



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO E311 OF 2020

IN THE MATTER OF ENFORCEMENT OF ARTICLES 2,

3, 10, 19, 20, 21, 22, 23, 165(3), 258(1) & 259(1) OF THE

CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND

INFRINGEMENT OF THE RIGHTS AND

FREEDOMS IN ARTICLES 25, 27, 28, 31, 40, 47,

48, 50 AND 159 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND

ABUSE OF ARTICLE 157 AND CHAPTER

FOURTEEN, PART 4 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED VIOLATION

AND INFRINGEMENT OF THE SPORTS ACT

AND

IN THE MATTER OF ALLEGED VIOLATION AND

INFRINGEMENT OF THE FKE CONSTITUTION

AND

IN THE MATTER OF ALLEGED VIOLATION AND

INFRINGEMENT OF THE FIFA STATUTES

BETWEEN

FOOTBALL KENYA FEDERATION.....1ST PETITIONER/APPLICANT

NICHOLAS MWENDWA KITHUKU.....2ND PETITIONER/ APPLICANT

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PERSECUTIONS.....2ND RESPONDENT

MILTON NYAKUNDI ORIKU.....3RD RESPONDENT

AND

KENYA COMMERCIAL BANK LIMITED.....INTERESTED PARTY

JUDGMENT

1. The Petitioners through the Petition dated 1st October 2020 seek the following orders:

i. A Declaration that the 1st to 3rd Respondents have violated the Petitioners' fundamental rights and freedoms as protected under Article 29, 47, 48 & 50 of the Constitution;

ii. A Declaration that the Petitioners be compensated the amount of money that the court deems sufficient and/or appropriate by the Respondents for the violation of the Petitioners' rights and fundamental freedoms under Articles 29, 47, 48 & 50 of the Constitution;

iii. This Honourable Court be pleased and do hereby grant an order of Permanent Injunction prohibiting and/or restraining the Respondents, their officials, employees, servants and/or agents or anybody working under or for them from summoning, investigating and/or further investigating, charging and/or prosecuting the Petitioners with respect to financial management of the 1st Petitioner;

iv. Any other or further relief that this Honourable Court may deem fit to grant;

v. The costs of this Application be provided for.

PETITIONERS' CASE

2. The Petitioners through their Petitioner and the Supporting Affidavit of Nicholas Mwendwa Kithuku, complain that the 3rd Respondent has been involved in filing several frivolous Petitions in the Sports Disputes Tribunal which the Petitioners claim is an attempt to delay the election of officials of the 1st Petitioner. It is further alleged that the 1st Respondent obtained orders to search the KCB accounts of the 1st Petitioner and summons against the 2nd Petitioner to appear before it.

3. The Petitioners opine that the orders and summons are malicious, unconstitutional, illegal, null and void since the 3rd Respondent lacks an identifiable stake in the affairs and running of the 1st Petitioner and hence actuated by malice. They assert that **Article 47** has been violated as the 1st Respondent obtained orders that affect the Petitioners ex parte. Moreover, the election funds are financed by FIFA which has already audited and approved the expenditure by the 1st Petitioner.

4. The Petitioners further claim that their right to a fair hearing under **Articles 25 and 50 (2) (a) of the Constitution** as the multiple processes instituted by the 3rd Respondent and his surrogates and aided by the 2nd and 3rd Respondents constitute inhuman and cruel treatment of the Petitioners. The Petitioners aver that the use of the criminal process to intimidate them violated their right to a fair hearing.

5. It is further claimed that the Petitioners' right to freedom and security of the person under **Article 29 of the Constitution** was violated as the 1st and 3rd Respondents illegal criminal process threatened to maim the 2nd Petitioner. Moreover, the alleged threat to injure and/ or kill the Petitioners violates their right to security of persons as guaranteed under **Article 29 of the Constitution**.

6. Finally, the Petitioners allege that the 1st to 3rd Respondents have violated their right to access to justice under **Article 48 of the Constitution**.

1ST AND 2ND RESPONDENT'S RESPONSE

7. The 1st and 2nd Respondents filed a Replying Affidavit sworn by Service No. 84000 Detective Sergeant Erick Otieno dated 29th October

2020 in response to the Petitioners' Petition. The Respondents assert that the 3rd Respondent lodged a complaint with the Banking Fraud Investigation Department through a letter dated 20th July 2020 which prompted the investigations in question. The Respondents assert that the investigations are in the initial stages and are yet to be concluded and forwarded to the 2nd Respondent. Therefore, the assertion that the investigations are malicious, unconstitutional and an illegal use of the criminal process to harass and intimidate the 2nd Petitioner is baseless and does not amount to a violation of constitutional rights.

8. Furthermore, it is averred that the 1st Respondent has a duty to investigate any complaint once a complaint is made. Therefore the investigations against the 2nd Petitioner have neither been commenced maliciously nor are they meant to harass or intimidate him. Moreover, it is argued that the accuracy and correctness of evidence or facts gathered in an investigation can only be assessed and tested by the trial court, which is best equipped to deal with the quality and sufficiency of the evidence adduced.

PETITIONERS' SUBMISSIONS

9. The Petitioners filed submissions dated 3rd December 2020 asserting that this Court is empowered under **Articles 23 (3) and 259 (1) of the Constitution** to hear and determine this matter. Moreover, the Petitioners claim that they have succinctly set out in their Petition the particulars and incidences of various constitutional fundamental human rights violations which have not been denied, explained or convincingly justified by the Respondents. Reliance is placed on the decisions in **Ndyanabo v Attorney General [2001] 2 E.A. 485 at 493; and Joseph Mbalu Mutava v Attorney General & another [2014] eKLR.**

10. The Petitioners further submit that in reliance on the holdings in **Otieno Mak'onyango v Attorney General & another [2012] eKLR; and Robert K. Ayisi v Kenya Revenue Authority & another [2018] eKLR**, the courts tend to award between Kshs 1.5 million and Kshs 2.5 million for every violation of a fundamental human right and freedom. The Petitioners pray that this Court fairly compensates them for every violation.

11. It is further submitted that the orders and summons obtained by the 1st Respondent are malicious, unconstitutional, illegal, null and void since the said impugned ex parte order is in violation of **Article 47 of the Constitution** and **Section 4 and Section 5 of the Fair Administrative Actions Act**. The Petitioners assert that the decision to obtain the orders without the Petitioners prior notice fell short of the constitutional test and was hence illegal. The subsequent actions are further faulted and therefore nullified by the apparent illegality. The Petitioners cite several decisions including **Republic v Director of Public Prosecutions & 3 others Ex parte Bedan Mwangi & another [2015] eKLR; Joram Mwenda Guantai v The Chief Magistrate Nairobi Civil Appeal No. 228 of 2003 [2007] 2EA 170; Kuria & 3 others v Attorney General [2002] 2 KLR 69** on the Court's power to prohibit the continuation of the criminal prosecution where there is an abuse of process.

1ST AND 2ND RESPONDENTS SUBMISSIONS

12. The 1st and 2nd Respondents filed Submissions dated 21st January 2021 and identified the issues for determination as:-

a. Whether the Petitioners' rights have been violated.

b. Whether the summoning, investigation and/or further investigation and subsequent intended prosecution of the 2nd Petitioner was illegal and oppressive.

c. Whether the Petitioners are entitled to the reliefs sought.

13. On the first issue the Respondents submit by dint of Article 157 (1) of the Constitution, the 2nd Respondent shall not require the consent of any person or authority for commencement of criminal proceedings in the exercise of his powers or functions. This is buttressed by the decision in **Hon. James Ondicho Gesami v The Attorney General & others, Petition No. 376 of 2011**. Moreover, the Respondents argue that the courts ought not to usurp the constitutional mandate of the Respondents to investigate crimes and initiate criminal proceedings. This is supported by the cases of **Michael Monari & another v Commissioner of Police & 3 others, Misc. Application No. 68 of 2011; and Paul Ng'ang'a Nyaga v Attorney General & 3 others [2013] eKLR.**

14. The Respondents further argue that the Petitioners have failed to prove that a decision by the 2nd Respondent to institute criminal charges and to prosecute them would be unconstitutional. Thirdly the prayer for an order declaring that the 1st and 2nd Respondents have violated the Petitioners' fundamental rights and freedoms is not well founded and should not be granted. Reliance is placed on the decision in **Diamond Hasham Lalji & another v Attorney General and 4 others [2018] eKLR.**

15. On the second issue, the Respondents submit that the Petitioners have not demonstrated that the investigations carried out so far by the 1st Respondent is in excess of their mandate or that the same is illegal and oppressive. It is further asserted that the Petition is premature and purely speculative as the investigations are ongoing and no decision has been made as to whether or not to charge the Petitioners with any criminal offence.

16. On the final issue, it is submitted that the Petitioners have failed to demonstrate particulars of any violation of their constitutional rights and that the Respondents have acted outside their respective mandates. The Respondents contend that the Petition is an abuse of the Court process and should be dismissed in its entirety with costs.

3RD RESPONDENT'S SUBMISSIONS

17. The 3rd Respondent filed submissions dated 8th February 2021 and in which he identifies the issues for determination as:-

- a. *Whether the 3rd Respondent has locus standi in regard to lodging a complaint against the Petitioners.*
- b. *Whether the DCI and the DPP were acting within their legal mandate in conducting investigations and making recommendations in their inquiry.*
- c. *Whether the Petitioners have satisfied this Honourable Court that the investigations ought to be halted.*
- d. *Whether the summoning, investigation and the further investigation and subsequent intended prosecution for 2nd Petitioner was illegal and apprehensive.*

18. On the first issue, the 3rd Respondent submits that in accordance with **Articles 35 and 36 of the Constitution**, he has every right as a member of the public to seek information and have access to such information. He relies on the case of **John Wekesa Khaoya v Attorney General, High Ct. Pet. No. 60 of 2012** on the filing of public interest cases.

19. On the second issue, the Respondent asserts that the 2nd Petitioner is seeking to stop a legal process with the intention of denying the public the right to scrutinize their financial activities. Additionally, the impugned financial audit systems of the 1st Petitioner do not oust the obligation of the Petitioners to subject themselves to other legal financial audit instruments as provided for by the Constitution and other legislation.

20. On the final issue, the Respondent submits that the Petitioners have not demonstrated that due process was not followed or that they were harassed or unfairly treated during the said investigations occasioning a violation of their constitutional rights and freedoms to warrant protection by this Honourable Court. It is further asserted that the Petition is premature and amounts to an abuse of the Court process with the view of obstructing the course of justice and therefore does not warrant the grant of the orders as sought.

ANALYSIS AND DETERMINATION

21. Upon consideration of the Petition, the responses and rival submissions and authorities relied upon, the following issues arise for consideration:-

- a) *Whether the Court has jurisdiction to halt the investigations of the 2nd Respondent.*
- b) *Whether the 3rd Respondent has locus standi in regard to lodging a complaint against the Petitioners.*
- c) *Whether the Petitioner rights and fundamental freedoms have been infringed.*
- d) *Whether the summoning, investigation and/or the further investigation and subsequent intended prosecution of 2nd Petitioner was illegal and oppressive.*

A. WHETHER THE COURT HAS JURISDICTION TO HALT THE INVESTIGATIONS OF THE 2ND RESPONDENT.

22. Under **Article 23(3) of the Constitution**, the Constitution empowers a Court to grant appropriate relief in any proceedings brought under **Article 22 of the Constitution**, where there has been violation of or threat of a violation of a fundamental right or freedom.

23. **Article 259(1) of the Constitution** clearly sets out the principles that should guide how the constitution is construed. The Article provides as follows:-

“259. (1) This Constitution shall be interpreted in a manner that—

- (a) promotes its purposes, values and principles;**
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
- (c) permits the development of the law; and**
- (d) contributes to good governance.”**

24. **Article 165(6) of the Constitution** provides that:-

“ 165. (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a Superior Court.”

25. **Article 157 (4) of the Constitution** deals with the power of the Director of Public Prosecution to direct the Inspector General of the

National Police Service to investigate any information or allegation of criminal conduct as directed by the Director of Public Prosecutions. Further under **Article 157 (10)** “ **The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.**”

26. In dealing with Director of Public Prosecution powers, the Court in **Commissioner Of Police & The Director Of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR** stated thus:-

“By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.”

27. Similarly in **Paul Ng'ang'a Nyaga & 2 others v Attorney General & 3 others [2013] eKLR** it was held that:-

“35. Having said so, I maintain therefore that this Court can only interfere with and interrogate the acts of other Constitutional bodies if there is sufficient evidence that they have acted in contravention of the Constitution, inter-alia and one of the complaints made herein is that the Petitioners were unlawfully arrested. Arrest is a form of state constraint applied to a person, during which the person is placed under detention, is imprisoned and is deprived of his right to move freely. Paragraph 3 of Article 5 of the European Convention of Human Rights and Fundamental Freedoms (the Convention) of the Council of Europe stipulates the following criteria for arrest and detention;

a. A reasonable doubt that an offence has been committed by the person

b. There are grounds to presume that it is necessary to hamper a crime to be committed by him and prevent his escape after the crime has been committed.”

28. The Petitioner in support of the contention that this Court has jurisdiction to halt the investigation against the 2nd Respondent sought reliance in the case of **Republic vs. Director of Public Prosecution & 3 others Ex-parte Bedan Mwangi Nduati & Another (2015) eKLR**, where the Courts authority to halt the Criminal proceedings against Petitioner can be invoked where there is an abuse of the Court process.

29. In the instant Petition, there is no dispute that the investigation is yet to be completed. The 2nd Respondent is yet to record statement; criminal proceedings are yet to be commenced against the 2nd Petitioner and further 2nd Respondent is yet to exercise its own mandate to charge the 2nd Petitioner. Further a decision to charge or not to charge is yet to be made. The law is clear that the Director of Public Prosecution in discharge of his mandate do not require Court authority for commencement of criminal proceedings and in exercise of his powers or function. However the Court can only halt the investigation in cases of clear and serious abuse of power or where there is demonstration of an oppressive and vexatious investigation contrary to public policy; or where it is demonstrated that police in conducting criminal investigation are in violation of the law and are acting in bad faith or intended to achieve ulterior motive or used as a tool for personal score-settling on vilification. In such situations there is no doubt the Court has inherent powers to interfere or proceed to halt interfere or proceed to halt such investigation or prosecution.

30. It is further provided under **Article 165(6) of the Constitution** that the Court has supervisory jurisdiction over constitutional bodies. However it is important, that the Courts do not interfere unless there has been a clear infringement of the process through excesses in execution of the mandatory mandate as well as violation of the Constitution.

31. I have considered the Petitioners submission and the pleadings and it is my view, I find that it has not been demonstrated how the 1st and 2nd Respondents have acted ultra vires or against the law in investigating a complaint by a member of public. In view whereby I find no basis or justification labelled against the 1st and 2nd Respondents to justify halting any investigations against the 2nd Petitioner.

B. WHETHER THE 3RD RESPONDENT HAS LOCUS STANDI IN REGARD TO LODGING A COMPLAINT AGAINST THE PETITIONERS.

32. The Petitioners contend that the 3rd Respondent lacks any identifiable stake in the offices of the 1st Petitioner and that his complaints are actuated by malice. It is suggested by the Petitioners that the 3rd Respondent's complaint which led to investigation is driven by selfish personal political agenda against the 2nd Respondent, in his quest to be re-elected as the President of the 1st Respondent.

33. In considering this issue guidance has to be sought from the Constitution which is noted to have enlarged the scope of locus standi. **Articles 22 and 23 of the Constitution** have empowered every person to move the Courts and or constitutional bodies to enable them access information and on that basis, it would be improper for the 1st and 2nd Respondents to be refrained from investigating or considering/determining a matter or complaint of great public importance such as running the affairs of the 1st Petitioner.

34. Locus standi on the other end is defined in **Black's Law Dictionary, 9th Edition (page 1026)** as **“the right to bring an action or to be heard in a given forum.”**

35. The 1st Petitioner is registered in accordance with **Section 46 of the Sports Act 2013 (amended 2018)** which at **sub-section 6** provides that:-

“All national sports organizations registered under this Act shall be open to the public in their leadership, activities and membership”.

36. The **Black’s Law Dictionary** defines **“public”** to mean:-

“Pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; open to common use.”

37. Upon consideration of the interpretation of **Section 46 (6) of the Sport Act 2013 (Amended 2018)** as regard the 1st Petitioner being open to the Public in running of its affairs, this I find does not restrict a citizen of the Republic of Kenya in any form or way whatsoever as posited in the Petitioners’ submissions, that 3rd Respondent lacks any stake in the 1st Respondent’s affairs. I find the effect of **Section 46(6) of the Sports Act** is clear that any member of the public has the right to invoke Constitutional provisions to appraise themselves with whatever they feel they deserve to have or know about the affairs of the 1st Petitioner.

38. In regard of this issue, I find that **Article 2, 3 & 10 of the Constitution** relevant. **Article 3(1) of the Constitution** provides :-

“3. (1) Every person has an obligation to respect, uphold and defend this Constitution.”

39. **Article 10(2) of the Constitution** provides:-

“10. (2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.”

40. In view of the aforesaid, I find that the 3rd Respondent has every right as a member of the public to seek information and have access to such information as clearly provided by the Constitution.

41. The 3rd Respondent sought reliance in case of **John Wekasa Khaoya vs. Attorney-General, High Ct. Pet. No. 60 of 2012**, where the Court set out factors to guide the filing of causes in the public interest. These include **(1) the intended suit must be brought in good faith, and must be in the public interest; and (ii) the suit should not be aimed at giving any personal gain to the applicant.**

42. In view of the aforesaid I find that the Petitioners herein must demonstrate how the 3rd Respondent can be urged lacks locus standi to lodge a complaint with Director of Public Prosecutions against the Petitioners, which Petitioners have failed to demonstrate. I therefore find no basis in their contention that the 3rd Respondent lacks locus standi to lodge complaint with the Director of Public Prosecution.

C. WHETHER THE PETITIONER RIGHTS AND FUNDAMENTAL FREEDOMS HAVE BEEN INFRINGED.

43. The Petitioners submit that they have clearly and succinctly set out in paragraphs 29 to 32 of the Petition, the particulars and incidences of various constitutional fundamental human rights violations, which violations have not been denied, explained or convincingly justified by the Respondents, and urges this Court to give a wholistic and purposive approach to interpretation and find that there was violation of the Petitioners’ fundamental human rights and freedoms as pleaded.

44. It is trite and established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been or will be infringed in respect to him.

45. In support of the aforesaid established principle reliance was placed in the case of **Anarita Karimi Njeru vs. the Republic [1976 – 1980] KLR 1272** where it was stated thus:-

“Constitutional violations must be pleaded with a reasonable degree of precision.

The Articles of the constitution which entitles rights to the Petitioner must be precisely enumerated and how one is entitled to the same.”

46. In the said case it was held as follows:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

47. Similarly in *Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 others [2018] eKLR* the Court stated thus:-

“20. Where a Petitioner approaches the Court through a constitutional Petition pleading that his constitutional rights and fundamental freedoms have been violated or denied, pleading with precision and clarity, pointing out with particularity the Articles of the Constitution concerned, enables the Court understand the issues it is called upon to resolve. This is because a claim of violation of constitutional rights and fundamental freedoms call on the court to interpret the constitution and its provisions as they relate to the rights and fundamental freedoms said to have been infringed, thus determine whether the petitioner’s claim of infringement of rights has any basis. That is however, not what I find in this petition. There are neither facts, particulars of violation of rights or Constitutional provisions breached. The Court is left to search for the nature and extent of violation the Petitioner complains of without any particularity and to what extent they have been violated or infringed. To that extent, this is not a proper Constitutional Petition.

21. I must also point out that it is not every disapproval of actions or decisions of public bodies that should lead to filing constitutional petitions alleging violation of fundamental rights and freedoms. There must be a real infringement, denial of rights or threat to violation that calls for interpretation of the constitution vis vis the rights infringed or threatened. It is not every disagreement that must find its way to the constitutional court.”

48. Looking at the Petitioners Petition it is clear that the Petitioners claim that their rights under **Article 25, 50, (2)(a), 29 and 48** have been infringed by the Respondents. However I am not convinced that the Respondents have concisely demonstrated herein that their rights have been infringed. The Petitioners herein have failed to set out the details of the actions which the Respondents undertook and how these actions have caused the Petitioners rights to be violated.

49. As regards the right to fair administrative action under **Article 47 of the Constitution**, the Petitioners claim that the 1st Petitioner’s Constitution and the FIFA statute provides for a comprehensive mechanism of financial audit of all monies received by the 1st Petitioner. However, I am not convinced that the existence of an audit mechanism negates the investigative jurisdiction of the 1st and 2nd Respondents, and more specifically where a complaint of a financial crime has been made. The Respondents are under a legal duty to investigate all complaints in a proper legal manner. I am unconvinced that the Respondents have acted outside of their mandate, and in particular, it is my view that the case against the 2nd Respondent is premature as investigations are yet to be concluded by the 1st Respondent. Further there is no evidence that the Petitioners rights will be infringed by the 1st and 2nd Respondents carrying out their mandate.

D. WHETHER THE SUMMONING, INVESTIGATION AND/OR THE FURTHER INVESTIGATION AND SUBSEQUENT INTENDED PROSECUTION OF 2ND PETITIONER WAS ILLEGAL AND OPPRESSIVE.

50. Under **Article 245(4)(a) (c) of the Constitution of Kenya** it is clearly provided that:-

“245. (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

(a) the investigation of any particular offence or offences;

(b)

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.”

This is clear that no person may give a direction to the Inspector-General of Police and by extension the 1st Respondent, with respect to the investigation of any particular offence or offences and the enforcement of law against any particular person or persons, including even effecting of arrest.

51. The functions of the Director of Criminal Investigations, established under **Section 28 of the National Public Service Act, No.11 of 2011**, stipulates under **Section 35 of the National Police Service Act** inter-alia to undertake investigations on money laundering and economic crimes including but not limited to perform any other function conferred on it by any other written law. Further it is clearly provided under **Section 52 of the National Police Service Act** that the 1st Respondent may compel attendance of witnesses or suspects at police station.

52. The 2nd Respondent in objecting to being summoned, investigated and subsequently prosecuted has not provided sufficient evidence demonstrating that 1st Respondent acted in excess of his jurisdiction or has breached the principles of natural justice when he was summoned to record his statement. I wish by virtue of provisions of **Section 35 of the National Police Service Act** and **Article 254(4) of the Constitution** the 1st Respondent acted within his jurisdiction and did breach the principles of the natural justice nor as he acted illegally or in an oppressive manner but within the law.

53. The Respondent in support of their contention that they acted within the law, placed reliance in the case of **Michael Monari & another**

vs. *Commissioner of Police & 3 others, Misc. Application No. 68 of 2011*, where it was held that:-

“The police have a duty to investigate any complaint once a complaint is made. The police only need to establish reasonable suspicion before preferring charges. The rest is for the trial Court. ...As long as the prosecution and those charged with the responsibility of making decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

54. I find as clearly provided in **Article 157(11) of the Constitution** the Director of Public Prosecutions should have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. In view whereof I find that it is in the public interest that all complaints made to the 1st Respondent are investigated. In this matter, a complaint was made to the 1st Respondent, and in line with the constitutional and statutory mandate, the Respondents commenced investigations into the alleged incident. This action was in accordance with the law. I find no demonstration of any exceeding of their jurisdiction nor malice or breach of the principles of natural justice in the Respondents taking steps in summoning the 2nd Petitioner or in investigating the complaint, as that is what the constitution demands and mandates of them.

55. Considering the provision of **Article 157 (6)(a) of the Constitution** it is clear that the 2nd Respondent is mandated to investigate and undertake criminal prosecution against any person before any Court (other than a Court Martial) in respect of any offence alleged to have been committed. I find that the 1st and 2nd Respondents in summoning, and investigating the Petitioners and if they find that there is sufficient evidence to charge and prosecute the Petitioner they would not be acting in excess of their mandate nor would they be in breach of the Petitioners Constitutional rights nor would their action be illegal. The Petitioners herein have not, in my view, demonstrated that the investigations carried out so far by the 1st Respondent is in excess of its mandate or that the same is illegal and oppressive.

56. Further to the above, it has not been shown by the Petitioner that the intended prosecution by the 2nd Respondent is not in accordance with the provisions of the law or is actuated by malice. I therefore find the Petitioners prayer for an order of permanent injunction prohibiting and/or restraining the 1st and 2nd Respondents from summoning, investigating and/or further investigating, charging and/or prosecuting the Petitioner with respect to financial management of the 1st Petitioner is not justified in the circumstances of this case. The instant Petition is premature and purely speculative as the investigation are ongoing and no decision has been made as to whether or not to charge the Petitioners with any criminal offence. I therefore find that the Court ought not to usurp the constitutional and legal mandate of the 1st and 2nd Respondents to investigate any matter that, in the said Respondent's view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the Respondents.

57. It is worthy to note that whereas the Court can interrogate the process of conducting the investigations to establish whether they were informed by any malicious or ulterior motives, it need not go to the merits of the charges and the evidence collected as that is the jurisdiction of the trial Court to evaluate whether the evidence produced is admissible.

58. As regards what investigation process may entail, reliance is placed in the case of ***Josephat Koli Nanok & Another vs. Ethics & Anti-Corruption Commission (2018) eKLR*** where the Court stated:-

“That a suspect is entitled to fair administrative action, such that before a decision is taken for the prosecution of the suspect, the investigative agency must observe that person's rights by granting him or her an opportunity to respond to the allegations. The Court cautioned that it ought not to set standards for review of complaints or of matters warranting investigation and suggested that courts should guard against interfering with the investigative mandate of agencies by prescribing investigative procedures. It stated that what courts should look out for should be condemnation of a person before he or she has had an opportunity to be heard and to respond to the charges levelled against him or her.”

59. In the instant matter, it is noted that the 1st Respondent obtained an order vide ***Milimani Law Courts Miscellaneous Criminal Application No. E1908 of 2020*** seeking inter alia; access to material that would aid in their investigations, and upon finding the Application merited the same it was allowed in its entirety. The 1st Respondent then proceeded to carry out preliminary investigations and based on the evidence gathered initially, they were satisfied that there was reasonable suspicion warranting further investigations. This was followed by issuance of summons in line with **Section 52(1) of the National Police Service Act** to the 2nd Petitioner to respond to allegations raised in the complaint and also to record a statement. This clearly show that the 2nd Petitioner was accorded an opportunity to give his side of the story. The 2nd Petitioner cannot therefore claim that his right to fair administrative action has been violated and that the investigations were marred with malicious intent or that they were illegal and oppressive.

60. In view of the aforesaid and in absence of demonstration that the 1st Respondent is conducting the investigation unlawfully and that the intended prosecution is actuated by malice, I find that the Petitioners have not demonstrated that their rights and fundamental freedoms have been infringed by the Respondents.

61. ***The upshot is that the Petitioners' Petition is without merits and is dismissed. Each party to bear its own costs.***

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF OCTOBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA