



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
ACEC PETITION NO. 36 OF 2019

HARDY ENTERPRISES LIMITED.....1ST PETITIONER
TODDY CIVIL ENGINEERING COMPANY LIMITED.....2ND PETITIONER
ANTHONY NG'ANG'A MWAURA.....3RD PETITIONER
ROSE NJERI NG'ANG'A.....4TH PETITIONER

VERSUS

ETHICS & ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION2ND RESPONDENT
CHIEF MAGISTRATE COURT, MILIMANI ANTI-CORRUPTION COURT...3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. Under Certificate of Urgency dated 2nd day of December, 2019, the Applicants moved to court by a Notice of Motion under Articles 22 and 23 of the Constitution of Kenya, Order 51 Rules 1 and 4 of the Civil Procedure Rules and sought the following orders: -

1. The application be certified urgent and service be dispensed with in the 1st instance.
2. A conservatory order do issue prohibiting and/or restraining the Respondent, their officials, employees, servants and/or agents or anybody working under or for them from investigating and or further investigating and prosecuting the petitioners pending the hearing and determination of the application inter partes.
3. A conservatory order do issue prohibiting and/or restraining the Respondents, their officials, employees, servants and/or agents or anybody working under or for them from investigating and/or further investigating and prosecuting the petitioner's pending the hearing and determination of the petition.

2. The Petition was grounded on the grounds on the face of the application, the import of which was that in May, 2018 the Nairobi City County Government advertised for a direct procurement of a garbage collection tender on its portal, which the 1st petitioner applied for and its bid accepted and tenders awarded to them through a letter dated 20th June, 2018, whose terms the 1st Petitioner accepted unconditionally.

3. It was further grounded on the fact that a formal contract thereon was entered into on 5th July, 2018 in compliance with Section 104(d) of the Public Procurement and Asset Disposal Act, 2015 having followed all the Procurement Laws and that thereafter the 1st Petitioner diligently offered the services that it contracted for and was duly paid strictly on the terms of the contract for, which the 1st Petitioner and the 2nd Petitioner occasionally borrowed money from each other, to finance their projects and activities, without the 2nd Petitioner contracting with the Nairobi City County and that the 3rd and 4th Petitioners were only directors of the 1st and 2nd Petitioners.

4. It was contended therefore that the 1st Respondent lacks jurisdiction to supervise the performance of the contract entered into between the Petitioners and Nairobi City County Government and that the investigations that had been commenced by the 1st Respondent against the Petitioners was irregular, illegal, null and void, as the search warrants were issued in violation of Section 27 and 28 of ACECA.

5. The application was supported by an affidavit sworn by ANTHONY NGANGA MWAURA in which he stated the factual basis for the petition.

6. Accompanying the application was the petition dated 2nd December, 2018 in which the Petitioners sought the following orders:-

a. A declaration that the 1st Respondent had violated the Petitioners' fundamental rights and freedoms as protected under Articles 25, 27, 28, 31, 40, 47, 48 & 50 of the Constitution.

b. A declaration that the Petitioners be compensated the amount of money that court deems sufficient and or appropriate by the 1st Respondent for violation of the Petitioners' rights and fundamental freedom under Article 25, 27, 28, 31, 40, 47, 48 and 50 of the Constitution.

c. A declaration that the search warrants obtained by the 1st Respondent to commence investigations without prior notice to the Petitioners violated Section 27 and 28 of Anti-Corruption and Economic Crimes Act and Article 47 of the Constitution and hence illegal, null and void.

d. This Honourable court be pleased and do hereby grant a permanent injunction restraining the Respondents, their officials, employees, servants and/or agents or anybody working under or for them from investigating or prosecuting the Petitioners pursuant to the impugned illegal search warrants obtained without prior notice to the Petitioners.

e. A declaration that the 1st Respondent's power only extends to investigating whether the procurement laws and procedures were complied with but lacks jurisdiction, power and mandate to supervise and/or investigate the performance of a contract.

7. While the Petition was still pending before the court, the Petitioners were charged in Nairobi ACC No. 32 of 2019 upon which the petition herein was amended in which the petitioners sought an additional prayer that this court grant Judicial Review order of CERTIORARI to remove into this court and quash the charges against the petitioners in respect of the award and performance of tender No. NCC/WEFE & NRI DP/276/2017-2018 – HIRE OF VEHICLES AND EQUIPMENT.

8. In support of the amended petition ANTHONY NGANGA MWAURA swore an affidavit, in which he stated that Section 92 of the Public Procurement and Assets Disposal Act, 2015 allows a procurement entity to use direct procurement, for procurement of goods and services among the other methods, which circumstances are provided for under Sections 103 and 104 of the Act.

9. It was deposed that sometimes in May, 2018 the Nairobi City County Government advertised for direct procurement of a garbage collection tender on its portal, which the 1st petitioner applied for and was awarded the tender, having been invited under a letter dated 28th May, 2018 for the negotiation meeting with the evaluation committee in compliance with Section 104 (b) of the Public Procurement and Assets Disposal Act and a formal written contract entered into thereafter.

10. It was the petitioners' contention that all the procurement laws were duly followed and if there was any non-compliance with the same, then the liability fell on the responsible County Government officials, in respect of any such non-compliance as the 1st petitioner diligently offered the services that it contracted for and was paid strictly on the terms of the contract commensurate with the work done.

11. It was deposed further that the 1st respondent lacks jurisdiction to supervise the performance of a contract as its mandate stops at investigating whether the procurement laws and procedures were complied with.

12. It was contended that the 1st and 2nd petitioners were related companies while the 3rd and 4th petitioners were directors of both 1st and 2nd petitioners, which were two different, separate and distinct entities conducting different unrelated activities.

13. It was stated further that the 1st and 2nd petitioners occasionally borrow money from each other to finance their project and activities and that on 14/12/2018 the 2nd petitioner paid Kshs. 20,000,000 to the 1st petitioner over a fixed repayment of Kshs.80,105,622.92 by the 2nd petitioner and further on 24th November, 2018 the 1st petitioner loaned the 2nd petitioner Kshs.8,000,000 which the 2nd petitioner refunded in two instalments of Kshs.7,000,000/- and Kshs.1,000,000 on 5th December, 2018 and 10th December, 2018 respectively.

14. It was contended that the 2nd petitioner previously contacted few businesses with the Nairobi county Governor in his individual capacity and that on 16th December,2018 the County Governor leased to the 2nd petitioner land title number Kwale/Golini/383 and the 2nd petitioner paid the governor a deposit of Kshs.3,000,000 on 17th December, 2018 and therefore the 1st Respondent's narrative that there was a kick back for influencing the award of tender to the 1st petitioner was ill-motivated, bad in faith, reckless, malicious and false since the 2nd petitioner was not a bidder with the Nairobi City County Government.

15. It was contended that the sum of Kshs. 3,000,000 paid to the Nairobi City County Government Governor was in his individual capacity and not as the County or its Governor and that the 2nd petitioner has had businesses with Nairobi City County Government Governor, previously even before he became the Governor, who was not part of the tender committee which awarded the tender to the 1st petitioner. It was further stated that the 2nd Petitioner was not a bidder with the Nairobi City County Government nor did it contract with the same to

collect garbage.

16. It was contended that the 1st Respondent had exparte and without prior notice to the petitioners obtained illegal search warrants against the petitioners' bank accounts and illegally commenced investigations against them in violation of Sections 27 and 28 of ACECA, Sections 4 & 5 of Fair Administration Actions Act, Article 47 of the Constitution and in blunt disregard of the guidelines espoused by the Court of Appeal in Nairobi Civil Appeal No.109 of 2016.

17. On behalf of the Petitioner it was deposed that the petitioners' right to privacy as guaranteed by Article 31 of the Constitution was violated as the 1st Respondent went ahead and maliciously and illegally circulated the petitioners bank account in social and main stream media without consent or knowledge of the petitioners.

RESPONDENT'S CASE

18. In response to the petition, the 1st Respondent filed a Replying Affidavit through **SIMON CHERKA**, a Forensic Investigator with the same, in which it deposed that it received a report that some officials of Nairobi City County Government, in collusion with private companies and individuals were engaged in a fraudulent scheme to embezzle public funds in the process of awarding tenders for the provisions of goods and service to the County between June, 2017 and February, 2019.

19. It was stated further that in the process of investigations, it was established that Hardy Enterprises (the 1st petitioner) received payment from Nairobi City County in respect of various tenders awarded to them in respect to tender No. NCC/WEFE & NR/276/2018-2019, for hire of heavy equipment and vehicles and that the procurement process was initiated by one Peter Kariuki, the County Secretary, contrary to Section 73 of the Public Procurement and Asset Disposal Act, 2015 and Regulations.

20. It was contended that the memo from the said secretary dated 24/5/2018 illegally gave specific instructions to the committee to use direct procurement method, without giving any reasons for the same contrary to Sections 54(1), 103(1) & (2) of the Act and the regulations therein and irregularly appointed committee met the six prospective bidders on 25th May, 2018 and gave them blank tender documents and the rates to quote in their bids and after the award of the tender no notification was made to the PPRA at all, as per the requirement of Regulation 62(3) of 2006 PPD Regulations.

21. It was contended that the choice of direct procurement was in blatant disregard of the procurement law, as the six companies selected were to undertake a one (1) year contract for services that had not been planned for and was reasonably foreseeable, coupled with the fact that the prices were issued to the bidders before they were issued with or had filled in the tender documents, which was to avoid competition contrary to Section 103 of the Act.

22. It was contended that the 1st Petitioner (Hardi Enterprises Ltd) did not meet the requirements for consideration for award of the said tender and that in a bid to sanitize an already stained process, a professional opinion signed by one Patrick Mwangangi indicated that the said tender was approved vide memo ref DOE/SWN/4/7/223/2018 dated 27/4/2018, which memo investigations established it was a request to incur expenditure for a 30 days contract for solid waste collection (which was done under a different tender using restricted tendering method) and not the one (1) year contract that was used for the subject tender.

23. It was deposed that the said contract was fraudulent as the County secretary and head of service Board without authorization of the Chief Officer Finance arbitrarily appointed members of a negotiation, opening and evaluation committee while he was not the designated officer and that the purported negotiation with the six bidders was pre-arranged with a common understanding among the members of the committee and bidders to agree on the rates to fill submit for a superficial and stage managed evaluation that followed with the six bidders submitting the same rates.

24. It was stated that the 1st petitioner did not submit a VAT certificate which fact was overlooked by the Evaluation Committee. Further investigations established that the head of procurement gave misleading information in his professional report and that as a result of the said fraudulent tender, the 1st Petitioner fraudulently received a net payment of Kshs.357,390,229/95 as the investigations established that some of the vehicles which Hardi Enterprises Ltd claimed payment for garbage collection were saloon cars, vans and motor cycles with no capacity to haul the tonnage of garbage claimed with the signature used thereof forged.

25. It was the Respondents case that investigations established that the 1st Petitioner received a total sum of Ksh.357,390,229.95 of which Ksh. 55,800,000/- was transferred to the 2nd petitioners account which then transferred a sum of Kshs.3,000,000/- to the Bank account of Mike Mbuvi Sonko, the then Governor of City County of Nairobi allegedly in respect of lease agreement for Kwale/Golini/383. It was stated that investigations established that prior to the award of tender to the 1st petitioner, MIKE MBUVI SONKO received monies totaling to Kshs.8,600,000/- between April and May, 2017 allegedly for campaign support.

26. It was deposed that based upon the evidence gathered, the 1st Respondent made recommendations to the 2nd Respondent pursuant to Section 35 of the Anti-Corruption Economic Crimes Act 2003 for the petitioners and others to be charged in court on 9th December, 2019 with various offences of Corruption and Economic Crimes in Nairobi ACC No. 32 of 2019.

SUBMISSIONS

27. Directions were issued that the petition be heard by way of written submissions which were duly filed and highlighted by the parties' respective Advocates. On behalf of the petitioners, Prof. Ojienda SC, submitted that the 1st petitioner was awarded tender for performance of specific duties under a contract as per the provisions of Public Procurement and Assets Disposal Act, which allowed for direct procurement and that if a party is dissatisfied with the same, the Act sets out dispute mechanism under the Act through the Public

28. It was submitted that Nairobi City County, the beneficiary of the contract in question, was not a complainant in the Anti-Corruption Case No. 32 of 2019. It was contended that the Respondents were abusing the criminal process, as the charge against the 3rd and 4th petitioners arose out of a contract entered into between the 1st petitioner and the Nairobi City County with the only link being that there were the directors of the same, without the corporate veil being lifted as required in law.

29. It was submitted that there was no specific bit that joined the petitioners who have been charged and named as 10th – 14th accused persons with the charge of conspiracy to commit an offence of corruption and unlawful acquisition of public property in respect of the contract herein. It was the petitioners' contention that any question arising from the said contract should have been a subject of civil law, as criminal law should not be used to supervise the execution of the contract and therefore the prosecution of the petitioners was an abuse of the process.

30. It was contended that in charging the petitioners herein with money laundering, it amounts to criminalizing a common arrangement where companies or business entities loan money to each other, which further ignores the mechanism for recovery of sums paid under contractual obligation. It was submitted that the prosecutorial power of the DPP (2nd Respondent) were amenable to review by the High Court, where the court is satisfied that the prosecution is an abuse of the process, as was stated in the case of:- **REPUBLIC v DIRECTOR OF PUBLIC PROSECUTION & 3 OTHERS EXPARTE BEDAN MWANGI NDUATI & ANOTHER [2015] eKLR.**

31. It was submitted that the proceedings against the petitioners were known to be arising from a contract which was performed and payment thereon made, which could therefore not be criminalized by the Respondent and that if the prosecution amounts to an abuse of the process of court, the High court has powers to stop the prosecution for which the case of **JORAM MWENDA GUANTAIN. THE CHIEF MAGISTRATE NAIROBI CIVIL APPEAL NO. 228 OF 2003 [2007] 2 EA 70** was submitted in support.

32. It was contended that it was not the purpose of the criminal law to help parties advance their civil law remedies or to advance a civil cause as was stated in the case of **REPUBLIC v CHIEF MAGISTRATE'S COURT at Mombasa ex parte GANIJEE & ANOTHER [2002] eKLR 703**. It was further contended that where there is a procedure/remedies provided for as in this matter, where the remedies for breach and violation of the procurement law and procedures as alleged by 1st and 2nd Respondent, then the same should be followed as was stated in the case of **THE SPEAKER OF NATIONAL ASSEMBLY v NJENGA KARUME.**

33. It was finally submitted that Sections 28 and 27 of the ACECA were not complied with and by reason thereof this court should grant the orders sought.

34. It was submitted by Mr. Makokha, that the case was an abuse of the court process since the complaint was that the tender was irregularly awarded and that it is only the County officials who awarded the tender, who should have been charged and not the bidders. It was contended that the only remedy available against the bidders was to challenge the award under the procurement laws, which mandate does not lie with the Respondents.

35. The 1st Respondent filed written submissions which were highlighted by Mr. Mwangela, that the petitioners herein were charged as a result of the 1st Respondent exercising its mandate of investigation, which established unhealthy relationship between the 1st petitioner and the Nairobi City County leading to irregular award of direct procurement of services, which resulted into loss of public funds. It was submitted that where the contract is awarded in violation of the provisions of Public Procurement and Assets Disposal Act, the same could not receive the seal of legitimacy, as was stated in the cases of:- **BLUE SEA SHOPPING MALL LTD v CITY COUNCIL OF NAIROBI & 3 others [2015] eKLR** and **BENSON ANYONA OMBAKI & 5 OTHERS v REPUBLIC [2015] eKLR** where the court held that if tainted with illegality then the contract becomes criminal in nature.

36. On the issue of the legality of search warrant, it was submitted that there was case law to the extent that it would be absurd for the person to be investigated to be given notice, as that could easily jeopardize the incriminating evidence for which the case of **MAPE BUILDING & GENERAL ENGINEERING v A.G. & 3 OTHERS [2016] Eklr**, was submitted in support. It was further submitted that the Court of Appeal decision thereon in the Ojienda case was stayed by the Supreme Court.

37. The 2nd Respondent filed written submissions which were highlighted by Ms Wagia, in which she submitted that the search warrants herein were issued under Sections 118 and 180 of the Evidence Act as well as Section 23 of ACECA. It was submitted further that the prayers in respect of the violation of the petitioners' rights were not specific but general and that the fact that the case was reported in the media did not amount to violation of the petitioners' rights.

38. It was submitted that the decision to charge the petitioners was not an abuse of the process and that the court is called upon to examine whether the petitioner was engaged in a criminal process as was stated by the Court of Appeal in the case of **DIAMOND HASSAN LAJI v REPUBLIC**. It was submitted further that the petitioners were not entitled to compensation since there was no violation of the constitutional rights as they only made blanket statements thereon.

ANALYSIS AND DETERMINATION.

39. The following factual basis of the petition before the court are not disputed:- That the 1st petitioner was awarded tender for performance of garbage collection services by Nairobi City County which was duly signed and according to the 1st petitioner serviced and monies paid in respect thereof, as admitted by the petitioners through the affidavit in support.

40. It is also not disputed that the 2nd petitioner shares directorship in the persons of 2nd and 3rd petitioners with the 1st petitioner and that

the 1st petitioner transferred some sums of money to the account of the 2nd petitioner during the period in question, whereas the 3rd petitioner and 4th petitioner during the period in question transferred some sums of monies into the account of MIKE MBUVI SONKO the Governor of Nairobi City County.

41. It is also not disputed that the petitioners together with others have been charged and are currently facing trial before the Chief Magistrates Anti-Corruption Court in respect of the tender awarded therein and the monies paid, which is the subject of this petition.

42. The petitioners' case is that the 1st petitioner entered into a valid contract for the provision of garbage collection services with the Nairobi City County, which contract it executed and was lawfully paid for, while the Respondents case is that the said contract was illegal, irregular and unprocedurally awarded for which the petitioners and others are standing trial, which the petitioners now want quashed.

43. The petitioners' further contention is that even if the said contract was unprocedurally secured, the same can only be as a result of breach of the provision of the Public Procurement and Asset Disposal Act, which has an inbuilt mechanism for dispute resolution, should therefore not have been a subject of Criminal prosecution in Nairobi ACC No. 32 of 2019.

ISSUES FOR DETERMINATION

44. Whereas the petition herein as amended on 17th day of December, 2019 raises allegations of violation of several constitutional and fundamental rights and freedoms for which they are seeking declarations, from the pleadings herein and the submissions, it is clear to this court that the main issue for determination in this petition is, whether the prosecution of the petitioners in respect of the contract entered into, between the 1st petitioner and the Nairobi City County is lawful, put different is whether the petitioners have made out a case for grant of order of CERTIORARI to remove into this Honourable Court and quash the charges instituted against them as a result of the said contract.

45. To enable the court answer the said issues, it is necessary for the court to look at the mandate of the 1st and 2nd Respondents in respect of investigation and prosecution of matters arising out of contracts awarded under the provisions of the Public Procurement and Assets Disposal Act, put different, does the 1st Respondent have jurisdiction to investigate contract allegedly awarded under the provisions of the Public Procurement and Assets Disposal Act? and if the answer is in the affirmative, were the petitioners herein investigated in a conformity with the provisions of the constitution? and if not what order should this court issue?

46. The 1st Respondent is established under the provisions of Article 79 of the Constitution of Kenya 2010, which directed parliament to enact legislation to establish an independent Ethics & Anti-Corruption Commission, with powers and statutes of independent commission established under Article 252(1) of the Constitution, which grants it powers to conduct investigation on its own or on a complaint made by a member of the public.

47. Parliament enacted **ETHICS & ANTI-CORRUPTION COMMISSION ACT, 2011** with powers thereof set out in Section 13(2) (b) to undertake preventive measures against unethical and corrupt practices and (c) to conduct investigations on its own initiative or on complaint made by any person under Section 28 of the Act. The commission is independent and subject to the constitution shall in the performance of its functions not be subject to the direction or control of any person or authority.

48. Section 23 of the Anti-Corruption and Economic Crimes Act 2003 further mandates the 1st respondent to conduct investigations in respect of corruption and economic crimes which is denied as follows:-

“Corruption

a. An offence under any of the provisions of section

44 (bid rigging)

46 (abuse of office) and

47 (dealing with suspect property)

b. Bribery

c. Fraud

d. Embezzlement or misappropriation of public funds.

e. Abuse of office

f. Breach of trust or

g. An offence involving dishonesty

h. Economic crime

a. An offence under Section 45 (protection of public property and revenue.)

b. An offence involving dishonesty under any written law providing for the maintenance or protection of the public revenues.

49. It is therefore clear that the 1st Respondent has both constitutional and statutory mandate to investigate corruption and economic crimes and in the performance of that function, the same is only subjected to the provisions of the constitution of Kenya 2010 and the limitations provided therein in addition to the supervisory jurisdiction of this court.

Whether the 1st Respondent has jurisdiction to investigate the propriety or otherwise of a procurement process.

50. Whereas the petitioners submitted at length that the 1st Respondent does not have power or jurisdiction to supervise the award and/or performance of public procurement tenders and that Section 27(1) of the Act established the Public Procurement Administration Review Board which procedure should be followed in case of any dispute, as was held in the case of **SPEAKER OF THE NATIONAL ASSEMBLY v JAMES NJENGA KARUME [1992] eKLR** as submitted by the 1st respondent, this issue had been adjudicated upon and it is settled that where the provisions of the act are violated in a manner that creates an offence or in violation of the provisions of Sections 45(1) and 48 of the ACECA, then the 1st respondent is entitled to investigate and make recommendations appropriately.

51. Similar issue was dealt with in the case of **REPUBLIC v KENYA ANTI-CORRUPTION COMMISSION & 4 OTHERS EX PARTE JACKSON GICHOHI MWANGI & 5 OTHERS [2010] eKLR** where the ex parte applicant raised similar issue as the petitioner herein and the court had this to say: -

“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 is whether the 1st Respondent powers are subject to the provisions of the public procurement and Disposal Act.... An aggrieved party has a right to judicial review board which is set up under Section 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 commit a crime.

.....

The issue at hand does directly relate to procurement and disposal but here in 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 involved investigation 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 has been breached. The procedure under Section 105 (2) could therefore not be followed because it is not the Director who commenced investigations. The KACC conducted investigations on the complaint made to it and forwarded their report to the A.G pursuant to Section 35 of ACECA. The KACC made a report to the AG with a recommendation that the applicants be charged with the offence. In my considered view, the KACC acted within its mandate both under ACECA and the PPD Act and cannot be faulted in any way.”

52. It is therefore clear to my mind and I find and hold that the 1st Respondent has mandate to investigate matters which arise out of public procurement and therefore the petitioner's submissions that it lacks mandate over the subject matter herein has no merit as where it is alleged that the tender was procured in blatant disregard of the statutory provision of the Act, then the contract entered into will be null and void as was stated in the cases of **BLUE SEA SHOPPING BALL LTD v CITY COUNCIL OF NAIROBI & 3 OTHERS (SUPRA)** and **BENSON ANYONA OMBAKI & 5 OTHERS v REPUBLIC (Supra)**

53. Once there is an allegation of illegality and/or corruption in the award of or performance of tender awarded by a public body, the 1st Respondent in fulfilment of its statutory and constitutional obligation is required to investigate the same and if it finds merit thereon, to make recommendations to the 2nd respondent who has the constitutional mandate to institute prosecutions in Kenya and unless the petitioner satisfy the court, that the said investigation and/or prosecution is in breach of their constitutional rights, the court will be very reluctant to injunct.... the Respondents from discharging their constitutional and statutory mandate.

54. In the case of **FLORICULTURE INTERNATIONAL LTD & OTHERS v TRUST BANK LTD & OTHERS High Court Misc. Civil Appeal No. 114 of 1997** the court was clear that the existence of an alternative procedure and/or remedy was no bar to pursuit of criminal redress and addressed itself thus: -

“I am of course very clear in my mind and I am alive to the well known principle that the existence of alternative remedies is no bar to the pursuit of a criminal process. Thus the power to stop private criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related fact.

55. This position is also confirmed by the Court of Appeal in **KENYA PIPELINE CO. LTD v GLENCORE ENERGY (UK) LTD [2015] eKLR** where it stated as follows:-

“In STANDARD CHARTERED BANK v INTER COMS SERVICES LTD & 4 OTHERS (supra) this court..... accepted the submissions made that once an issue of breach of statute is brought to the attention of the court in the course of proceedings, then in the interest of justice the court must investigate it because the courts fundamental role is to uphold

the law. The court upheld and endorsed the old English case of HOLMAN v JOHNSON (1775-1803) ALLER 98 where Chief Justice Mansfield stated:-

The principle of public policy is this

Ex dolo malo no ovitur citor . No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause appears to arise ex turpi causa, or the transgression of a positive law of the country, then the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.....”

56. Having found that the 1st Respondent had a mandate to investigate the subject contract herein, notwithstanding the provisions of the Public Procurement and Assets Disposal Act, the next issue for the court's determination is whether the said investigation was lawful and/or procedural, put differently whether the said investigation was conducted in violation of the petitioners' constitutional rights which would lead to vitiating their subsequent arraignment in court by the 2nd respondent?

57. From the affidavit evidence and the submissions herein, the petitioner's complaint is that in investigating them, the 1st respondent did not issue them with a notice under Sections 27 and 28 of the ACECA and further the provisions of Section 4 & 5 of the Fair Administrative Actions Act and Article 47 of the Constitution were violated thereby making the said investigations irregular, illegal, null and void. It has also been contended that right to privacy under Article 31 of the Constitution was also violated.

58. The Respondents on the other hand contended that whereas Section 29 of ACECA empowers the commission to apply for warrants, the procedures thereof are duly provided for under Section 23 of the Act which allows the application of procedures under Section 118A of the Criminal Procedure Code and Section 180(1) of the Evidence Act.

59. The issue as to whether or not it is mandatory to issue notice to the petitioners under Sections 27 and 28 of the ACECA seems not to have been settled in our jurisprudence. The Court of Appeal in **DPP v PROF. TOM. OJIENDA & 3 OTHERS [2019] eKLR** was of the view and held that EACC must adhere to the procedural guidelines set out in ACECA as to how it should handle investigations and not approbate and reprobate invocation of its powers while disregarding its safeguard. The Supreme Court in **ETHICS & ANTI-CORRUPTION COMMISSION v PROF. TOM OJIENDA & 2 OTHERS** while granting an order for stay had this to say:-

“15. We have considered these rival submissions. It is not in doubt that the fight against corruption and economic crimes is a matter of great public importance. In the circumstances in the interest of justice and to provide guidance, a clear and authoritative statement of this court on the issues raised is imperative. Consequently, we allow the application and direct that pending the hearing an determination of the appeal NO. 30 of 2019, the effect of the high Court and Court of appeal decision in this matter is hereby stayed. Neither party to this appeal nor any person shall use, apply or in any way rely upon them until the said appeal is heard and determined (emphasis added)

60. In the support of their contention that in seeking for warrant it utilized a lawful procedure provided for under Section 23(4) of ACECA in obtaining the orders in Magistrate Court Misc. Criminal Application No. 2242 of 2019, the 1st Respondent submitted the following persuasive authorities: -

a. OMBATI T/a NCHOGU OMWANZA NYASIMI ADVOCATE v DCI EMMANUEL KANYUNGI & 3 OTHERS [2017] eKLR in which the court held that to give the notice to the person being investigated can easily jeopardize the incriminating evidence and that the justification (for exparte order) fell within the provisions of Article 24(1) of the Constitution.

b. OKIYA OMUTATAH OKOITI & OTHERS v HON. ATTORNEY GENERAL & OTHERS [2018] eKLR to the effect that the Civil Procedure Code provided a simple yet effective mode of obtaining authority through the court.

c. AMBROSE DICKSON OTIENO RACHIER & 3 OTHERS v ETHICS & ANTI-CORRUPTION COMMISSISON & 2 OTHERS [2018] eKLR to the effect that both procedures provided for under Section 118 of CPC and Section 180 of the Evidence Act and Sections 26, 27 and 28 of ACECA were applicable though serving difference objectives, none was unconstitutional or inferior.

61. From the authorities herein, I take the view that the issue for determination is whether the petitioners were prejudiced by non-issuance of the notice under the provisions of Section 28 of ACECA. This can only be answered if there is evidence that the petitioners were issued with notices under Sections 26 and 27 of the Act. From the affidavit evidence in support of the petition, the petitioners have not indicated whether that was the case.

62. The Respondents on the other hand have indicated that the warrants were lawfully issued through court orders obtained under the provisions of Section 180 of the Evidence Act and Section 118 of CPC while on the authority of **AMBROSE DICKSON OTIENO RACHIER & 2 OTHERS v EACC & 2 OTHERS (supra)** was held to be lawful with the very rider being that the order so obtained ought to be served upon the petitioners.

63. It therefore follows that the issue of breach of the petitioners' right to Fair Administration Act does not arise. The constitution and the ACECA provides for a safeguard to the rights of any person being investigated under Section 35 of the Act upon completion of investigation, the 1st Respondent must submit a report to the 2nd respondent before any action whether to charge the same or not is undertaken.

64. The petitioners' right to privacy must be balanced with the public right to information under Article 35(1) (a) of the constitution which implies the entitlement by the citizens to information as a basis for accountability and openness. The 1st Respondent being a constitutional

commission is under a duty to inform members of the public of what its doing in the fight against corruption. I further agree with the submissions by the Respondent that they had no control over what the media decided to publish as regards the ongoing investigations.

65. The final issue for determination is whether the prosecution of the petitioners herein by the 2nd Respondent is an abuse of the court process which should be halted by the court? As submitted by the 2nd Respondent and conceded by the petitioners, the 2nd Respondent is an independent body established under Article 157 of the constitution with powers to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence allegedly to have been committed and in execution of its duties he shall not require the consent of any person or authority.

66. The court will only interfere with the decision of the Director of Public Prosecution where there is sufficient proof that the action to prosecute is actuated with malice, made in bad faith and hence ultravires And is therefore made in contravention of the constitution as was stated in the cases of **Paul NG'ANG'A NYAGA v ATTORNEY GENERAL AND 3 OTHERS [2013] eKLR** and **DIAMOND HASHAM LALJI & ANOTHER v ATTORNEY GENERAL & 4 OTHERS [2018] eKLR** where the court of Appeal stated as follows:-

“42. The burden of proof rests with the person alleging unconstitutional power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”

67. In the case of **BITANGE NDEMO v DPP & 4 OTHERS [2016] eKLR** the court has this to say: -

“97. It is now established law that a court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecutions in the exercise of the discretion conferred upon that office. And the mere fact that the ongoing criminal prosecution is bound to collapse is no ground for halting those proceedings by way of Judicial Review proceedings, since Judicial Review proceedings are not concerned with determination of the merits but with the decision making process.

98. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt the criminal process being undertaken bona fides since that defence is open to the applicant in those proceedings.

99. However, if the applicant demonstrates that the criminal proceedings that the Director of Public Prosecutions or the police have commenced or intend to commence against him constitute an abuse of the legal process, the court will not hesitate to put a halt to such proceeding(s) or declare the proceedings as being in breach of the law.”

68. From the material presented to the court by the petitioners and the respondents, it is clear that the prosecution of the petitioners has arose out of an investigation carried by the 1st Respondent in respect of allegations of irregularity in procurement of tender for the Nairobi City County in breach of the provisions of the Public Procurement and Disposal of Assets Act. The petitioners have been charged with several offences arising out of the said procurement which prosecution is ongoing. The petitioner's case as stated herein is that the said contract was valid which I take will form their defence at the said trial. I am therefore unable to find that the said prosecution is an abuse of the court process.

69. All the issues raised by the petitioner, I take the view can only properly be the subject of the domain of the trial court, where the Respondents will be allowed to present the evidence they have against the petitioners and the petitioners will be allowed in exercise of the rights under Article 50 of the Constitution to challenge the said evidence and like a jig saw puzzle, all the issues will fall in place and if the petitioners were not constitutionally treated, they shall be entitled to appropriate remedies thereafter. It is therefore unnecessary at this place to make any determination on the defence of the petitioners which has been placed before the court by way of this petition.

70. The petitioners can still challenge the action of the Respondent at the Criminal trial if there is evidence that the evidence relied upon was obtained in violation of the bill of rights and the matters raised in the petition herein will form the petitioners' defence where the validity or otherwise of the contract entered into between the 1st petitioner and the Nairobi City County Government will be in issue with the starting point being that if the petitioners succeed in putting up the said defence, then the prosecution shall fail.

71. The evidential burden of proof of breach of constitutional right as alleged was upon the petitioner and from the material placed before me, they have failed to explain how their investigations and prosecution on alleged breach and violation of the provision of the procurement procedures and statute, constituted a breach of their fundamental rights, as an allegation of corruption as stated by the Respondent, is in itself also a breach of fundamental human right of citizens who are entitled to legitimate expectation of prosecution.

72. There was further no evidence tendered by the petitioners in support of the allegations that their rights to equality and freedom from discrimination under Article 27(1) – (5) and Human dignity under Article 28 of the Constitution were breach in the manner in which they were investigated and subsequently charged. It is not enough for the petitioner to make allegations of breach. The same is further under obligation to prove to court how the action of the Respondents have resulted to the said breach when the court is exercising its constitutional mandate to enforce and protect the Fundamental Rights and Freedoms under Article 23(1) and 165 of the Constitution.

73. In conclusion I must state that the issue of whether the subject contract herein was properly tendered for and awarded is the subject matter of the petitioners' prosecution in Nairobi ACC No. 32 of 2019 and the alleged breaches of the petitioners' constitutional right pleaded herein forms part of their defence to the said prosecution and should they be presented in contravention of their constitutional rights, the doors of this court are wide open to step in and offer the necessary constitutional protection in an objective fair and impartial manner as is expected of the court.

74. I take the view and hold that the petition herein differ from one where the case law allows the court to intervene where the constitutional

rights of the petitioners or contractual obligations are being frustrated by way of investigations prosecution by the Respondents based on the nature of the charges they are facing before the trial court.

75. It therefore follows that the petition herein lacks merit and I hereby dismiss the same in its entirety.

76. On the issue of cost, since the petitioners approached this court to enforce allegations of breach of constitutional rights, I take the view that having approached the court in an honest but mistaken belief of the said breach, each party shall bear its own cost as to order the petitioners to pay cost may have a negative effect on future litigation to enforce rights.

77. And it is hereby ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MAY, 2021

.....

J. WAKIAGA

JUDGE

IN THE PRESENCE OF:

Mr. Makokha for the Petitioner

Mrs. Litoro for Mr. Mbiti for 1st Respondent

Ms Nyamache for 2nd Respondent

Potishoi - court assistant