as the court holds. The true proposition is that it will take a wholly exceptional case on its legal merits to justify a judicial review of a discretionary decision by the director to investigate or not.
- a. Whether the Respondents acted in contravention of *the Constitution* in recommending and prosecuting the Petitioners with related charges in separate cases.
 - b. Whether orders sought should be issued.



97. From onset I must mention that the sanctity of the bill of rights and the protection of fundamental rights and freedom of individual citizens is guaranteed in our Constitution.
98. From the evidence that has been tendered before this Court, the Petitioner's and the Interested parties' main bone of contention with the Respondents is that the Petitioner herein, has already refunded Kshs.21,280, 780/= that had been advanced to him pursuant to Tender Number: (TCG/L&UP/160/2015-2016) for purposes procure a firefighting engine truck for the County Government of Turkana and thus the criminal charges that have been preferred against them in Eldoret Chief Magistrate's Court ACC No. E002 of 2021, should be dropped.
99. The Petitioner and the Interested parties maintain that the tendering process was done in accordance with law, and in manner that was open, transparent and fair.
100. The Petitioner and the Interested parties also contend that pursuant to the ruling that the ruling that was rendered on 17th August, 2020, in Nairobi HCCC No. 384 of 2018 by Honourable Lady Justice M.W. Muigai, the issue in dispute was only a breach of contract and not corruption issues.
101. The 2nd Respondent's case on the other hand is that sometime in September, 2019 it received a complaint of alleged procurement irregularities in the purchase of a firefighting engine by the County Government of Turkana in Tender Number: (TCG/L&UP/160/2015-2016) and consequently commenced investigations independently and in accordance with its mandate.
102. The 2nd Respondent maintained that in the conduct of its investigations it invited the Petitioner through its directors Mohammed Akram Khan and Naweed Akram Kham who appeared in its offices to record their statements regarding the allegations that had been made against them. Similarly, the 2nd Respondent deposed that the Interested parties herein who are co-accused with the Petitioner. There was evidence of fair administrative action in the process of investigation and conclusion on the disputed subject matter
103. The rule of law does encounter this conceptual huddle by providing devices to counter any exercise of power by public bodies which are also creatures of *the constitution* and statute. It seems to me superior courts both at the comparative and domestic level have interrogated this demanding question on abuse of discretion. In the case of: Reg.vs D.P.P Ex. P Kibilene (2002) 2 A.C 326 "... In a case where it is obvious that the director wishes a charge to go to trial, I think the courts should be very slow to allow review of a consent to be used as a device for resolving points which otherwise be dealt with in the ordinary course of the criminal proceedings. As a general rule, proceedings on indictment should not be delayed by collateral challenges."
104. The 2nd Respondent contended that the investigations that were carried out revealed that the Petitioner together with the Interested parties herein through corrupt conduct were involved in procurement irregularities that led to the County Government of Turkana losing approximately Kshs.20,000,000/= to the detriment of the public, in particular the residents of Turkana County.
105. Having completed its investigations, the 2nd Respondent then forwarded the investigation file to the 1st Respondent with the recommendation that criminal charges be preferred against the Petitioner and the Interested parties. Upon review of the evidence that had been tendered by the 2nd Respondent, the 1st Respondent recommended that the Petitioner together with the Interested parties be charged. Accordingly, the Petitioner and the Interested parties were then charged on 7th April, 2021 in Eldoret Chief Magistrate's Court ACC No. E002 of 2021 wherein they moved the Court to defer their plea taking on the basis that they were pursuing a plea bargain with 1st Respondent and the 2nd Respondent respectively.



106. Pursuant to Article 79 of *the Constitution*, the office of the 2nd Respondent was created and the power to investigate and recommend prosecution bestowed upon it under Section 11 (1) (d) and 13 (2) of *Ethics and Anti-Corruption Commission Act* and Section 35 of *Anti-Corruption and Economic Crimes Act*. The 2nd Respondent is obligated to forward its recommendation to the 1st Respondent for prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the Act.
107. The 1st Respondent is equally conferred with constitutional authority under Article 157 (10) to act independently in making decisions as to who is to charge and who not to be charged. Both offices have their powers insulated by *the Constitution* and statute to act independently without subjecting themselves to anybody's directions or control, external factors or influence or even seek consent or authority from anybody.
108. Article 157(11) provides that in exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. From the aforementioned provision, it clear that as much as the 1st Respondent is mandated to commence criminal proceedings the same must be done in a manner that is consistent with the public interest or the interests of the administration of justice. He must therefore act with utmost fidelity to the law without abusing or misusing those powers to settle personal scores or simply act maliciously with the sole purpose of punishing somebody.
109. Where there is proof of abuse of power by the 2nd Respondent or the 1st Respondent in exercise of their duties thereby acting in breach of any constitutional or statutory powers, it is the duty of the court to intervene and correct the situation by setting aside such actions or breaches. However, courts must act also with extreme caution not to unreasonably gag the operations of such independent state agencies or organs so as to give them room for effective operation
110. In *Republic v Director of Public Prosecution & Another ex parte Patrick Ogola Onyango & 8 Others; Onguto J* stated as follows:
116. The courts' twin approach in ensuring that the discretion to prosecute is not abused if only to maintain public confidence in the criminal justice system and the same time balancing the public interest in seeing that criminals are brought to book has led to rather contradictory principles.
117. On the one hand the courts have consistently held that suspects investigated and charged before trial courts can only have their way before the trial court. It is stated that the trial court is the appropriate forum where evidence is to be tested and all defences raised: see the cases of *Thuita Mwangi & 2 Others vs. The Ethics and Anti-Corruption Commission* Petition No. 153 of 2013 [2014] eKLR and also *Republic vs. Commissioner of Police & Another Exp Michael Monari & Another* [2012] eKLR where Warsame J (as he then was) stated as follows:
- “The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene.”



111. It is worth noting that the Petitioners must also prove in the pleadings with precision that indeed a particular provision of *the Constitution* has been violated and the nature of the violation (See Anarita Karimi Njeru vs R (1979) IKLR.

112. In *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), the South Africa Constitutional Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

“*The Constitution* provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of *the Constitution* are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

113. The Petitioner has alleged the violation of various Articles of *the Constitution* particularly; Articles 10 and Article 47,48 and 50. The very basis for the Petitioner’s and the Interested parties’ outcry is the money that had been issued has since been refunded and thus it will be superfluous to continue with the criminal proceedings instituted in Eldoret Chief Magistrate’s Court ACC No. E002 of 2021.

114. I have carefully considered the arguments made by the Petitioner and the Interested parties with respect to the alleged violation of their rights, and the responses thereto. In my view by undertaking investigations, the Respondents herein were only carrying out their constitutional mandate and cannot be curtailed by this Court if the so wish to bring charges of any kind against the Petitioner and the Interested parties herein. Further, the fact that civil proceedings had been instituted in this matter does bar the Respondents from instituting criminal proceedings of any kind if there is reason enough to do so. The general position of the law is as specified in the *Republic vs Kenya Anti-corruption Commission and 2 Others Exparte wild life lodges Limited* (2014) eKLR :

“the mere fact that allegation made are likely to be found worthless is not a ground for halting investigations into the complainants made or brought to the attention of the 1st respondent since the purpose of a criminal investigations conducted bona fide is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which criminal charge may be laid.”

115. Not surprisingly constitutional courts have made extensive and decisive trajectory of the contextual interpretation of *the constitution* to give effect to the doctrine of separation of powers for fundamental rights and freedoms are not absolute (See Articles 20, 22, and 23 of *the Constitution*). Their boundaries are set by the rights of others and the legitimate needs of society. In my view this considerations are



much more comfortably accommodated in the treatise on Judicial Review Law Procedure and Practice LawAfrica 2nd Edition by Peter Kaluma Page 142 where he observed that:

“Where power is conferred upon a particular public body by parliament or other lawful authority, and that power is exercised properly, it is beyond the power of any court to interfere. On the other hand, parliament or the authority granting power cannot be supposed to have intended that powers granted by it be open to any kind of abuse. It is to be presumed and is always presumed that the body upon which power is bestowed will act judiciously in affecting the intent and scheme of the enabling law.

116. The structure of the enquiry as set out above in the petition appears quite systematic over a petitioner who tendered and qualified to supply goods and services in particular the fire engine to the county government. It is difficult to apply the usual two stage analysis of a right and its limitation in view of the fact that this court by its characteristic jurisdiction cannot delve into the merit and demerits of the tendering process from initiation to completion for purposes of this litigation. In jurisdiction this is not a forum of conveniens for the justiciable issues bedevilling the petitioner.
117. There is nothing placed before this Court that suggests that the 1st Respondent, in exercising his discretion to prefer charges against the Petitioner and the Interested parties in this matter, acted under the control of any person or body, or that he acted in a manner that was not consistent with the public interest or the interests of the administration of justice. There is no evidence also, in my view, to suggest that the actions of the 1st Respondent are inimical to the need to prevent and avoid abuse of the legal process. I do not see any malice, abuse of office nor ill motive in recommending the prosecution herein. The Respondents executed properly their mandate and the rest is for the trial Court to determine after hearing evidence from both sides. Following the test illustrated above proportionality is the key element as the standard of review on a sliding scale of intensity depending on the type of the impugned decision that was made. Proportionality test approach can be adjusted to give due weight the fact that the decision maker may have a great expertise or democratic legitimacy than the court. In essence the court can apply the test with varying degrees of intensity, scrutiny, and evaluation more or less closely against the decision makers claims making it necessary to frustrate the petitioners expectation. That is the position I take in in this matter to decline review of the decision by the respondents against the petitioner to initiate a criminal proceedings in respect of Turkana County Government questioned tender.
118. Having found so, it is therefore my finding that there is no basis for an allegation or finding that the Petitioner’s and the Interested parties rights were violated in any way.
119. On whether the orders sought should be issued. The grant of the said orders was dependent on the determination in their favour of the issues identified earlier. As the issues have all been answered in the negative, it follows that the petition fails, and the Petitioner is not entitled to the orders that it seeks.
120. In the end the petition dated 3rd June, 2021, has no merit and is hereby dismissed. There shall be no orders as to costs. The criminal charges facing the Petitioner and the Interested parties in Eldoret Chief Magistrate’s Court ACC No. E002 of 2021 shall therefore, proceed to full trial.
121. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF FEBRUARY, 2023.

In the Presence of:

Ondieki Advocate for the Petitioner



Mugun for the 1st Respondent

E.W Githinji for the 2nd Respondnt

Omwenga Advocate for the Interested parties

.....

R.NYAKUNDI

JUDGE

