



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC JUDICIAL REVIEW MISC.APPLICTION NO 35 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF ARTICLE 23(3) (F) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT 2015**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

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

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**AND**

**MIKE MBUVI SONKO.....1<sup>ST</sup> INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> INTERESTED PARTY**

**EXPARTE.....PAUL NDONYE MUSYIMI**

**RULING**

1. The *ex parte* applicant herein Paul Ndonye Musyimi has filed a Judicial Review application dated 7<sup>th</sup> November, 2019 against the Ethics and Anticorruption Commission (herein referred to as the 1<sup>st</sup> respondent) and the Director of Criminal Investigations (herein referred to as the 2<sup>nd</sup> respondent) seeking orders as follows;

1) .....

2) That leave be granted to the *ex parte* applicant to seek by way of Judicial Review, an Order of Certiorari to remove into the honourable court and quash all and every summons, minutes, statements, documents and reports touching on the investigation of 1<sup>st</sup> Interested Party by the 1<sup>st</sup> Respondent while Abdi A. Mohamud was/is its Director of Investigations since 7<sup>th</sup> May, 2019 and, without prejudice to the generality of the foregoing summons of the 1<sup>st</sup> Respondent against the 1<sup>st</sup>

Interested Party dated 29<sup>th</sup> July, 2019, 30<sup>th</sup> July 2019, 27<sup>th</sup> August, 2019 and 28<sup>th</sup> October, 2019.

3) That leave be granted to the *ex-parte* applicant to seek by way of Judicial Review, that an order of prohibition do issue, prohibiting the respondents herein, and any person acting under their behest or direction, in purported enforcement of the 1<sup>st</sup> Respondent's decision from investigating, summoning, issued a report against and/or taking any adverse action on any and all matters touching on and related to the 1<sup>st</sup> Interested Party and, without prejudice to the generality of the foregoing, with regard to any matter or transaction that allegedly transpired while Abdi A. Mohamud was/is its Director of Investigations pending conclusion of the investigations by the 2<sup>nd</sup> Respondent on the allegations made by the 1<sup>st</sup> Interested Party against the EACC Director of Investigations Mr. Abdi A. Mohamud.

4) That leave be granted to the *ex-parte* applicant to seek by way of Judicial Review, and order of mandamus directed to the 2<sup>nd</sup> Respondent to compel them to investigate all the allegations contained in the Advertorial Statement of signed by 1<sup>st</sup> Interested Party appearing in People Daily of Monday 4<sup>th</sup> November 2019 and the 22-Page complaint letter to DCI by Interested Party dated 4<sup>th</sup> November 2019 and received on Tuesday 5<sup>th</sup> November 2019 and file a report with the 2<sup>nd</sup> Interested Party as per its mandate Section 35 of the National Police Act and to undertake any and all future criminal investigations including and not limited to corruption and ethics touching on the 1<sup>st</sup> Interested Party while the Order of Mandamus against the 1<sup>st</sup> Respondent still stands.

5) That leave be granted to the *ex-parte* applicant to seek by way of judicial Review, an order of mandamus directed to the 1<sup>st</sup> Respondent to compel them to suspend and/or send on compulsory leave its Director of Investigations Mr. Abdi Mohamud pending investigations into the grievous allegations made by the 1<sup>st</sup> Interested Party against them in the best interest of the credibility and reputation of EACC as the Constitutional Commission vested with enforcing Chapter Six of the Constitution on Leadership and Integrity.

6) That pending he filing and the final determination of the Substantive Judicial Review of Motion herein, or until further Court Orders, leave so granted to operate as a stay of any enforcement, decision or report or finding of the 1<sup>st</sup> Respondent that has been taken or may be taken or may be against the 1<sup>st</sup> Interested Party for any activity, exercise or process started while Abdi A. Mohamud was/is 1<sup>st</sup> Respondent Director of Investigations pending conclusion of the investigations by the 2<sup>nd</sup> Respondent on the allegations made by the 1<sup>st</sup> Respondent against the said EACC Director of Investigations.

7) That consequent to the grant of the prayers above the Honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour of justice.

8) That costs be in the cause.

2. The application also listed Mike Mbuvi Sonko as the 1<sup>st</sup> interested party and the DPP as the second interested party.

3. The application is premised upon grounds set out on the face of it, statement of facts, verifying affidavit sworn by the *ex-parte* applicant on 7<sup>th</sup> November, 2019 together with the supporting documents annexed thereto. The application was originally filed in the Judicial Review Division as JR No. 326/2019. It was certified urgent on 8/11/2019 and directions for service upon the respondents and interested parties herein made.

4. Consequently, the DPP filed grounds of opposition dated 19<sup>th</sup> November, 2019 challenging the application. Equally, the 1<sup>st</sup> respondent through replying affidavits sworn on 20<sup>th</sup> November 2019 by Emily Ibeere and Margaret Wambeti, opposed the application. On 19/11/2019, the 1<sup>st</sup> respondent filed a notice of motion dated 15/11/2019 seeking transfer of the matter to the High Court Anti-Corruption Division as the court seized with jurisdiction to hear and determine anti-Corruption related matters.

5. On 29/11/2019, the 1<sup>st</sup> interested party filed his replying affidavit which is sworn before a commissioner of oaths but not dated. He basically supported the application citing several grounds. In response to the 1<sup>st</sup> interested party's reply, the 1<sup>st</sup> respondent filed further affidavits sworn by Margaret Wambeti and Emily Wambeti, all filed on 5/12/2019 and another one sworn on 20/11/2019 by Simon Cherpka.

6. After canvassing the transfer application before the JR Division, this file was transferred to the Anti-Corruption Division for hearing and determination. When it came before me on 22/11/2019, the *ex-parte* applicant opted to act in person instead of being represented by the law firm of Kabaka & Co. Advocates. Parties then agreed to have the application for leave to file a substantive Judicial Review application to be disposed of by way of written submissions. Consequently, on 29/11/2019, the *ex-parte* applicant filed his submissions dated 28/11/2019. The first respondent filed theirs on 29/11/2019, while the 2<sup>nd</sup> interested party (DPP) also filed theirs on 29/11/2019. The 1<sup>st</sup> interested party followed suit and filed his on 6<sup>th</sup> December, 2019. Parties then highlighted on their submissions on 6/12/2019 and a ruling then fixed for 15/01/2020.

#### **Parties.**

7. The *ex-parte* applicant is an advocate by profession and also a resident of Nairobi. The 1<sup>st</sup> respondent is a commission established under Section 3 of the Ethics and Anti-Corruption Commission Act pursuant to Article 79 of the Constitution. It is seized with the mandate to investigate and recommend to the DPP for prosecution of Corruption related cases and Economic Crimes pursuant to Chapter six of the Constitution.

8. The second respondent is an organ of Government vested with overall and overarching jurisdiction in the conduct of criminal investigations in Kenya as envisaged under Article 240 of the Constitution and Section 35 of the National Police Service Act.

9. The 1<sup>st</sup> interested party is a Governor of the Nairobi City County elected pursuant to Article 179 of the Constitution. The 2<sup>nd</sup> interested party is an independent office vested with unfettered Prosecutorial Powers in the republic of Kenya pursuant to Article 157 of the Constitution.

#### **Exparte Applicant's Case.**

10. The applicant's case is hinged on the claim that on 29/06/2019, 30/07/2019, 27/08/2019 and 28/10/2019, the 1<sup>st</sup> respondent issued letters to the 1<sup>st</sup> interested party purporting to summon him to record statements or inquiring on his bank accounts from banks without notice to him. That in the public advertorial statement in the Daily People News Paper of 4/11/2019 and the letters of even date, the 1<sup>st</sup> interested party enumerated 126 factual reasons and Justifications why he believes the 1<sup>st</sup> respondent's Director of Investigations Mr. Abdi A. Mohamud is abusing his office by intimidating and stopping him ( the 1<sup>st</sup> interested party) from halting construction on grabbed public land and/or from investigating land grabbing in Nairobi.

11. He averred that the allegations of grabbing of public land should be investigated by the 2<sup>nd</sup> respondent who should then forward their investigation report to the 2<sup>nd</sup> interested party for action. He further averred that the 1<sup>st</sup> interested party's complaint against Abdi as protecting public land grabbers was ignored by the 1<sup>st</sup> respondent thus covering on Abdi Mohamud's illegal activities. That despite repeated complaints to the 2<sup>nd</sup> respondent against Mohamed Abdi, no action has been taken and that ordering the 1<sup>st</sup> interested party to record a statement with the 1<sup>st</sup> respondent was akin to silencing him from complaining against its officer.

12. It was his contention that the respondents had abdicated their mandate by refusing to investigate land grabbing issues and Mr. Abdi's support of illegal acquisition of land within Nairobi city.

13. The applicant contended that the 1<sup>st</sup> respondent has run amok and gotten drunk with power and authority, thereby deviating from established norms of investigations hence refusing to take the 1<sup>st</sup> interested party's complaint against one of their own. To support that position, the court was referred to the decision in the case of **Republic vs. Non-Governmental Organizations Co-Ordinations Board exparte Okiya Omtatah Okoiti and 2 Others (2017) e KLR**

14. He contended that investigations are an administrative action pursuant to Article 47 of the Constitution. To Support that proposition, the appellant relied on the decision in the case of **DPP vs. Prof. Tom Ojienda & 3 others (2019) eKLR**. He further contended that the ultra vires actions by the 1<sup>st</sup> respondent is likely to prejudice and infringe on the rights and freedoms of the 1<sup>st</sup> interested party.

15. In further submission, the applicant reiterated the averments contained in his affidavit in support. He contended that the 1<sup>st</sup> interested party is being victimized for standing against the grabbing of LR. NRB/Block 103/793 whose approval building plans he had cancelled. He stated that the 1<sup>st</sup> respondent's decision to interrogate the Governor was ultra vires. That the 1<sup>st</sup> respondent has failed the proportionality test as they have not struck a balance between individual and public interest rights.

16. Further, those investigations against the first interested party were tainted with illegalities thus violating Articles 50(4) and 10 of the Constitution. He further contended that, the 1<sup>st</sup> respondent's conduct went against legitimate expectation that their governor was entitled to complain and his complaint acted upon.

#### **1<sup>st</sup> Respondent's Case.**

17. Vide grounds of opposition filed on 20/11/2019, replying affidavits of Margaret Wambeti, Emily Ibeere and Simon Cherpka sworn the same day, the 1<sup>st</sup> respondent opposed the application stating that; it has a constitutional and statutory mandate to investigate complaints pursuant to Section 11(j) of EACCA and 23 of ACECA. It was averred that following a complaint over the alleged illegal and fraudulent acquisition of parcel land to wit Nairobi/block 103/793, they commenced investigations leading to the conclusion that the said property was public property which was irregularly transferred to one Nyagah Kibira who in turn sold it to one Abdullahi thus an act of abuse of office, fraud and corruption committed by various Public officers in city hall and lands office.

18. They disputed the claim that they have refused to investigate the complaint and that the 1<sup>st</sup> interested party was not being intimidated nor harassed. That the commission was committed to protect the public land which it has done by forwarding their recommendations to the DPP for prosecution of the grabbers. They further denied protecting some people involved in the scam from prosecution. That the summons issued against the 1<sup>st</sup> interested party had nothing to do with the grabbing of the public land but rather his involvement in corrupt procurement activities and false declaration to the EACC during the general elections nomination exercise of 2017 to the effect that he had no criminal record contrary to the available records both in the law courts and police stations.

19. On the other hand, Emily Ibeere an investigator with EACC averred in her affidavit that on 11/07/2019 the commission got a complaint from Hon. Esther Passaris Nairobi Women Representative to the effect that the 1<sup>st</sup> interested party had during a live interview on Citizen TV and on Madaraka day of 1/06/2019 made threatening remarks against her thus breaching some Sections of the Leadership And Integrity Act.

20. That the 1<sup>st</sup> interested party was summoned and indeed honored those summons on 5/11/2019 by appearing for interrogation thus confirming that due process was followed by according him an opportunity. She termed the application as an abuse of the court process and that the court cannot be used to perpetuate the same.

21. It was further stated that the applicant has not demonstrated any wrong doing by the commission nor any violation of rights or injury suffered. In submission, Ms. Odipo appearing for the 1<sup>st</sup> respondent relied on her submissions filed on 29/11/2019 which is a replica of their grounds of opposition and affidavits in response to the application. Counsel submitted on the points that; the applicant had not met the threshold for grant of leave to institute JR proceedings; the court should not interfere with the investigative mandate of the commission; and, in the circumstances of this case, leave should not operate as a stay.

22. Counsel urged that, prima facie, the application amounts to an abuse of the court process and that, leave to institute JR proceedings was meant to exclude frivolous and vexatious proceedings. To support this position, she referred the court to the decision in **Matiba vs. AG Nairobi HCC misc. Appeal no. 790/1993**. Secondly, that for leave to apply, there must be an arguable case based on the material available and that the same is meant to filter and weed out hopeless cases in conformity with the holding in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**,

23. Learned counsel contended that the application is meant to interfere with the commission's mandate, and there was no evidence of inaction nor malice in carrying out its mandate. To support the submission that there was no proof of prima facie case, Counsel referred to the case of **Mirugi Kariuki vs. AG Civil Appeal No. 70/1991 (1990-1994)EA 156(1992)eKLR** where the court held that; "***Leave is meant to protect abuse of court process by keeping off busy bodies***".

24. Counsel further referred to the case of **Boundaries Commission (1983) 2WLR 458.475** where it was held that; courts should be careful not to interfere and usurp the discretion of the public authority which parliament appointed to take decision. As to whether there should be stay, learned counsel argued that the High Court is not the right forum to stay the intended proceedings as it is the trial court that is equipped to deal with the evidence gathered to support the charge.

### **1<sup>st</sup> Interested Party's Case**

25. The first interested party supported the application through his replying affidavit filed on 29/11/2019 giving a long history on how his constitutional rights have been violated by being threatened by one Abdi the Director of Investigations working with the 1<sup>st</sup> respondent. That his complaints against a grabber of public property one Isaac Abdullahi has been frustrated by the said officer thus intimidating him by trying to prefer frivolous and non-existing charges just for the sake of covering up the scam. He gave a chronology of events among them his address to the Newspaper People Daily of 4/11/2019 in which he issued a statement on land grabbing and that One Abdi from EACC was manipulating the evidence to cover up the scam hence the failure to act on his complaint.

26. He claimed that the intended corruption related charges against him were malicious as the allegations of corruption relating to procurement matters before he became governor cannot be visited on him. He further stated that his problems started when he questioned the illegal sale of integrity house with Abdi as the master mind hence abuse of office.

27. Regarding the charges of false declaration, he stated that he correctly filled the forms as he had no criminal record nor conviction in Cr. Case No. 863/2000 Kibera where he was cleared. He went further to state that the Director investigations EACC (Abdi) has been holding meetings with his political opponent one Abdi Guyo who in September 2019 was seen handing over to Abdi the Director of investigations EACC a bag of money as a bribe to finish him (governor) and that the same was captured flagrante delicto.

28. Mr. Ondieki appearing for the 1<sup>st</sup> interested party filed his submissions on 6/12/2019 principally adopting the averments in the replying affidavit. Counsel submitted that the 1<sup>st</sup> respondent is under obligation to interrogate all complaints objectively and impartially to meet the legitimate expectation of the public that it serves. That failure to investigate the case of grabbing public land was a clear violation of public duty and an act in bad faith hence acting ultra vires and in breach of public duty. To support this position, Mr. Ondieki referred to the decision in the case of **Anisminic v. Foreign Compensation Commission (1969) 2 AC 147**

29. Regarding breach of proportionality principle, counsel urged that the investigations by the 1<sup>st</sup> respondent were not balanced between the general public interest of the community and protection of fundamental rights and freedoms. Touching on the element of legitimate expectation, counsel submitted that the investigation report is tainted with illegalities and violates Article 50(4) as read with Article 10 of the Constitution in which the 1<sup>st</sup> respondent is expected to treat all persons equally, act fairly, exercise discretion reasonably and not to ignore legitimate complaints.

30. Counsel argued that the power to grant leave is purely discretionally which the court should apply judiciously. That if stay of investigations is not granted, the application will be rendered useless.

31. Further, counsel referred to the decision in **Pravin Galot vs. Chief**

**Magistrate Court Milimani Law Courts (2017)eKLR where the court when citing Econet Wireless Ltd vs. Econet Wireless Nigeria Ltd and Another (FHD/KD/CS/39/208** held that ;

***"Parties who have invited the court to adjudicate on a matter which they are disputing over, ought not to create a situation whereby the decision to be made by the court would be of no use".***

32. Lastly, Mr. Ondieki submitted that due to the integrity issues facing the 1<sup>st</sup> respondent, they have no moral authority to investigate the 1<sup>st</sup> interested party and that it should deal with its officers first. That they have established a prima facie case with a possibility of success.

### **2<sup>nd</sup> Interested Party's Case.**

33. Through its grounds of objection filed on 19/11/2019, the 2<sup>nd</sup> interested party contended that; the application was frivolous, vexatious and an abuse of the court process; application is devoid of any legal factual basis; the 1<sup>st</sup> interested party has already filed an independent constitutional petition no. 453 of 2019 (petition. 34 of 2019) seeking similar orders in his favour; there is no dispute between the applicant and the 2<sup>nd</sup> interested party; no file has been forwarded to the DPP for action hence the suit is not ripe; the 2<sup>nd</sup> interested party cannot be prohibited from executing its constitutional mandate and, the facts relied on are general and omnibus.

34. In submission, Mr. Kinyanjui state counsel relied on his written submissions filed on 29/11/2019. He submitted that the applicant does not deserve the orders for leave as it has not met the conditions set out under Orders 53 Rule 1 and 2 of the Civil Procedure Rules. He contended that the summons, minutes, statements, documents, reports touching on investigations were not attached to the application hence there is nothing to quash. To buttress this proposition, counsel referred to the decision in the case of Republic vs. County Assembly of Nakuru and 2 others, exparte Samuel Waithuku Njane and 21 others judicial Review Application No. 19/2016 Nakuru. Referring to similar position, Counsel referred to the case of Republic Vs. Mwangi s. Kimenyi. Exparte Kenya Institute for Public Policy and Research Analysis (KIPPPRA) (2013) eKLR.

35. Mr. Kinyanjui further submitted that the DPP's mandate cannot be usurped without any proof of misfeasance, injury suffered, malpractice, illegality, irrationality or unreasonableness on the part of the respondent to warrant the court exercise its discretion. To support this proposition, counsel referred to the decision in the case of Ambrose Dickson Otieno Rachier, Jotham Okome Arwa, Francis Olalo and Stephine Lingunya T/A Rachier & Amollo Advocates vs. Ethics and anti-corruption commission & 2 others (2019) Eklr where the court emphasized on the need for a litigant to state with particularity or specificity the acts complained of, the resultant injury suffered or likely injury to be suffered.

36. Relying on the decision of Okiya Omtatah Okoiti & 2 others vs. AG & 3 others (2014) & Jasbhai Desai vs. Roshan Kuran (1976) (30) ACR 58b Counsel urged that the applicant is a busy body masquerading as a crusader of justice thus clogging the wheels of justice in the name of justice litigation.

37. In his rejoinder, the applicant stated that he had an interest in the suit as the land in question is public property serving as a playing ground to children to which he has an interest as well being a parent with children.

#### ***Analysis and determination***

38. I have considered the application herein seeking leave to institute judicial review, the responses thereto and submissions by counsel. The application before court is filed pursuant to Order 53 of CPR and the Law Reform Act. Order 53(1) provides guidelines on how to approach the court for Judicial Review Orders. For a party to apply for orders of Mandamus, certiorari or prohibition, the applicant must first seek leave of court pursuant to order 53(2) of the CPR. Such leave can be made *ex parte*. However, the court reserves the discretion to grant the same *ex parte* or direct for *inter partes* hearing subject to any other terms as the court may impose. Under sub rule 4, the court may direct if it finds it necessary that the leave so granted operates as a stay of the proceedings until further orders or determination of the application.

39. In this case, leave was not granted *ex parte*. It is trite that grant of leave is not automatic. The same is subject to proof of well laid down parameters. Objectively, leave is supposed to sieve and separate deserving cases from hopeless ones to save on precious judicial time and possible cost to be incurred by parties. To underscore the significance underlying the request for leave, the court of appeal in the case of Justus Ongera vs. Director of Public Prosecutions and another (2018) eKLR held at par. 24 that;

***“we are aware that the grant of leave is not automatic. The purpose of it, as stated in numerous court decisions, is to exclude frivolous and vexatious applications which prima facie appear to be in abuse in the process of the court or those applications which are statute barred.”***

40. Similar position was held in the case of Republic vs. County Council of Kwale & another exparte Kondo & 57 others Mombasa HCMCA. No. 384 of 1996 where it was held as follows;

***“the purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for Judicial Review which are frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial review of it were actually pending even though misconceived”.***

41. See also Matiba vs. Attorney General Nairobi HC Misc. Appln No. 790/1993 & R. vs. Land Dispute Tribunal Courts Central Division & Another exparte Nzioka (supra) where the court held thus;

***“leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave, and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest opportunity possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out unmeritorious.***

42. Guided by the above authorities, it is incumbent upon the applicant to prove to the satisfaction of the court that;

**a. The application is not frivolous or vexatious nor does it amount to an abuse of court process.**

**b. That there is a prima facie case for further interrogation or that there is an arguable case based on the materials placed before court**

**c. Whether the orders sought are likely to create uncertainty or ambiguity to any administrative action taken by any public body.**

43. As can be gleaned from case law quoted and the criteria to be established before granting leave, the burden of proof lies with the applicant and the bar is deliberately set too low so as not to shut out deserving litigants from accessing justice. Leave is therefore some form of assessment based on material evidence before court to ascertain and allow merited and only deserving litigation to the corridors of justice.

44. Has the applicant demonstrated that he has an arguable case? As stated in the case of **Kariuki V. AG (1992) KLR** an arguable case will be determined if the applicant shows reasonable grounds for believing that there has been a failure of a public duty.

45. In the case before me, the applicant is seeking certiorari orders to remove to the honorable court and quash all and every summon, minutes, statements, documents in reports touching on the investigation of the 1<sup>st</sup> interested party by the 1<sup>st</sup> respondent. According to the ex parte applicant, the 1<sup>st</sup> interested party having lodged a complaint regarding grabbing of public land, the Director of Investigations at EACC (1<sup>st</sup> respondent) one Abdi frustrated the investigations and instead decided to harass him by summoning him to integrity house with a view to threatening to charge him so as to abandon the complaints.

46. How does the summons issued against the 1<sup>st</sup> interested party in his individual and private capacity affect the ex parte applicant? Further, the applicant did not attach any of the minutes, statements and or documents touching on the 1<sup>st</sup> interested party to be quashed. He has not demonstrated any injury likely to be suffered should the court not grant him leave to prosecute JR application for certiorari orders.

47. In the absence of material evidence such as alleged minutes, the court cannot ascertain whether there was anything ultra-vires or breach of public duty (**see R. Vs. Mark Lloyd Steveson (2016) eKLR & R. vs. County Assembly of Nakuru & Others ex parte Samuel Waituku Ngare & 21 others (supra)**) where the court held that;

***“the failure to annex the decision to be challenged in this case is fatal as it remains uncertain whether there actually exist a decision which can be called into court for purposes of quashing”***

48. Since the ex parte applicant has not demonstrated existence of the documents or decision which may have been arrived at against the principles of natural justice, there is nothing to quash. In any event, I take judicial notice that the first interested party has since been charged based on impugned investigations. Further, as submitted by Mr. Kinyanjui, the 1<sup>st</sup> interested party has already filed a petition no. 34 of 2019 seeking similar orders. In my view, the ex parte applicant who purport to represent public interest has not demonstrated that his rights were or likely to be affected and that the interest of the public will be in jeopardy if the 1<sup>st</sup> interested party is charged. For those reasons, the prayer for leave to seek certiorari orders cannot issue as the applicant is not directly or even indirectly connected or affected.

49. The second relieve sought is that of prohibition thus restraining the 1<sup>st</sup> respondent from investigating, summoning, issuing a report against and/or taking adverse action against the 1<sup>st</sup> interested party. Again, the application is already overtaken by events as the investigations are complete and the 1<sup>st</sup> interested party has since been charged hence nothing remaining to prohibit. To bolster that proposition I am guided by the holding in the case of **Kenya Examination Council vs. R. ex parte Geoffrey Gathenji Njoroge & 9 Others 1997 Eklr where** the court held that;

***“where a decision has been made (whether in excess or lack of jurisdiction, or whether in violation of rules, an order of prohibition will not be efficacious against a decision that has already been made. It can only prevent the making of a contemplated decision.***

50. For this case to move further, and for intervention by this court to apply, the applicant must prove that there is sufficient evidence that the act complained of was unconstitutional. (see **Paul Ng’ang’a Nyaga vs. AG & 13 others) eKLR.**

51. In any event, the ex parte applicant has not demonstrated that his rights have been affected or threatened by investigation of the 1<sup>st</sup> interested party who has already filed a petition no. 34/2019 seeking similar orders. At best, I do not find a prima facie case to warrant grant of the relieve sought which is spent. The ex parte applicant should have filed a civil suit seeking recovery of the public land or file a JR application to quash the decision leading to the allocation of the public land to the private developers (grabbers). However, the investigation he is seeking to forestall or stop has no relationship whatsoever with the investigations of the 1<sup>st</sup> interested party’s alleged involvement in corruption in respect of procurement transactions while serving as governor and false declaration that he had no criminal record during the 2017 general election nomination exercise.

52. The next relief sought is the order of Mandamus directed at the 2<sup>nd</sup> respondent to investigate corrupt practices regarding the complaint lodged by the 1<sup>st</sup> interested party vide a letter dated 4/11/2019 and file a report with the 2<sup>nd</sup> Interested party and that the 1<sup>st</sup> respondent to suspend a Mr. Abdi Mohamud its Director in charge of investigations.

53. The office of the 1<sup>st</sup> Respondent is a creature of the constitution pursuant to Article 79 and 252 of the Constitution. Its mandate and more particularly investigative role on corruption and economic crime is clearly spelt out in section 11 of EACC Act and Section 23 and 35 of the ACECA. The DPP’s mandate is also spelt out under Article 157 of the Constitution which provides that the DPP shall have powers to institute and take over proceedings or discontinue.

54. In the instant case, it is not clear why the DPP was enjoined as a party since the investigation report against the 1<sup>st</sup> interested party had not been forwarded to its offices for consideration. It was premature to drag the DPP to these proceedings. An order of Mandamus cannot issue against the 2<sup>nd</sup> interested party an independent office holder to act before the process of investigation is complete.

55. The ex parte applicant is seeking orders directing that the Director of investigations in the 1<sup>st</sup> respondent's office be suspended from employment. I do not think this court can even after hearing a substantive JR application order for any suspension of any officer or employee as each institution has mechanisms established to regulate disciplinary matters among them suspension from employment. It is therefore not reasonable to seek orders to institute a suit where there is no reasonable cause of action. In the case of *Paul Ng'ang'a Nyaga* above quoted, the court held that;

***“This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence they acted in contravention of the constitution”.***

56. The orders sought herein have since been prayed for by the 1<sup>st</sup> interested party in petition no. 34 of 2019 which is also pending before me. I take judicial notice that he has since been charged with corruption relation charges. The prayer seeking to compel the 2<sup>nd</sup> respondent to commence investigations is not within the ambit of this court to order. I do not find any sufficient ground to warrant issuance of of leave to canvass the prayers sought.

### **Conclusion**

57. Having analyzed the evidential material before me, I do find that the applicant has not demonstrated that he has an ascertainable interest in the suit; he has not proved that he has a prima facie case to warrant further interrogation by filing a substantive JR application. Further, he has not demonstrated how his constitutional rights have been violated or likely to be violated. He has not shown how the violation of the 1<sup>st</sup> interested party's rights have affected him as a person. At best, I would say the application herein is purely an abuse of court process as the 1<sup>st</sup> interested party cannot seek JR orders through the ex parte applicant who is acting as proxy and has nothing to do with the alleged violations against the 1<sup>st</sup> interested party. Further, the prayers sought in favour of the 1<sup>st</sup> interested party are the same ones sought by the 1<sup>st</sup> interested party personally which is the right direction to follow.

58. Without delving into the merits of the intended JR application, it is my finding that the application herein has not met the criteria to warrant grant of leave to institute a substantive application which in my view will not serve any meaningful purpose and therefore, inclined to dismiss the application. Having done so, the prayer for stay of proceedings automatically falls by the way side. I will however spare the ex parte applicant payment of costs and order that each party pay its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI this 17<sup>th</sup> day of January, 2020.**

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**J. N. ONYIEGO**

**JUDGE**