REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

JUDICIAL REVIEW NO. 25 OF 2019

REPUBLIC.....APPLICANT

V E R S U S

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

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE CHIEF MAGISTRATES' COURT AT MILIMANI.....3RD RESPONDENT

STEPHEN OGAGA OSIRO.....EXPARTE APPLICANT

RULING

1. By a Chamber Summons dated and filed on 26th September 2019, Stephen Ogaga Osiro (herein after the applicant), moved this court seeking leave to apply firstly; for orders of certiorari to call, remove, deliver up to this Honourable Court and quash the exparte order issued at the Chief Magistrate's court Kibera law courts pursuant to **Misc. Application No. 1195/2015** filed on 7th July 2015 by the 1st respondent which relates to a specified period of interval but which order remains undated and could therefore and to date cannot be legally and or regularly effected. Secondly, that a prohibition order to issue to restrain the 1st and 2nd respondents whether by themselves or through their agents from giving effect to the said order obtained in **Miscellaneous Application No. 1195/2015** at the Chief Magistrate's Court at Kibera and using it in whatsoever manner.

2. Thirdly, that the Anti-Corruption Court in **Anti-corruption Case No. 32 of 2018 Republic v. Dr. Evans Kidero and 10 Others** presided over by the Honourable Mr. Ogoti (CM) be directed to expunge from the court records; the said order obtained in **Miscellaneous Application No. 1195 of 2015** and marked for identification as MF1.54(b); applicant's account opening documents produced as Exhibits 55(a-e); statements of account with NIC Bank produced as Exhibit 56 and, the certificate prepared by the bank official produced pursuant to Section 65(8) of the Evidence Act and produced as Exhibits 57 thereto.

3. Upon perusal of the said application, leave was granted exparte on 30th September 2019 with no order for stay of criminal court proceedings relating to this case. The applicant was directed to file a substantive Notice of Motion within fourteen (14) days.

4. Subsequently, the applicant filed his Notice of Motion dated 9th October 2019 which was later amended on 31st October 2019 and filed on 6th November 2019 just to add the title referring to the applicant as 'Exparte applicant' instead of 'applicant'.

5. Basically, the substantive application is brought pursuant to Articles 31, 37, 50 and 165(7) of the Constitution, Section 8 of the Law Reform Act, Part 1-11 of the Fair Administrative Action Act No. 17/15, Section 28 of the Anti-corruption and Economic Crimes Act No. 3/2003(ACECA) and Order 53 rules 3 and 4 of the Civil Procedure Rules seeking orders as hereunder;

> **i. That an order of certiorari do issue to call, remove, deliver up to this Honourable Court and quash the ex parte order issued at the Chief Magistrate's Court at Kibera pursuant to Miscellaneous Application No. 1195 of 2015 filed on the 7th July 2015 by the 1st Respondent and which relates to a specified period of interest but which order remains undated and could therefore and to date cannot be legally and/or regularly effected.**
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> **ii. That an order of prohibition do issue to restrain the 1st and 2nd Respondents whether by themselves or through their**

agents from giving effect to the said order obtained in Miscellaneous Application No. 1195 of 2015 at the Chief Magistrate's Court at Kibera and using it in whatsoever manner.

iii. That this Honourable Court be pleased to call for and examine the Record of the proceedings in Anti-Corruption Chief Magistrate's Court at Nairobi in Anti-Corruption Case No. 32 of 2018, Republic v. Evans Kidero and 10 others for the purpose of satisfying itself as to the circumstances leading up to the filing of this present application.

iv. That the trial Court at the Anti-Corruption Chief Magistrate's Court in Anti-Corruption Case No. 32 of 2018 Republic v. Evans Kidero and others presided over by the Honourable Douglas Ogoti be directed to expunge from the Court records the said order obtained in Miscellaneous Application No. 1195 of 2015 and marked for identification as MF1-54(b) together with the Applicant's account opening documents produced as Exhibit 56 and the certificate prepared by the bank official pursuant to Section 65(8) of the Evidence Act and produced as Exhibit 57 thereto.

v. That this Honourable Court do grant any other or further relief that it may deem fit and just under these circumstances.

vi. That costs of this application be in the cause.

6. The application is premised upon grounds stated on the face of it, statutory statement dated 26th September 2019 and a verifying affidavit sworn on 26th January 2019 by the applicant.

7. Upon being served with the application, the first respondent filed a replying affidavit sworn on 5th December 2019 by Andrew Lekamparish. Equally, the 2nd respondent filed his response vide a replying affidavit sworn on 12th November 2019 by Joseph Riungu Ass. Director of Public Prosecutions. Subsequently, parties agreed to dispose of the matter by way of written submissions. Due to Corona Pandemic and the closure of normal court operations, parties by consent agreed for the court to proceed and write its Ruling based on the submissions filed.

Exparte Applicant's Case

8. Institution of this suit revolve around the prosecution of the Exparte Applicant in **Milimani Chief Magistrate's Court in ACC No. 32/2018** where he is charged together with ten (10) others on various charges relating to corruption. Prior to his arraignment in court on 9th August 2018, the 1st respondent had through what is titled as Kibera Chief Magistrate's Court Misc. Application No. 1195/2015 obtained a warrant to investigate and inspect account No. 1000256249 NIC Bank held in the name of the Exparte Applicant for purposes of lifting copies of account opening documents, bank statements, cheques, deposit slips, bankers books, payment vouchers or any other relevant information in respect of the said account.

9. It is the applicant's averment that the Honourable Magistrate's undated order allowing the EACC's Notice of Motion filed on 7th July 2015 to inspect his account is not of any legal effect or consequence. He further averred that, the documents among them bank statements obtained from NIC bank could not be legally relied on as evidence against the exparte applicant as notice under Section 28 of ACECA was not served upon the applicant before the search and inspection of his account could be executed.

10. It is the applicant's further contention that; the Magistrate's Court was not competent to issue orders to search and inspect accounts; the order was not dated and therefore lacks legitimacy and, that the 1st respondent's move to obtain a search warrant and bank statements from the applicant's NIC account on 13th June 2015 without the requisite notice under Section 28 of ACECA was irregular and illegal.

11. He stated that the certificate prepared by the bank official under Section 65(8) of the Evidence Act dated 13th June 2015 confirmed that the bank official purportedly printed out statements for the period beginning 1st October 2010 to 15th October 2015 which suggest that the bank printed out futuristic transactions and/or transactions that had not yet been effected by him a situation untenable in law.

12. Further, he contended that the certificate by the bank official suggest that he printed electronically account opening documents from their computer system for account No. 1000256249 whereby the account opening documents produced as Ex. No. 55 (G.R) in **Criminal Case No. 32/2018** now ongoing suggest that the account opening documents were manually produced and given for account No. (A3130001274).

13. Based on the above allegations which the applicant referred to as serious procedural irregularities visited upon him by the respondents, he sought court's intervention through certiorari and prohibition orders to put to halt what he referred to as gross violations of his privacy protected under Article 31 of the Constitution. That the respondent's actions are ultravires and this court under Article 165(7) of the Constitution has supervisory jurisdiction to so direct or quash and prohibit any illegal actions carried out.

14. That despite spirited objection against the production of the impugned documents obtained vide an irregular court order, the trial court presiding on ACC No. 32/2018 dismissed the same vide its ruling dated 25th July 2019 thus admitting them as exhibits.

15. He therefore urged; the court to quash the exparte and undated order in the **Chief Magistrate Kibera Misc. Application No. 1195/2015**; the Honourable Court to call for and examine court's proceedings in **ACC No. 32/18** and direct that the same be expunged from court records; the said order obtained in **Misc. Appl. No. 1195/15** (marked MF1.54(b)) together with the applicant's account opening documents produced as Ex. 56 and certificate produced by the NIC bank official produced as Ex. 57 be expunged also from the court records.

16. In support of the application, Mr. Mtange appearing for the applicant filed his submissions on 16th December 2019 reiterating the averments contained in the affidavit in support of the application. Counsel basically focused his submissions on issuance of an undated court

order in Misc. Appl. No. 1195/15 Kibera Court, access to the applicant's account prior to obtaining the court order and, failure to serve the applicant with the requisite notice under Section 28 of ACECA.

17. Counsel further submitted that Misc. Appl. No. 1195/2015 was filed in Kibera Law Courts and not Milimani as reflected in the heading of the Notice of Motion.

18. In support of his argument regarding issuance of notice pursuant to Section 28 of the ACECA, counsel referred the court to the Court of Appeal decision in the case of **DPP v Professor Tom Ojienda and 3 Others 2019 eKLR Civil Appeal No. 109/2016** where the court stated that the legislature's intention in enacting Section 28 of ACECA was for a person of interest or suspect to be made aware of the intended order by EACC against him by issuing requisite notice as envisaged under Section 28 before any action is taken against him. Counsel further submitted that the uncertified court order in **Misc. Appl. No. 1195/2015** and bank statements do not meet the test under Section 68 of the evidence Act.

1st Respondent's Case

19. In response to the Notice of Motion, the 1st respondent filed a replying affidavit sworn on 5th December 2019 by Andrew Lekamparish a forensic investigator working with the Ethics and Anti-Corruption Commission. It was deposed that the exparte applicant's prayers cannot issue in law as the matter is time barred and that acts against which the exparte applicant is seeking to prohibit took place over four (4) years ago.

20. He further averred that the application was filed six (6) months after the impugned orders were made and that the exparte applicant has since been charged and nine (9) witnesses already testified hence a certiorari order cannot issue. It was further deponed that prohibition orders can only issue where the act complained of has not taken place.

21. Touching on the illegality of the undated order in **Misc. Appl. No. 1195/2015,** the deponent stated that the same was not challenged by way of revision since 7th July 2015 when it was issued by a competent court. Concerning whether the order issued under Misc. No. 1195/15 was valid, it was contended that the Commission wrote to the court seeking for a record of court proceedings and the court did supply the same with a certified copy (see annexture (1 – a and b) confirming that the suit and order were properly filed and issued respectively. He further contended that failure to date an order is a mere technicality which is curable under Article 159(2)(2)(d) of the Constitution.

22. Turning into the allegation that the applicant's constitutional rights under Article 31 were violated, Mr. Andrew deposed that the applicant should have filed a Constitutional Petition before a Constitutional Court for a declaration and not Judicial Review which is concern with due process and not merits of a case.

23. Lastly, it was deposed that the applicant has not demonstrated any malice or abuse of office on the 1st respondent's part while carrying out its statutory and constitutional mandate of investigation and that the applicant has not proved any prejudice suffered or likely to be suffered as a result of the impugned actions.

24. In submission, M/s Shamalla appearing for the 1st respondent filed her submissions on 24th February 2020 restating the averments contained in their replying affidavit to the application. Counsel submitted that the applicant has not met the conditions set out under Order 53(2) and (7) of the Civil Procedure Rules and in particular the need to file for leave to apply to quash the action complained of within six (6) months from the time the act was made or executed. That to file the application after six months is contrary to Section 9(2) of the Law Reform Act which is couched in mandatory terms. In support of this proposition, counsel referred to the holding in the case of **Republic v. the Judicial Inquiry into The Goldenberg Affair Exparte Hon. Mwalulu and Others HCMA No. 1279 of 2004 (2004)eKLR** and **Republic v. The Commissioner of Lands Exparte Lake Flowers Ltd Nairobi HC Misc. Appl. No. 1235/1998**; and **Republic v. Kenya Civil Aviation Authority and Another Exparte Elite Earthmovers Limited (2017)eKLR** where the court held that the provision relating to time limitation in Judicial Review proceedings is not a procedural one but a substantive one hence must be obeyed.

25. Regarding the prayer for prohibition, M/s Shamalla submitted that the applicant must prove that: the act being restrained has not taken place or occurred and that, the decision, order, proceedings being restrained was made in excess of the body's or tribunal's jurisdiction or in contravention of the law. To support this position, reliance was placed on the decision in the case of **Kenya National Examination Council vs. Republic Exparte, Geoffrey Gathenji Njoroge and 9 Others (1997)eKLR** where the court held that:-

> **"…. an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition."**

26. Counsel submitted that the court that issued the orders in **Misc. Appl. 1195/15** was competent and therefore acted within jurisdiction and that it was on the strength of that order that the bank allowed the 1st respondent to conduct investigations leading to the preferment of criminal charges against the applicant and ten (10) others.

27. Counsel submitted that this court cannot purport to prohibit institution of or the act of conducting investigations which have already been done, charges preferred and hearing already at an advanced stage. Further, M/s Shamalla submitted that the applicant should have challenged **Misc. Appl. No. 1195/15** on Appeal or Revision and not through judicial review proceedings.

28. Touching on lack of notice under Section 28 of ACECA and reliance on the decision of **DPP v Prof. Tom Ojienda (supra)**, counsel submitted that the Court of Appeal decision in Prof. Tom Ojienda case has since been stayed in **Supreme Court Civil applicationNo. 21/2019 EACC v. Prof. Tom Ojienda and 2 Others** delivered on 7th February 2020. M/s Shamalla therefore contended that notice was not necessary in the circumstances of this case and the Court of Appeal in Prof. Tom Ojienda Case is not tenable.

29. As to the confusion relating to the court that issued the order, counsel submitted that the order was issued at Milimani Law Courts and not Kibera as indicated on the face of it terming it as a typographical error occasioned by confusion when preparing the application. That the official stamp of Milimani Law Courts on the application is clear that the order was issued at Milimani and not Kibera.

30. As to the failure to date the order issued in **Misc. Appl. No. 1195/15,** counsel asserted that the same was a curable omission under Article 159(2) (d) of the Constitution. Lastly, on the issue of expunging the order made in **Misc. Appl. No. 1195/2015** from the court record in ACC No. 32/18, counsel opined that there is no order expunging proceedings in Misc. Application No. 1195/2015 as the court that issued the order had become functus officio.

2nd Respondent's case

31. In opposing the application, the DPP (2nd respondent) filed a replying affidavit sworn on 12th November 2019 by Joseph Riungu who deposed that the order issued on 7th July 2015 by Kibera Chief Magistrate's Court in Misc. Application No. 1195/2015 was legally and procedurally issued by a competent court.

32. That the DPP independently reviewed the evidence submitted by the 1st respondent under Section 35 of the ACECA and found the applicant criminally liable hence preferred criminal charges without anybody's control, consent or direction. He further averred that the orders of Judicial Review sought cannot issue as the acts complained of have already been executed.

33. Regarding ground 1 of the Notice of Motion dated 31st October 2019 that suggest that NIC bank statements were printed on 13th June 2015, he contended that the print date as captured on the face of each page of the bank statement at the top right hand side corner is 15th October 2015 which is in compliance with the court order.

34. As to the discrepancy in the account number reflected in the order in Misc. Application no 1195/2015, account opening documents and the bank statement, it was deponed that PW9 while testifying in ACC No. 32/18 clarified the position that the bank had changed its case banking system and all customer accounts were automatically changed and that the applicant was aware of the situation.

35. As regards violation of the applicant's rights under Article 31 of the Constitution he averred that, there was no proof of such violation and there were no procedural irregularities demonstrated.

36. In submission, Mr. V. Owiti prosecution counsel appearing for the 2nd respondent literally adopted the averments contained in the replying affidavit sworn by Joseph Riungu. Learned counsel broke down issues for determination into three (3) namely:-

a. Whether the impugned order was valid.

b. Whether the applicant's right to privacy was violated.

c. Whether the difference in account numbers is explainable.

37. Concerning the validity of the impugned order, Mr. Owiti submitted that it was regularly and procedurally issued. That the requirement for notice to issue under Section 28 of the ACECA as held in **DPP v. Prof. Tom Ojienda** is no longer applicable as the same holding had been stayed by the Supreme Court. He further submitted that the order in question having not been challenged on appeal or revision is still valid.

38. As concerns the omission to date the order in **Misc. Appl. No. 1195/15**, learned counsel contended that PW9 while giving evidence in **ACC No. 32/15** gave reasonable explanation. Counsel also submitted that the application is time barred as it was filed six (6) months after the action.

39. On the alleged violation of the applicant's rights under Article 31 of the Constitution, counsel submitted that the applicant did not state with precision the manner in which the alleged right was violated. To support that argument, counsel referred the court to the case of **Japheth Ododa Origa v Vice Chancellor University of Nairobi and 2 Others (2018)eKLR**.

40. As to differences in the account number, counsel reiterated the averment made by Joseph Riungu in his replying affidavit and the testimony of PW9 in **ACC No. 32/2018**. Finally, counsel submitted that the applicant had not proved any illegality, incorrectness nor impropriety to warrant revision of the orders for admission of exhibits in **ACC No. 32/2018**.

Analysis and Determination

41. I have considered the application herein, responses thereto and parties' oral submissions. Issues that crop up for determination are:-

a. **whether the prayers sought for certiorari and or prohibition orders are time barred.**

b. whether the exparte applicant has met the threshold for grant of the reliefs sought.

c. whether the exparte applicant was entitled to notice under Section 28 of the ACECA before the 1st applicant could conduct search and inspection of his bank account.

d. whether the impugned exhibits admitted in ACC No. 32/2018 against the exparte applicant in Republic v Evans Kidero and 10 others should be expunged from the court record.

Whether the prayers sought for certiorari and prohibition orders are time barred

42. The law governing Judicial Review proceedings which is a common law principle but has progressively evolved more particularly under the new constitutional dispensation is Order 53 of the Civil Procedure Rules as well as Sections 8 and 9 of the Law Reform Act.

43. Order 53(2) of Civil Procedure Rules provides that:-

> **"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal; the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."**

44. Section 9(2) of the Law Reform further provides that:-

> **"Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.**
>
> **Sub-Section 3-**
>
> **In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or Judge may adjourn the application for leave until the appeal is determined or the time for appealing h as expired."**

45. In the instant case, the order sought to be granted by way of certiorari was issued by a Magistrate's Court pursuant to Notice of Motion dated and filed on 7th July 2015. The order issued consequent thereto authorizing the 1st applicant to search the exparte applicant's bank account held at NIC was not dated. However, both parties are in agreement that the orders were issued the same day the application was filed. This is born out of the parties' pleadings in which the applicant only challenges the legality of an undated order and not its existence nor the date it was issued.

46. Taking the material date when the impugned order was issued whether legal or not, the six months period would start running from 7th July 2015. It is clear from the record that leave to institute judicial review proceedings was lodged on 26th September 2019 and a substantive application filed on 11th October 2019. Obviously, the period is far in excess of the six (6) months prescribed under Order 53(2) and (3) of the civil procedure rules and Section 9(2) and (3) of the Law Reform Act. Considering the wording of the said provisions, the applicant would be expected to address the issue of time factor which he and his lawyer avoided both in their pleadings and submissions.

47. In the case of **Wilson Osolo v John Ojiambo Ochola and Another (1996) eKLR Civil Appeal No. 6/1995** the Court of Appeal Nairobi while addressing a similar situation where the applicant had filed a judicial review application after six (6) months and had sought extension of time stated that;

> **"Mr. Niare then in a separate suit (H. C. Miscellaneous Civil Case No. 35 of 1983) applied for extension of time to file the application for such leave. That application was heard ex-parte by Platt J. (as he then was) and was granted. There was quite clearly a fundamental error on the part of the Superior Court in granting such extension of time as Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed."**

48. Similar position was held in the case of **Ako v Special District Commissioner Kisumu and another (1989)eKLR Civil Appeal No. 27/1989** Court of Appeal Kisumu where the learned Judges had this to say:-

> **"It is plain that under sub-section (3) of section 9 of the Law Reform Act Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits for enlargement of time. That is the basis of the contention that the prohibitive nature of sub-section (3) of section 9 of the Act is capable of bearing such a liberal interpretation as would make it permissible for the court to enlarge time beyond the period of six months. We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of subsection (3) of section 9 of the Law Reform Act."**

49. To emphasize the mandatory nature of Section 9(3) of the Reform Act, the Court of Appeal was categorical in **Wilson Osolo v John Ojiambo Ochola and another (supra)** that there is no law that provides for enlargement of time when it comes to time limitation under the said provision. At page 2 paragraph six of its judgment the court stated that:-

"There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (Cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a Limitation period. But this Act has no relevance here…It therefore follows that the extension of time granted by Platt J. was a nullity. Any steps taken thereafter are therefore of no consequence."

50. From the above quoted statutory provisions and case law, it is clear that the orders sought cannot issue on account of time limitation. As stated above, the applicant did not address this crucial issue. Although leave was granted exparte, the same does not validate the substantive application hence the prayers sought can not apply courtesy of Section 9(3) of the Law Reform Act and Order 53(2)&(3). See also **Republic v. Council of Legal Education & another Exparte Sabiha Kassamia and another (2018)eKLR**.

51. However, some superior courts have held contrary views against courts' rigidity in construction of Order 53(2) of the Civil Procedure Rules and Section 9(3) of the Law Reform Act by extending a window of flexibility in terms of access to justice through enlargement of time. The applicant herein did not even attempt to seek enlargement of time. In addressing and promoting the spirit of the Constitution on Fair Administrative Action under Article 47 and Article 48 on the right to access to justice, Justice Mativo did allow enlargement of time after expiry of six months in the case of **Republic v Kenya Revenue Authority Exparte Stanley Mombo Amuti (2018) eKLR** where he held that;

"It is my conclusion that in an application for extension of time such as the one before me, all that an applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court or sufficiently account for the delay. It will also be a consideration that the impugned decision seeking to be challenged violates or threatens to violate the Bill of Rights or violation of the Constitution."

52. Whereas I am in agreement with Justice Mativo's holding that in extreme situations e.g sickness in which an applicant could not reasonably under normal circumstances be expected to institute judicial review proceedings within the prescribed time, the situation here is different as no application for enlargement of time was made and therefore no explanation rendered as to the justifiable cause for the delay.

53. In the circumstances of this case and considering clear mandatory provisions of the law enunciated by the Court of Appeal decisions quoted above, this court cannot invoke judicial discretion to interpret otherwise. Where the provisions of the law are unambiguous on the face of it, a court has no business importing any other interpretation other than to interpret the law as it is. For those reasons, I am in agreement with the 1st and the 2nd respondents that the suit herein is time barred and the prayers sought are incapable of granting.

Whether the exparte applicant has met the threshold for grant of reliefs sought

54. Assuming that the applicant had filed the suit within the prescribed time frame which is not, has he met the requisite criteria to persuade this court grant the reliefs sought. Grant of Judicial Review remedy is subject to proof of certain well settled criteria in law. It is therefore incumbent upon the applicant to discharge that onerous duty by establishing that, the impugned act or omission is illegal, irrational, procedurally improper, irregular, incorrect, malicious or amounts to abuse of office or generally the act is ultravires thus offending the principles of natural justice. Therefore, Judicial Review remedy is basically concern with weaknesses in the process making exercise and not the merits or demerits of the act or omission complained of.

55. In the case of **Pastoli v. Kabale District Local Government Council and Others (2008)2EA 300** the Court had this to say:-

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v. Minister for the Civil Service (1985)AC 2 …"

56. Also in the case of **Municipal Council of Mombasa v. Republic and Umoja Consultants Ltd, Nairobi Civil Appeal No. 185/2001 (2002)eKLR** the court held that:-

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

57. The applicant is seeking certiorari order in attempt to quash the decision of the trial court in granting exparte orders in **Misc. Application No. 1195/95**. The objective of certiorari order as a judicial review remedy is to prevent abuse of power by an inferior court, tribunal or public body. The applicant should convince this court that the trial Magistrate acted in excess of authority or jurisdiction or in breach of material justice.

58. The impugned order herein was obtained pursuant to Sections 118 and 121(1) of the Criminal Procedure Code and Section 23 of the Anti-Corruption and Economic Crimes Act. Section 118 of the Criminal Procedure Code bestows powers upon a Magistrate's Court to issue search warrants in respect of an offence being investigated for the investigating officer to enter into any place, building, shop, aircraft, vessel, box or receptacle and search the thing prescribed in the search warrant. Section 118A does empower the court to issue orders exparte. The two provisions are further solidified by Section 23 of ACECA which provides EACC investigating officer's powers similar to those provided to police officers under the Evidence Act and Criminal procedure Code for detection, prosecution and investigation of crime.

59. Under the two provisions, the 1st respondent did apply exparte as required by the law for search warrants and inspection of account held by the applicant. Although the hearing of the application and order arising from **Misc. Appl. No. 1195/95** reads Kibera Law Courts, the same was an oversight as it should have read Milimani and not Kibera. This is clear from the 1st respondent's replying affidavit annexture AL.1-a in which the order was certified by Milimani Law Courts as the source of the order. I do not find this to be a serious omission and no prejudice suffered by the applicant.

60. Equally, the applicant has not demonstrated any illegality or procedural wrong committed by the Magistrate's Court in issuing the order. The court had jurisdiction hence competent to issue the impugned orders. It acted in accordance with the law which provides for consideration of such applications exparte. I do not see any procedural breach committed by the trial court.

61. Regarding the issue of undated order which has already been executed, the same is already overtaken by events as the search was undertaken and various documents including bank opening documents and bank statements obtained and tendered before the trial court. Reliance of these documents is within the remit of the trial court to determine. I will however deal with it below under the admissibility of exhibits.

62. Regarding prohibition, this remedy is not concerned with reviewing errors that have already occurred or inquiry into past irregularities. It looks into the future as it is meant to contain or stop an anticipated event and is completely not available for a decision already made. This position was upheld in the case of **Kenya National Examiantions Council v Republic exparte Geofrey Gathenji Njoroge and others (supra)** where the court held that:-

> **"Where a decision has been made, whether in excess or lack of jurisdiction or whether the violation of the rules of material justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of a contemplated decision."**

63. A look at the order sought to be prohibited reveals that it was made on 7th July 2015, search conducted and subsequently the applicant charged the year 2018. Basically, there is nothing to stop from execution or from being executed by the 1st and 2nd respondent. The order of prohibition is not applicable in the circumstances.

Whether the exparte applicant was entitled to notice under Section 28 of the ACECA before the 1st applicant could conduct search and inspection of his bank account

64. It is the applicant's argument that before the search and inspection of account could be carried out, the exparte applicant ought to have been served with notice pursuant to Section 28 of ACECA. Section28 provides that:-

> **"Sub. Sec. 1 – the Commission may apply, with notice to affected parties, to the court for an order to:-**
>
> **a. require a person, whether or not suspected of corruption or economic crime, to produce specified records in his possession that may be required for an investigation; and**
>
> **b. require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not."**

65. According to Mr. Mtange for the exparte applicant, the above requirement is mandatory pursuant to the holding of the Court of Appeal decision in **DPP V Prof. Tom Ojienda case** (supra). M/s Shamalla however countered the argument by referring to the Supreme Court decision between the **EACC v. Prof. Tom Ojienda (supra)** where the Court of Appeal decision was stayed.

66. Whereas Section 28 of ACECA refers to service of notice upon a person under investigation, the same does not oust Section 118, 118A, 121 of the Criminal Procedure Code and Section 180 of the Evidence Act which confers authority upon the 1st respondent to conduct investigation against any person suspected or alleged to have committed a crime.

67. Indeed, the very purpose for which the legislature enacted Sections 118, 118A, 121 of the CPC and 180 of the evidence would be rendered superfluous if notice were to issue in advance against people suspected of or being investigated over engaging in criminal conduct. It will definitely amount to alerting a wrong doer of the impending investigation hence cover up his inadequacy by concealing any implicating evidence or materials. This court will not serve any public interest if suspects of crime were to be alerted of pending sting operation/s. See **Mape Building and General Engineering v. Attorney General and 3 Others (2016)eKLR** where the court stated that:-

> **"The 2nd Respondent moved the court. Statute law under Section 118 of the Criminal Procedure Code and Section 180 of the Evidence Act allowed them to do so. The application could be made ex parte for very obvious reasons. To hold otherwise would not be in the public interest. It would indeed destroy the very fabric of forensic investigations. No suspect or offender, knowing that there existed evidence which if not destroyed or vanquished would lead to his guilt or liability, can be expected to sit back once notified of possible investigations. The suspect would rid the evidence out of sight and reach. Consequently, the investigator must where there is a foundational basis be allowed and be in a position to seize and secure the evidence."**

68. It is no wonder that the Supreme Court in **The Ethics and Anti-Corruption Commission v. Tom Ojienda S.C T/A Prof. Tom Ojienda and Associates(Supra)** stayed the Court of Appeal decision which held that service of notice under Section 28 of ACECA was mandatory. Further, in the case of **George Onyango Oloo v. EACC and another ACEC Misc. Criminal Application No. 29/2019** the Court found that issuance of exparte order was within the statutory provisions under Section 118, 118A and 121 of the CPC and 180 of the Evidence Act. The

court further held that public interest should prevail when investigations are executed to achieve a lawful purpose.

69. It is my humble finding that there was nothing irregular, improper or illegal in issuing the orders sought to be quashed . Accordingly, I am of the view that notice was not necessary and that no prejudice was suffered.

70. As to whether the applicant's right to privacy was violated in breach of Article 31 of the Constitution, the applicant did not with precision establish the manner in which his rights were violated when a lawful process was executed. **See Japhet Ododa Origa V Vice Chancellor University of Nairobi (supra.** In any event, public interest supersedes individual rights**.** The 1st and 2nd respondents have a mandatory constitutional and statutory obligation pursuant to Articles 79 and 157 of the Constitution respectively to investigate crime and prefer criminal charges against any person suspected of committing a crime. Carrying out investigations is a lawful duty and its upon the court to reasonably balance individual and public interest and strike a balance while fully aware that public interest triumphs over private interest. In this case I do not find any specific private interest violated or threatened to be violated.

Whether the impugned exhibits admitted in ACC No. 32/18 the exparte applicant and 10 others should be expunged from the court record

71. It is the exparte applicant's prayer that the search order, his account opening documents and bank statements obtained through the alleged illegal order should be expunged from the court record. Similar issues were raised before the trial court in ACC 32/18 when the applicant raised an objection resisting admission of the said exhibits on grounds of non-compliance with Section 68 of the Evidence Act.

72. It is trite that admission of exhibits before a trial court is the duty of the presiding Magistrate or Judge. Whether the documents are properly admitted or not is a matter for the trial court to determine. It cannot be an issue to call for Judicial Review remedy. There is a suitable remedy which is lodging an appeal upon completion of the hearing. If courts were to entertain every application challenging admissibility of exhibits, it will be akin to entertaining interlocutory appeals through the back door. See **Thomas Patrick Gilbert Cholmondeley v. Republic (2008)eKLR** where the Court of Appeal stated that:-

> **"In ordinary criminal trials, there is generally no interlocutory appeals allowed for Section 379(1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person: … the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused."**

73. Relying on the **Cholmondeley case**, Justice Mumbi in the case of **ACEC Appeal No. 17/2019 Nairobi (UR)** held that:

> **"In the circumstances, it is my view and I so hold that the present appeal is improperly before me. The appellant has no right of appeal to this court on an interlocutory appeal relating to the admissibility or otherwise of documents in a trial before the Magistrate's Court."**

74. Whether the order for search, bank opening documents and bank exhibits were properly admitted as exhibits before the trial court, the same cannot be elevated to an appeal, revision or Judicial Review. To allow this trend will be akin to micro managing the trial courts thus encouraging unnecessary litigation before the High Court hence clogging justice system and effectively undermining Article 159 of the Constitution and overriding objective under Sections 1A and 1B of the Civil Procedure Act on expeditious delivery of justice. For those reasons, it is my holding that, admissibility of exhibits should be left to the ambit of the trial court to determine.

75. In a nutshell, I do not find any merit in the application herein. The applicant has failed to meet the threshold for grant of Judicial Review orders hence the suit is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JUNE, 2020.

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J. N. ONYIEGO

JUDGE