



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. 21 OF 2019

IN THE MATTER OF ARTICLE 2, 3, 10, 19, 20, 21,

22, 23, 2, 27, 28, 29, 7, 48, 50, 165, 258 AND 259 OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION

OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER

ARTICLES 27, 47, 48 & 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTION

OF KENYA (PROTECTION OF RIGHTS AND

FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

JAMES KARIUKI GITHINJI.....PETITIONER

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. By a petition dated 11th December 2019 and supported by an affidavit sworn by the petitioner, the court is asked to grant to the petitioner orders of permanent injunction restraining the respondents from investigating, arresting, charging/prosecuting the petitioner based on the contract entered into between the petitioner and the Board of Management of St. Mary's Girls High School Igoji for construction of a dormitory together with a declaration that the intended or ongoing investigations being undertaken by the 1st respondent against the petitioner are an abuse of the due process of the law and an infringement of the petitioner's rights and fundamental freedoms. The costs of the petition are also asked for.

The Petitioners' Case

2. The petition avers that on or about 16/12/2014, the petitioner was awarded a tender for construction of a dormitory by the board of management, St. Mary's Girls High School Igoji, a written contract in the sum of Kshs. 43,727,740, was executed for phase 1 and another in the sum Kshs. 16,727,740, was executed for phase 2. For phase 1, the board paid him Kshs. 27,000,000 while for face 2 he was only paid Kshs 3,000,000 leaving a balance of Kshs 13,727,740. The petitioner asserts having completed the work, handed over the said dormitory, and was issued with a certificate of practical completion by the Sub-County Works Officer Imenti South but the Board has to date refused to pay

him the balance of the contract sum. With the refusal to pay, the petitioner filed Meru Civil Suit No. 6 of 2018 against the board, seeking the recovery of the balance, which suit is said to have been procrastinated by the 2nd respondent and its client the board by foot dragging and failure to comply with procedural requirements to have the matter set down for hearing.

3. It is added that while the respondents continued seeking adjournments, way after the petitioner had closed his case on 16/9/2019, when the court made an order that the defence case be heard, the petitioner was shocked to have received a call from the 1st respondent informing him that they were investigating the tendering process, pursuant to a complaint made by the board of management. To the petitioner, it became clear that, the 2nd respondent had been procrastinating the hearing of the said suit, and was using the 1st respondent to aid in further procrastination or to just stall the entire suit. He takes the view that the investigations had been initiated in extreme bad faith after a long and inordinate delay hence a violation of his right to fair administrative action for which reasons he deserves the sought declaration and an injunction as prayed.

4. After being served with a replying Affidavit, and with the leave of the court, the petitioner filed a supplementary affidavit sworn by him on 8/3/2020 and denied all allegations in the said Replying Affidavit and contended that the investigations were selective and skewed towards him only. He stated that the investigation started when he instituted the suit, and after the 2nd respondent on numerous occasions deliberately failed to comply with court directions, with the ulterior motive to defeat his claim.

Respondent's Case

5. The respondents filed a Joint Replying affidavit sworn on 17/1/2020 by Nicholas Willy Mutuku, a forensic investigator with the 1st respondent. The gist of that affidavit is to the effect that the 1st respondent is constitutionally mandated to ensure compliance and enforcement of the principles on leadership and integrity, and to investigate the conduct of any person that in its opinion have acted in a manner that constitutes corruption or economic crime. Pursuant to such mandate, the 1st respondent received a complaint regarding an allegation of irregularities in procurement of tender for construction of a school dormitory on title No. Igoji/Gijua/2653 at St, Mary's Girls High School to the effect that the school did not follow procedure in securing a loan for funding the project from Kenya Commercial Bank, the contractor was singly sourced by the school principal and the costs were highly inflated.

6. The investigation which ensued faulted the petitioner for being privy to the process that awarded the tender in a procurement procedure that was marred with fraudulent irregularities. He termed the payments made to the petitioner as being illegal, as they were made through a fraudulent scheme meant to defraud the public of Kshs. 76,051,47. He urged the court to disallow the petition with costs.

Submissions

7. By the consent of the parties, the petition was directed to be canvassed by way of written submissions which were then filed by the petitioner in his submissions filed on 9/03/2020 and supplementary submissions on the 25/3/2021 and by the respondent on the 12.03.2021.

8. In the submissions the petitioner contends that the investigations are selectively directed at him and not the against the school as the procuring entity and the entity to answer if there had been fraud in the contract between him and the school. Failure to pursue the school was to the petitioner a proof that the impugned investigations were bad in faith, unlawful, discriminatory and only meant to achieve an ulterior purpose other than administration of justice. He submitted that although the 1st respondent has the mandate to investigate all complaints concerning corruption, they ought to be guided by the provisions of the constitution. He questioned why the investigations were being done 4 years after the completion of the construction, and after the said board had already paid a substantial amount of the contract sum. He contended that his right to a fair administrative action under Article 47 of the Constitution had been violated and he urged the court to find so. He cited to court the decisions in **Thuita Mwangi & 2 others v Ethics & Anti-corruption Commission & 3 others [2013] eKLR**, in support of the position that the powers of the Director of Public Prosecution is never a blank check but must be exercised in a way that serves the case for justice, protect public interests and sovereignty of the people and to promote democratic values and constitutionalism. The decision in **Investments & Mortgages Bank Limited (I&M) v Commissioner of the Police and the Director of Criminal Investigations Department & DPP & 2 Others [2013] eKLR** was cited for the proposition that the mandate of the office of the Director of public prosecutions must be carried out in consonance with and within the constitutional dictates

9. The respondents in their submissions faulted the petitioner for his failure to demonstrate any infringement of any of the rights under the bill of rights or fundamental freedoms or any real prejudice he is likely to suffer as a result of the investigations. It is further submitted that the petitioner failed to demonstrate to that the respondents acted out of malice, abused of office and power or that they exercised their powers in a manner contrary to the law. In their view, the prejudice suffered by the petitioner if any, does not outweigh the public interest in having the ongoing investigations concluded. They called upon the court to protect public interest by dismissing the petition. Reliance was placed on the provisions of article 252 of the Constitution and sections 11 and 22 of the Ethics and Anticorruption Act, which give the mandate to the 1st Respondent to receive complaints, investigate same and recommend prosecution to the Director of Public Prosecutions. Also cited to the court were the decisions in **Paul Nganga Nyaga & 2 others v AG & 3 others [2013]eKLR**, **Joash Oindo & Another v EACC & Another: NLC & Another(interested parties)[2020]eKLR**, **Paul Nganga Nyaga v DPP & Another[2012]eKLR and Daniel Munyambu v DPP & others[2014]eKLR** in support of their submissions that the court will be slow to intervene in the execution of duties by other constitutional bodies, will only do so upon demonstration that the same have acted in contravention of the constitution; the court must give other organs the space to execute mandate and the onus remain upon a petitioner to particularise the rights violated and how violated and that it is never enough to claim that an act violates his rights.

Analysis and Determination

10. Upon consideration of the petition and the supplementary Affidavit, the respondents' replying affidavit, the parties' rival submissions and authorities relied upon as well as provisions of law cited. Being a constitutional petition, I take the view that the only issue for consideration to be whether, in investigating a complaint against the Petitioner, the 1st respondent has violated the petitioner's rights.

11. Like all organs created under the constitution and others under various statutes, the 1st respondent, in carrying out its constitutional mandate, is expected and bound, because the constitution dictates so, to have due regard to public interest, apply national values and principles of good governance, promote the rule of law, work diligently without any discrimination, abuse of power or office and free from any direction, control or influence from any quarters. Those are the safeguards the Kenyan people through their draftsmen found necessary to impose on that constitutional organ of the state. Otherwise over and above the safeguards, the office must be left to execute its mandate free from all and every interference by all including the court.

12. A reading of the petition discloses the complaint to be that there is a contractual dispute between the petitioner and the Board of Management, St. Mary's Girls' High School- Igoji, being litigated as Meru High Court Civil Suit No 6 of 2018 and seeking the recovery of the sum of Kshs 13,727,740 which is alleged to have been stalled by tactics of the second Respondent and its client, the school. The dispute whether the sum claimed is due for payment must be left to the civil court just like whether or not a crime was committed in the tendering process and its execution must remain for determination by the criminal case if and when the ODPP decides to prefer criminal prosecution. This court cannot, at this stage and on the material availed, say with conviction that there is no genuine and proper basis to carry out the investigations pursuant to the mandate of the 1st respondent. As observed by **Achode j**, in **Paul Nganga Nyaga's case** (supra) the court cannot properly restrain a state investigation agency like the 1st respondent from carrying out its legal and constitutional mandate to cushion the subject of investigation from embarrassment or inconvenience. When such happens, especially in a case without much but paucity of evidence and particulars, the court cannot escape the accusation of overreaching and usurping the mandate of other agencies.

13. I find that it is within the 1st respondent's mandate to receive complaints on the breach of the law, investigate and recommend to the Director of Public Prosecutions, the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution. The court cannot, without a prima facie proof of malice, bad faith, impropriety, irrationality or outright abuse of office and violation of the constitution and the law, bar the 1st respondent from carrying out its mandate.

14. I make the conclusion that the petition lacks merit having not been grounded on any substantive material to demonstrate the allegations. Let the investigations proceed, if and should it result in prosecution, let the petitioner have his day in court to show that there is no evidence of wrongdoing and the criminal court will at that juncture make an informed decision based on evidence on the matter.

15. There being no basis to grant the declaration sought, it follows that the entire petition fails and the same is therefore dismissed with no orders as to costs

DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON 4TH DAY OF OCTOBER, 2021

Patrick J.O Otieno

Judge

In presence of

Miss Kilimo for 1st respondent and hold brief for Kungu for 2nd respondent

Miss Nyaga for the petitioner.

Patrick J.O Otieno

Judge