REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

PETITION NO. 2 OF 2019

BETWEEN

GRACE SARAPY WAKHUNGU.....1ST PETITIONER

JOHN KOYI WALUKE.....2ND PETITIONER

ERAD SUPPLIES & GENERAL CONTRACTS LTD.....3RD PETITIONER

VERSUS

NATIONAL CEREALS & PRODUCE BOARD.....1ST RESPONDENT

ETHICS & ANTI CORRUPTION COMMISSION.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

CHIEF MAGISTRATE'S COURT MILIMANI ANTI CORRUPTION COURT.....5TH RESPONDENT

THE NATIONAL ASSEMBLY OF KENYA.....6TH RESPONDENT

JUDGMENT

1. In their petition dated 18th January, 2019, the petitioners seek to stop their prosecution in **Anti-Corruption Criminal Case No 31 of 2018-Republic v Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited**. The challenge to their prosecution is predicated on a challenge to a recommendation contained in item 7 at pages 95 to 96 of the Report by the National Assembly's Public Investment Committee (PIC) titled **"Special Report on the Contract Between National Cereals and Produce Board and M/S Erad Supplies and General Contracts Limited for the Supply of White Maize"** made in October, 2013. The petitioners allege that the report was submitted to, amongst others, the 1st, 2nd, 3rd and 4th respondents on 20th November, 2013.

2. The petitioners contend that their prosecution and the recommendations made in the report violate their constitutional rights under Articles 27 (1) and (2), 47 (1) and 50 (1). They also allege violation of Articles 10, 157 and 159 of the Constitution.

3. The petition, which is supported by affidavits sworn by the 1st and 2nd petitioners on 18th January, 2019, seeks the following orders from the court:

> **a. An order of certiorari be and is hereby issued, to bring into the High Court and quash recommendations against the Petitioners contained in item 7 at pages 95 to 96 of the Report by the National Assembly Public Investment Committee titled "SPECIAL REPORT ON THE CONTRACT BETWEEN NATIONAL CEREALS AND PRODUCE BOARD AND M/S ERAS SUPPLIES AND GENERAL CONTRACTS LIMITED FOR THE SUPPLY OF WHITE MAIZE" made in October,**

2013 and submitted to amongst others, the 1st, 2nd, 3rd and 4th Respondents on 20th November, 2013.

b. A declaration be and is hereby issued that investigations on the Petitioners by the 2nd, 3rd and 4th Respondents, recommendations for prosecution of the Petitioners and the institution of criminal proceedings against the Petitioners in Anti-Corruption Criminal Case No 31 of 2018, Republic v Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited on a contractual claim the dispute in respect of which has finally been determined in arbitration and the High Court, violates the Petitioners' constitutional rights under Articles 27 (1) and (2), 47 (1), 50 (1) and 159 the Constitution of Kenya, is an abuse of the process of the Court and therefore unlawful, null and void ab initio.

c. An order of certiorari be and is hereby issued, to bring into the High Court and quash the entire charge sheet dated 2nd August 2018 together with all criminal proceedings instituted against the Petitioners in criminal Anti-Corruption Criminal Case No 31 of 2018, Republic v Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited.

d. An order of prohibition be and is hereby issued, prohibiting the Respondents from proceeding with the prosecution of Anti-Corruption Criminal Case No 31 of 2018, Republic v Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited.

e. An order of prohibition be and is hereby issued against the 2nd, 3rd and 4th Respondents from investigating, recommending the prosecution or commencing any further prosecution of the Petitioners on the basis of the complaint pursuant to which Anti-Corruption Criminal Case No 31 of 2018, Republic v Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited was instituted.

f. An order of prohibition be and is hereby issued against the 1st, 2nd, 3rd, 4th and 5th Respondents from initiating any criminal complaint, investigating, recommending the prosecution or commencing any further prosecution of the Petitioners in respect to any dispute arising out the contract dated 26th August, 2004 between National Cereals & Produce Board and Erad Supplies & General Contracts Limited, the arbitral award published on 7th July, 2009, proceedings in High Court in Misc Civil Appln No 639 of 2009, National Cereals & Produce Board v Erad Supplies & General Contracts Limited, Civil Appeal No 9 of 2012, National Cereals & Produce Board v Erad Supplies & General Contracts Limited and related civil proceedings.

g. A conservatory order be and is hereby issued prohibiting the Respondents from commencing the hearing of and/or proceeding with the prosecution of Anti-Corruption Criminal Case No 31 of 2018, Republic v Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited.

h. The costs of this Petition be provided for.

4. The petition is opposed. The 1st, 2nd and 3rd respondents filed affidavits in reply while the office of the Attorney General (AG) filed grounds of opposition on behalf of the 4th and 5th respondents.

5. By an order issued on 21st January 2020, the National Assembly was joined as the 6th respondent following an application in that regard dated 29th November 2019 which was allowed with the consent of all the parties. The National Assembly filed affidavit in opposition to the petition sworn on 28th February 2020 by the Clerk of the National Assembly, Mr. Michael Sialai. The parties filed written submissions which were highlighted before the court on 4th March 2020.

The Petitioners' Case

6. The petitioners' case is set out in the petition and in the affidavit sworn by the 1st petitioner on 18th January 2019. The 1st and 2nd petitioner are the shareholders and directors of the 3rd petitioner, a limited liability company incorporated in the Republic of Kenya. They were charged on 2nd August, 2018 upon a complaint by the National Cereals and Produce Board (NCPB) and the recommendations for prosecution made by the Ethics and Anti-Corruption Commission (EACC) and accepted by the Director of Public Prosecutions (DPP). All the petitioners were charged with uttering a false document to an arbitrator, being invoice number 12215-CF-ERAD for US$ 1,146,000.00, as evidence in an arbitration between the NCPB and the 3rd petitioner.

7. The 1st petitioner was charged with perjury for giving false evidence for claims for costs of storage of 40,000 metric tonnes of white maize. All the petitioners also faced a charge of fraudulent acquisition of public property being Kshs. 297,386,505.00 paid by the NCPB on 19th March, 2013 in execution of the arbitral award published by the arbitrator on 7th July, 2009 and the judgment and decree in respect thereto issued by the High Court on 17th February, 2012. They also faced a further charge of fraudulent acquisition of public property being Kshs. 13,364,671.40 paid by the NCPB to the 3rd petitioner on 27th June, 2013 in execution of the said arbitral award and judgment of the court. All the petitioners also faced a charge of fraudulent acquisition of public property, being US$. 24,032.00 paid by the NCPB to the 3rd petitioner on 2nd July, 2013 in execution of the award and judgment aforesaid.

8. The petitioners contend that the criminal case against them relates to a contractual relationship between them and the NCPB and a dispute arising therefrom. This dispute was determined in their favour in an arbitration and before the High Court and the Court of Appeal. The sums the petitioners were alleged to have received fraudulently were paid in execution of the arbitral award and the judgment, and they give a breakdown of the manner in which the payments were made. They also set out in some detail the process of entering into a contract with the NCPB for the supply of 40 metric tonnes of maize.

9. The NCPB had breached the contract and in accordance with the contract, the petitioners had referred the matter to arbitration and an award made in their favour. The 1st petitioner had testified in the arbitration on behalf of the petitioners while two officials of the NCPB had testified on its behalf. The arbitrator had made an award of damages of US$. 3,106,000.00; US$. 1,960,000.00 on account of loss of profit and US$. 1,146,000.00 on account of storage costs due to the supplier, costs and interest.

10. An application to set aside the arbitral award on the basis that the petitioners did not have any maize stored with Chelsea Freight to warrant the award of storage charges of US$. 1,146,000.00 and that the arbitral award had been obtained corruptly was dismissed by the court. The Court of Appeal had also declined to set aside the arbitral award. Funds held in various accounts in the name of the NCPB were thereafter attached pursuant to garnishee orders issued in favour of the petitioners. The petitioners were paid, on diverse dates in 2013, Kshs. 297,386,505.00, Kshs. 13,364,671.40 and US$. 24,032.00 arising out of the arbitral award, which the petitioners state constitute the charges against them in the criminal case.

11. The petitioners state further that the appeal by the NCPB to the Court of Appeal against the High Court's refusal to set aside the arbitral award is yet to be heard despite having been filed on 27th January, 2012. An application by NCPB for stay of execution was heard and dismissed by the Court of Appeal on 18th December, 2012.

12. The petitioners contend that on 4th June, 2013, the National Assembly's Public Investment Committee commenced an inquiry into the contract, the arbitral award and the execution thereof. The Clerk of the National Assembly had, on 20th November, 2013, submitted the PIC report to the respondents and made recommendations for EACC to investigate the petitioners and one Jacob Juma for alleged fraudulent acquisition of public property contrary to section 45 (1) as read with section 48 – 53 of the Anti-corruption and Economic Crimes Act.

13. It also recommended investigations of the existence of the petitioners' alleged international suppliers in the maize importation tender and establish if indeed maize was purchased and stored as alleged. They were also to investigate whether the petitioners uttered false documents to tender for the maize at the NCPB, which documents were relied upon to award the tender for the supply of maize contrary to section 353 of the Penal Code. The petitioners contend that the report was made without affording them a chance to be heard and to cross-examine witnesses. It is also their contention that the PIC had no mandate to hear a matter that was pending before the court.

14. It is the petitioners' case further that the NCPB had sought leave to adduce additional evidence before the Court of Appeal, a request that the petitioners aver was denied. A request by EACC to join the appeal between the NCPB and the petitioners in the Court of Appeal was allowed. However, an application by the EACC to adduce additional evidence, bring documents to demonstrate that no storage charges in the sum of US$. 1,146,000.00 in respect to Chelsea Freight were incurred by the 3rd petitioner and that the arbitral award in that regard was fraudulently obtained, as well as evidence to show that the 1st petitioner lied on oath in her testimony before the arbitrator on the issue, was dismissed.

15. The petitioners contend that the PIC report contravened Article 10 as read with Articles 94 and 160 of the Constitution. This is because it commenced investigation of a matter that was pending before the courts, assumed jurisdiction and usurped the role of the judiciary. It is also their contention that the PIC had thereby violated the independence and the constitutional authority of the judiciary as the final interpreter of the law.

16. The petitioners allege violation of several Articles of the Constitution in the institution of the criminal case against them. They allege contravention of Article 10 as the prosecution is in respect of a contractual dispute that has finally been determined. They also allege contravention of Article 27 on the basis, among others, that the EACC and DPP have exempted the NCPB from the application of the arbitral and civil processes in the final determination of a contractual dispute with the petitioners. Violation of Article 47 is alleged on the basis that the criminal prosecution has been instituted without a factual or legal foundation, a process which they deem as intended to undermine the lawful authority of the arbitral and legal processes which resulted in the payment of the funds at issue.

17. Violation of the right to fair hearing under Article 50 (1) is cited as they have been condemned to stand trial on a civil dispute that has finally been determined by the High Court. They allege that the EACC and DPP have acted under the direction and control of the legislature in pursuing criminal investigations and in recommending and undertaking the criminal prosecution against them, thus breaching Article 157 (10) and (11) of the Constitution.

18. In their written submissions dated 11th February 2020, the petitioners reiterate their case as set out in the petition and the affidavits in support. They ask the court to declare unconstitutional and prohibit their prosecution, and to quash the recommendations made against them in the PIC report.

19. The petitioners submit that they seek to quash the PIC report as the rights between the petitioners and the NCPB were settled by the arbitrator and the High Court, and that an application to stay execution of the decree in the High Court was dismissed. They argue that the judiciary has made findings upholding the decision of the arbitrator, and the National Assembly, in its report, cannot purport to counter the judiciary's authority in this matter while the NCPB's appeal is pending in the Court of Appeal and the award in their favour has yet to be set aside by any court.

20. The petitioners cite the decision in **R v The National Assembly & 7 others *ex parte* Edward Ouko [2017] eKLR** with respect to the doctrine of separation of powers. Their submission is that the National Assembly is purporting, in its report, to play an oversight role over the judiciary by countermanding its decision while aware that there is a pending appeal in the Court of Appeal. It is their submission that even the EACC had told the National Assembly Committee not to investigate the matter, and Parliament cannot purport to investigate and make damning recommendations.

21. The petitioners submit further that courts of law have power to quash recommendations and findings of committees of Parliament, support for this submission being sought in the case of **Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others *ex parte* George Saitoti [2006] eKLR** and **Eric Cheruiyot Kotut v S.E.O. Bosire & 2 others [2008] eKLR**.

22. The petitioners argue that an arbitral award is final, reliance being placed on section 10 and 42(9) of the Arbitration Act which provides that arbitral awards are final, binding and conclusive between the parties. They submit that after failing in the arbitral process, the NCPB had resorted to the criminal process, and in their view, it is wrong to criminalize a commercial dispute. Reliance is placed on the case of **Nedermar Technology BV Limited v Kenya Anti-Corruption Commission & Another [2008] eKLR** on separability of the criminal and civil justice system. They submit that it is unconstitutional and unlawful to use the criminal process to settle scores, reliance being placed on the case of **Vincent Kibiego Saina v Attorney General Misc Appl. Nos 839 and 1088 of 1999 (UR)**.

23. While conceding that under section 193 of the Criminal Procedure Code (CPC) there can be concurrent civil and criminal proceedings, the petitioners submit that the section must be read with Article 157 (11) on the powers of the DPP. In the petitioners' view, section 193 of the CPC cannot be used to sustain a criminal process while there is a pending appeal. Further, that the powers of this court to issue declarations cannot be restrained by the CPC as they are vested in the court by Article 23 of the Constitution.

24. The petitioners cite the decision in **Prof Njuguna S. Ndung'u v The EACC & 3 others [2018]eKLR** to support their contention that there was no factual foundation for their prosecution. Their submission is that as was held in that case, there must be a factual or legal foundation for their prosecution, and the court must delve into an analysis of the evidence to determine whether the case can proceed. In their view, the charges against them are unsustainable and the argument that they unlawfully acquired pubic property cannot be sustained as they were paid the funds pursuant to a court order. They contend that if someone is paid pursuant to a court order, the payment does not become unlawful when the order for payment has been set aside.

25. With respect to the investigation of the matter by the PIC, the petitioners argue that such investigation was not a matter of public interest. Rather, Parliament was invading the judiciary's sphere by countermanding what the judiciary had done. Public interest, in their view, cannot be used to justify an unlawful act, and the PIC lacked the legal mandate to investigate the matter. The petitioners urged the court to allow the petition and quash their prosecution.

The Case of The NCPB

26. The NCPB relied on an affidavit sworn on its behalf by John Ngetich, the Board Secretary, on 5th February 2019. Mr. Ngetich avers that all the efforts of the NCPB to explain to the arbitrator and the court that the petitioners' claim was fraudulent could not be believed. Its case is that the award made against it was based on forged documents, and the petitioners had obtained Kshs 314 million from it after attaching its properties and obtaining garnishee orders against its bank account. It is its case therefore that this petition is without merit as the EACC has the mandate to investigate and the petitioners' rights have not been violated.

27. In its written submissions dated 14th February 2019, the NCPB argued that the prosecution of the petitioners has been undertaken and concluded, and what was remaining was a judgment which was scheduled for 30th March 2020. NCPB noted that the petitioners were seeking to prohibit their prosecution, yet they are presumed innocent and have had a chance to defend themselves before the criminal court.

28. With regard to the factual matters relating to the petition, NCPB referred to a bid bond (annexure 1) and what purports to be a bid bond (annexure 2) annexed to the affidavit of John Ng'etich which, according to the NCPB, were fraudulent. Reference was also made to disclosure certificates (annex 3 and 4) as well as annexure 5 which the petitioners had purported to be an invoice from Chelsea Freight which, according to NCPB, was a forgery. The NCPB's position was that all that the prosecution requires of the petitioners is to justify those documents, based on the NCPB's complaint.

29. The NCPB submitted further that what the petitioners were arguing was that the prosecution arose out of a commercial contract and no one should inquire into it. However, in its view, if the commercial contract was premised on fraud, it would not be proper to wave an arbitral award obtained on fraudulent grounds and say that the prosecution cannot inquire into it.

30. The NCPB submitted further that the petitioners were asking the EACC and other investigative agencies to look away. While the petitioners had relied on the decision in **Nedermar Technology BV Limited v Kenya Anti-Corruption Commission & Another** (supra), they had only cited portions of the decision, omitting the part where the court had held that a commercial contract can lead to criminal charges.

31. The NCPB further urged the court to consider the threshold for grant of conservatory orders. Its submission was that the court should only grant such orders if to do so would enhance constitutional values and public interest. In its view, it would not serve the public interest to allow the petition on the basis of a fraudulent arbitral award.

32. With regard to the application by the petitioners to quash the PIC report, it was submitted that there are processes for review of the PIC findings which the petitioners could have utilized, and the court should not be asked to throw out the report when one of the petitioners was interviewed and a report made. The NCPB urged the court to dismiss the petition with costs.

The Case of the EACC

33. In the affidavit sworn on behalf of the EACC by Kipsang Sambai, an investigator with the EACC, it is averred that the 3rd petitioner had used an invalid tender security bid and should never have been evaluated for the supply of maize to the NCPB. The petitioners had also obtained the arbitral award by means of false testimony and forged documents. Through the 1st petitioner, the 3rd petitioner had alleged that it had made arrangements to bring maize which had been procured and stored by Chelsea Freight of South Africa for 123 days. The 1st petitioner had further testified that since the NCPB had not opened a letter of credit, the 3rd petitioner could not import the maize. It was on this basis that the 3rd petitioner was awarded US$1,146,000.

34. EACC states that through mutual legal assistance, it had established from South Africa that the documents purportedly from South

African firms on the basis of which the award was made to the 3rd petitioner did not emanate from the said firms. It cites in particular the invoice alleged to have been issued by Chelsea Freight to the 3rd petitioner. The directors of the said company had specifically denied dealing with the 3rd petitioner. The EACC states that it had applied to join the appeal in the Court of Appeal relating to the arbitral award to the 3rd petitioner. This application had been allowed, but an application to adduce additional evidence was yet to be heard.

35. It is the case of the EACC that since the entire case of the petitioners before the arbitrator was based on fraudulent documents, the petitioners had illegally and fraudulently acquired public funds. The criminal prosecution against them did not therefore relate just to part of the award, the storage charges, but to the entire award. It is its case further that there is no bar to prosecution simply because there is an arbitral award which was obtained using false evidence. EACC observes that apart from raising technical arguments that the issues were dealt with during the arbitration, the petitioners have not challenged the substance of the case against them-that they obtained the arbitral award on the basis of false evidence.

36. EACC's case is that this petition is without merit. Contrary to the petitioners' contention, there is a proper factual foundation for the criminal case. This is that the arbitral award forming the basis of the petitioners' case was founded on the simple but false narrative that the 3rd petitioner had obtained 40 metric tonnes of maize from Ethiopia through Djibouti at a contract sum of US$ 180 per metric tonne, that it had negotiated to sell it to the NCPB at US$229 per metric tonne and that the petitioners would thus have made a profit of US$ 1,960,000. The petitioners had also claimed that Chelsea Freight of South Africa charged them storage charges of US$ 1,146,000, and that Chelsea Freight stored the maize for 123 days. The arbitrator had believed the evidence and granted them damages totaling to US$ 3,106,000.

37. The EACC submits that it had investigated the matter and established that Chelsea Freight did not deal with the 3rd petitioner. One of the directors of Chelsea Freight, Freddy Chetty, had testified in the criminal case to that effect. The evidence of Chetty had demolished the basis of the arbitral award, for it means that no maize was imported, no profit was made and no storage charges were incurred.

38. The EACC notes that the response from the petitioners is that an arbitral award was made and no-one should look at other evidence. Its position was that a law enforcement agency could not be asked to take such a position. It had investigated the matter after the award was made, and the documents it obtained such as the alleged invoice from Chelsea Freight showed that the petitioners used forged documents. It had applied to join the appeal against the arbitral award after it obtained the documents from South Africa, and this is the application that is pending before the Court of Appeal. EACC submits that in her response to the application, the 1st petitioner had stated that she had not been charged with perjury, then having been charged with perjury in the criminal case, the 1st petitioner now asks the court to stop the prosecution. In the view of the EACC, the present petition is an abuse of the court process.

39. Regarding the petitioners' reliance on **Nedermar Technology BV Limited v Kenya Anti-Corruption Commission & Another** (supra), EACC takes the position that the decision related to a complex Anglo Leasing type contract between the Government and an international company. It had a choice of law, English law, and a place of arbitration, The Hague. It also had an exclusion clause that excluded the application of public law, including criminal law. The contract was done by the Government of Kenya as a sovereign, which was not the case in the contract between the petitioners and the NCPB. EACC asked the court to distinguish the decision from the present case but to note the statement in the case that a commercial transaction can mutate and give rise to criminal activity both before and after commencement of the transaction.

40. EACC further submits that in order to stop a prosecution, a criminal prosecution needs a bad mental element on the part of the prosecution, reference being made to **Director of Public Prosecutions & another v Crossley Holdings Limited & another [2016] eKLR**. In the absence of dishonesty or bad faith, the decision of the EACC and DPP to prosecute cannot be challenged. EACC informed the court that the judgment in the trial court was scheduled for 3rd March 2020 but had since been deferred to 30th March 2020. The court was asked to allow the decision to be delivered as the petitioners have a right of appeal.

The Case of the DPP

41. The DPP's case was set out in an affidavit sworn by Ruby Okoth on 23rd January 2019 and submissions of the same date. Ms. Okoth avers that the EACC had commenced investigations into the allegations of fraudulent claims amounting to Kshs 577,000,000 by the 3rd petitioner on a contract with the NCPB for the importation of 40,000 metric tonnes of white maize. The investigations revealed that the 3rd petitioner had, by a letter dated 26th August 2004, been awarded the contract. No letter of credit was issued to the contractor and on 27th October 2004, the 3rd petitioner demanded the said letter of credit. A dispute arose between the NCPB and the 3rd petitioner which was referred to arbitration and an award made in favour of the 3rd petitioner.

42. In the arbitration, the 3rd petitioner had relied on an invoice for USD 1,146,000 as evidence of storage of 40,000 metric tonnes of white maize from 21st September 2004 to 22nd January 2005 by Chelsea Freights Ltd. On the basis of the said invoice, number 1225-CF, the arbitrator made an award of USD 1,146,000. The 3rd petitioner had thereafter taken out garnishee proceedings for payment to them of Kshs. 264,864,285, which sums were paid to them by Kenya Commercial Bank and National Bank. It transpired, however, from statements recorded by two directors of Chelsea Freight Ltd based in South Africa that they had never had any dealings with the 3rd petitioner and had not issued invoice number 1225-CF.

43. The invoice number 1225-CF purported to have been authored by Chelsea Freights Ltd and which was produced by the 3rd petitioner to claim storage costs for the 40,000 metric tons of white maize was a forgery. It had also emerged from investigations that the fax purportedly issued by Ropack International dated 27th January 2005 which was also produced by the 3rd petitioner to show that it had suffered extra inconveniences as a result of failure by the NCPB to issue a letter of credit was also a forgery. The DPP had reviewed the evidence forwarded by EACC and was satisfied that it was sufficient to support the charges against the petitioners. The DPP had therefore directed that the petitioners should be charged with the offences indicated in the charge sheet in Anti-Corruption Case No. 31 of 2018. The DPP's case is that the petitioners have not demonstrated that his office, in making the decision to charge, has breached or violated any provision of

the Constitution or the law.

44. The DPP's position is that when he made the decision to charge the petitioners, none of the provisions of the Constitution or the law was violated. Article 157(6) gives his office the discretion to institute prosecutions on the basis of the evidentiary and public interest tests. His office, he submits, is not subject to the direction or control of any party in making the decision to charge. The DPP agrees with the submissions of the EACC that the EACC had carried out investigations after the arbitral award had been made. It had discovered criminal liability way after the arbitral award, and neither the DPP nor the EACC had taken part in the arbitration proceedings.

45. The DPP further submits that the petitioners had not shown that the DPP has acted in bad faith or without independence, or that he has abused his powers, in order to trigger the court's intervention. In its view, even though an appeal is pending before the Court of Appeal and there have been civil proceedings in the High Court, section 193A of the CPC allows for simultaneous civil and criminal proceedings.

46. The DPP submits that the issue of evidence has been assessed by the trial court and its accuracy and correctness can only be assessed by that court. In his view, the petitioners have failed to demonstrate breach of constitutional rights, and the petition should be dismissed.

The Case of the Attorney General

47. The AG relied on the Grounds of Opposition dated 11th March 2019 and submissions dated 28th November 2019. He submits that under Article 157, the DPP has the powers to prefer charges at any point when the evidence is availed to him, reliance being placed for this submission on the case of **Stanley Munga Githunguri (1986) eKLR**. It was the case of the AG that there is no rational connection between the charges preferred against the petitioners and the report of the PIC challenged in this petition.

48. It was also the case of the AG that the prayers sought at prayers b-g of the petition are all spent. This was because the petitioners were seeking to stop, *inter alia*, investigations and prosecution, which are all complete. In the AG's view, parties are bound by their pleadings, and if this is all that the petitioners had brought before this court, the petition must be dismissed.

49. The AG further submitted that the National Assembly has powers, pursuant to Articles 110 and 95, to carry out investigations into matters that are of a public nature and of public interest. That it is also entitled, as an arm of government, to lodge complaints with regard to such matters. The AG asked the court to dismiss the petition as one lacking in merit.

The Case of the National Assembly

50. The case of the National Assembly is set out in an affidavit sworn by Mr. Michael Sialai, the Clerk of the National Assembly, on 28th February 2020 and submissions filed on 2nd March 2020. The National Assembly sets out in Michael Sialai's affidavit the role of the PIC and the reasons for its involvement in the matters relating to the contract between the petitioners and NCPB. It states that due to the high public interest and concern on the manner in which the NCPB had handled the issue of importation of white maize following shortage of maize and drought in the country in 2004, the PIC resolved, in its sitting of 4th June 2013, to undertake an inquiry into the contract between the NCPB and the 3rd petitioner and the alleged indebtedness arising from the contract. It had requested the Auditor General to undertake a special audit, and the Inspectorate of State Corporations to investigate and submit a report to the PIC.

51. The PIC had carried out its inquiry in accordance with, *inter alia*, Standing Orders and Article 125 of the Constitution. It had heard evidence from witnesses, including directors of the 3rd petitioner who appeared and gave evidence on various dates between 8th July 2013 to 1st August 2013.

52. The National Assembly states that the 2nd petitioner was a member of the PIC, though he did not participate in the proceedings on the matter. He had been invited, in accordance with Standing Order 184, to give evidence as a witness before the PIC but he decided to adopt the evidence given by his co-directors. The petitioners had submitted to the jurisdiction of the PIC and the National Assembly under Article 95(2) and did not challenge the PIC recommendations from 2013 to date. The PIC had submitted its report to the National Assembly, where it was adopted on 20th November 2013. It had also made recommendations for agencies such as the EACC to carry out investigations in line with its mandate under Article 125.

53. The National Assembly argues that under Articles 1, 95, 124 and 125, it has power to investigate matters of public interest, which it carries out through its committees. The PIC, which investigated the matter between the petitioners and the NCPB, is established under Standing Order No 206 of the National Assembly, and it has the mandate to inquire into the matters at issue. This was a matter of public interest since the NCPB is a public organ funded by tax payers' money. The National Assembly had decided to investigate the matter as the NCPB accounts had been frozen and its property attached.

54. According to the National Assembly, the 2nd petitioner was and still is a Member of Parliament, and he was also a member of the PIC. He did not participate in its proceedings but was, as one of the directors of the 3rd petitioner, given an opportunity under Articles 47 and 125 to appear and give evidence. The National Assembly had not, contrary to the assertion by the petitioners, violated Articles 10, 27, 94, 157, 159 and 160 of the Constitution in carrying out its investigations but had done so in accordance with its constitutional mandate.

55. The National Assembly submits that the report of the PIC was adopted in October of 2013. As a member of the National Assembly as well as of the PIC, the 2nd petitioner knew of the report and its recommendations. The petitioners did not, however, challenge the mandate of the PIC then but submitted to it, and only sought to challenge the report in 2019. Its submission is that this is a demonstration of bad faith on the part of the petitioners given that the procedure of the National Assembly allow anyone dissatisfied with a report to approach the House and file a motion to challenge the report, which the petitioners did not do.

56. To the allegation that the National Assembly directed the EACC to investigate and prosecute, the response is that even without the report, the EACC could investigate, and the DPP prosecute. The National Assembly accordingly joined the other respondents in urging the court to dismiss the petition.

Petitioners' Submissions in Reply

57. The petitioners reiterated their submission that the PIC countermanded the judiciary since a decision had already been made by the High Court and Court of Appeal. They conceded, however, that the National Assembly has the mandate, under Article 95, to deliberate on issues of concern to the people, and that it does so through committees. Their submission, however, was that under Standing Order 206(6), the PIC did not have the mandate to carry out the investigations it did in this case.

58. The petitioners further conceded that the DPP has power to prosecute. However, such prosecutorial power is limited by Article 157(11) which provides that such power should not be abused.

59. It was also their submission that contrary to the assertions by the respondents, the correctness or legality of charges was not a matter that fell only within the mandate of the trial court. Reliance was placed on the case of **Njuguna S. Ndung'u** for the submission that courts can examine the correctness and legality of the charges.

Analysis and Determination

60. I have read and considered the pleadings of the parties, as well as their submissions and the authorities relied on. The main issue in this matter is whether this court should grant the orders that the petitioners seek. The first order sought is an order of certiorari to quash the recommendations against the petitioners made in a PIC report in October, 2013. They also seek a declaration that investigations and institution of criminal proceedings against them in Anti-Corruption Criminal Case No 31 of 2018 violates their rights under Articles 27 (1) and (2), 47 (1), 50 (1) and 159. Also sought is an order to quash the charge sheet in the criminal proceedings, as well as an order prohibiting the respondents from proceeding with their prosecution.

61. Together with the petition, the petitioners had filed an application for conservatory orders in which they sought orders to restrain the respondents from commencing the hearing of and proceeding with the prosecution of the petitioners in Anti-Corruption Criminal Case No. 31 of 2018 pending hearing of this petition. In the ruling dated 30th January 2019, the court (Ong'udi J) declined to issue the orders sought, noting that there was no obvious violation of the petitioners' rights that would justify the court granting orders to stay the proceedings before the trial court.

62. At the hearing of this matter on 4th March 2020, it emerged from the submissions of Counsel for the EACC that the criminal case against the petitioners was complete. What was awaited was the decision of the trial court, which had initially been scheduled for 3rd March 2020 but was rescheduled for 30th March 2020. Effectively therefore, as submitted by the EACC, the orders sought by the petitioners have been overtaken by events. The petitioners did not respond to or dispute this contention by EACC, and this court takes it that the criminal case was complete as submitted by EACC.

63. The first issue that I must address then is whether there is a basis for this court to consider this matter and issue the orders sought by the petitioners. The EACC undertook its investigation and made its recommendations to the DPP. The DPP has presented its case to the trial court which has completed its hearing and may well have rendered its decision. What, in the circumstances, remains for this court to determine, and what orders can it give?

64. In its decision in **John Harun Mwau & 3 Others v Attorney General and 2 Others, Petition No. 65 of 2011**, the court stated as follows:

> **"We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."**(Emphasis added)

65. Perhaps, initially, there was a basis for this petition- a claim of violation of constitutional rights. However, the court, in the petitioners' interlocutory application, considered the arguments advanced in a bid to stop the prosecution but found no basis for intervening. The case before the trial court proceeded, and is now complete. It was complete even as the petitioners persisted in presenting their arguments against it before this court on 4th March 2020. For this court to now issue the orders sought would be an exercise in futility. The court cannot stop investigations or prosecutions that have already been undertaken and completed.

66. For the sake of completeness, however, and in the event that the court is mistaken in reaching the conclusion that the core of this petition is now academic, I will address myself briefly to the arguments made against the investigations and prosecution, and against the report which is alleged to have precipitated the actions of the EACC and DPP.

67. First, the petitioners wish to quash the report of the PIC and the recommendations made therein in October 2013. It has been averred by Mr. Michael Sialai, the Clerk of the National Assembly, that the report was tabled and adopted in Parliament in November 2013. The 2nd petitioner, a director of the 3rd petitioner, was a Member of Parliament then, and a member of the PIC. He was given an opportunity to testify before the PIC, and was in Parliament when the report was adopted. As a Member of Parliament and of the PIC, he also must be deemed to have known the manner in which such a report can be challenged. Yet, the petitioners did not then challenge the report, nor did they do so for more than five years, until they filed the present petition in 2018. In my view, it is too late in the day for the petitioners to challenge the report. Even had the trial of the petitioners not been completed, this court would not have been satisfied that the petitioners merited a chance

to challenge the report this late in the day.

68. The petitioners have argued that the payments the subject of the prosecution against them were made pursuant to an arbitral award that was upheld by the court. They rely on the decision in **Nedermar Technology BV Limited v Kenya Anti-Corruption Commission & Another (supra).** In his decision, Nyamu J stated as follows:

> **"Common sense suggests that a commercial transaction can give rise to a criminal activity both before and after commencement. It would therefore be contrary to public policy to prevent fair and genuine investigations against individuals and companies relating to a transaction including a probe on the individuals involved. However, what is still a mystery to this court, is that KACC plans or intends to carry out general investigations touching on performance and value of the contract and not any alleged criminal elements against any individuals or companies attached to the Contracting parties. According to their declared intentions they propose to look into the performance or non-performance or execution of the contract including valuations, instructions, drawings and specifications just to outline a few. Yet under the terms of the contract any dispute on this (and the GoK has presumably filed a defence in The Hague setting out all its grievances) is a matter for the arbitral tribunal as per the arbitration clause in the agreement. This is why the petitioner contends that the principal aim in the role of the KACC is to domestically criminalize the transaction. In other words, KACC has not demonstrated clearly any defined criminal aspects of the contract taking into account the Attorney General's representations concerning the matters KACC now wants to investigate."**

69. The court went on to observe as follows:

> **"Neither the Honourable Attorney General nor KACC can run away from the opinion, and the representations made by the Attorney General in the areas now the subject matter of the intended investigations. They are birds of a feather! For example, has the GoK's defence in The Hague pleaded illegality, corruption, fraud or bribery by the applicant or its contractors or agents? KACC has not shown at all that, it bona fide, intends to carry out investigations for the purpose of vindicating criminal justice in this country. KACC intends to unravel the representations made by the Attorney General concerning the legality of the transaction on behalf of the GOK. KACC has urged that it has a statutory recovery role under the Act but to what extent can it use the court's processes either in this country or elsewhere to recover under an illegal contract?"** (Emphasis added)

70. As submitted by the EACC, the circumstances of the **Nedermar** case are clearly distinguishable from the facts of the present petition. While both raise questions relating to loss of public funds from public entities, the **Nedermar** case involved contracts entered into by the State with international companies in circumstances in which the State hobbled itself by choosing arbitration outside the jurisdiction, under foreign law, and with an express exclusion clause that barred the application of public law in Kenya. In this case, the contract, though containing an arbitration clause, did not exclude application of public law. Further, the EACC has demonstrated, in the words of the court in **Nedermar**, that it intended ***"to carry out investigations for the purpose of vindicating criminal justice in this country."*** The **Nedermar** case is therefore clearly distinguishable from this case, and it is therefore not of assistance to the petitioners.

71. The petitioners allege violation of Articles 10, 27, 47, 50 and 157 of the Constitution. They put forward the argument that the court has the power to issue the orders sought as the respondents have violated these provisions, and they submit that the court is under an obligation to examine the undisputed evidence upon which the petitioners lay a claim of violation of their rights. Should the documents establish violation, the court should find that the orders sought are merited.

72. I have considered the petitioners' averments and submissions against the judicial precedents on the circumstances under which the court can intervene to prohibit a prosecution. In his decision in **Republic v Director of Public Prosecution &another *ex parte* Patrick Ogola Onyango & 8 others** Onguto J stated as follows:

> **"116. The courts' twin approach in ensuring that the discretion to prosecute is not abused if only to maintain public confidence in the criminal justice system and the same time balancing the public interest in seeing that criminals are brought to book has led to rather contradictory principles.**
>
> **117. On the one hand the courts have consistently held that suspects investigated and charged before trial courts can only have their way before the trial court. It is stated that the trial court is the appropriate forum where evidence is to be tested and all defences raised: see the cases of Thuita Mwangi & 2 Others vs. The Ethics and Anti–Corruption Commission Petition No. 153 of 2013 [2014] eKLR and also Republic vs. Commissioner of Police & Another Ex p Michael Monari & Another [2012] eKLR where Warsame J (as he then was) stated as follows:**
>
> **"The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene."**

73. The court then went on to consider the decisions in which courts have taken a more liberal approach to the review of the decisions of the DPP, and concluded as follows:

> **"118. On the other hand, the courts have also been consistent that a prosecution which lacks a foundational basis must not be allowed to stand. The DPP is not supposed to simply lay charges but must determine on sound legal principles whether the evidence can sustain a charge prior to instituting the prosecution: see the cases of Republic vs Director of Public**

Prosecutions Ex p Qian Guon Jun & Another [2013] eKLR, Republic vs. Attorney General Ex p Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, Githunguri vs. Republic (Supra) and Republic vs. The Judicial Commission into the Goldenberg Affair and 2 Others Ex p Saitoti HC Misc. Application No. 102 of 2006.

119. In Republic vs. Attorney General Ex p Kipngeno Arap Ngeny (Supra), the court observed as follows:

"It is an affront to our sense of justice as a society to allow the prosecution of individuals on flimsy grounds. Although in this application we cannot ask the Attorney General to prove the charge against the accused, there must be shown some reasonable grounds for mounting a criminal prosecution against an individual. There must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the individual and put him to unnecessary expense and agony. The Court may, in a proper case, scrutinize the material before it and if it is determined that no offence has been disclosed, issue a prohibition halting the prosecution." (emphasis mine)

120. The same rather oxymoronic tide appears to obtain outside our jurisdiction. In Australia, in the case of William vs. Spautz [1992] 66 NSWLR 585 the High Court was of the view that proceedings lacking in any proper foundation amount to abuse of process and ought to be stayed. Yet in England, the House of Lords was emphatic in the case of Director of Public Prosecutions vs. Humphrey [1976] 2 ALL ER 497 at 511 that:

"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval…<u>If there is a power…to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances."</u>

74. The Court went on to conclude as follows

122. Thus while it appears true that the court has authority to prevent abuses of its process and safeguard an accused person from oppression and prejudice on basis of baseless charges, the courts have also been quick to observe and hold that where an indictment is properly drawn in accordance with established practice and pursuant to a decision by the DPP to institute the prosecution the rest must be left to the trial court clothed with jurisdiction to deal with it and the accused is thereat to present its defence.

123. It is these two principles in the context of challenges to prosecutorial powers of the DPP which lead to the inevitable inference that in matters of judicial review, it is not merely a question of process but also merit. How else would a court ascertain the presence of or lack of a foundational basis without questioning the merit of the DPP's decision." The court must reflect on both the law and the evidence to ascertain the foundational basis and in the process undertake a more substantive review of the decision by the DPP."

75. In the **Njuguna S. Ndungu** case whose holding this court is urged by the petitioners to follow, the Court stated that:

"[23] I have referred to the reasoning of the High Court in paras. 9, 10 and 11 above. It is apparent that the High Court left the matters raised by the appellant and the respondents to the trial court for determination without making any tentative and objective finding on the legality of the charges and the prospect of a conviction.

<u>The jurisprudence shows that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise of discretion sparingly</u>. (Emphasis added)

76. The petitioners are correct, therefore, that this court has power to examine the decision of the DPP to prosecute, and in doing so, enter into a merit inquiry. However, what is clear is that such an inquiry must be undertaken sparingly, in exceptional circumstances and in the clearest of cases.

77. Having considered the material placed before the court in this matter, I find that this is not such a matter as the court would be minded to inquire into the propriety of the decision of the DPP to prosecute. While the petitioners argue that their documents show that the payments to them were made pursuant to an arbitral award that was upheld by the court, there is material to suggest that such award was arrived at on the basis of documents that may have been fraudulent.

78. A specific document, invoice number 12215-CF-ERAD alleged to be in respect of storage charges for 40 tonnes of maize, and on the basis of which the petitioners were awarded storage costs of US$ 1,146,000.00, is cited.. This is one of the documents that was, I believe, at issue in the charges against the petitioners before the trial court. It is an issue that the petitioners have not responded to at all, maintaining only that there was an arbitral award in their favour. If storage charges were based on a fraudulent document, it may well be that no maize had been ordered, and the award in respect of alleged loss of profits may also have been unmerited and therefore a fraudulent acquisition of public funds. In the circumstances, this case does not qualify as one of the clear cases in which the court can be satisfied that the prosecution does not have a proper legal and factual foundation to mount a prosecution.

79. Accordingly, and in light of my earlier finding that the orders sought in this petition have been overtaken by events, the petition is without merit and is hereby dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 21st day of May 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent and pursuant to a notice issued on 19th May 2020. The parties have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE