



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**ACEC PETITION NO 4 OF 2019**

**BETWEEN**

**ANTONY JUMA OPONDO.....PETITIONER/APPLICANT**

**VS**

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

**THE OFFICE OF THE DIRECTOR OF**

**PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petitioner filed the petition dated 21<sup>st</sup> January 2019 seeking among others two declaratory orders, a permanent injunction, and order of prohibition. Alongside the petition he filed the Notice of Motion of even date seeking the following orders:

*(i) This Honorable court be pleased to issue a conservatory order against the Respondents whether by themselves, their servants, their employees, their assigns and/or agents from confuting any further investigations, intimidating, arresting, charging and or in any other manner howsoever affecting the Applicant's personal liberty and movement until the hearing and determination of this Petition.*

*(ii) The costs of this application be provided for.*

2. The application is supported by the grounds on its face plus the Applicant's supporting affidavit. The main ground he has raised is that the investigations against him which are founded on witch hunt and malice have taken almost two years to complete. He is therefore apprehensive that he could be arrested and charged anytime on trumped up- charges.

3. He has deponed that he was employed by the 1<sup>st</sup> Respondent on 1<sup>st</sup> January 2015, and thereafter appointed as an investigator (AJ 1 & 2). That on 27<sup>th</sup> April 2017, he received some information in respect to Mwananchi Credit Ltd in respect to tax evasion by the said company (AJO3). He conducted a preliminary inquiry and filed a report at their report center on 2<sup>nd</sup> May 2017.

4. On 4<sup>th</sup> May 2017 he was confronted by the 3<sup>rd</sup> Respondent to record a statement with regard to allegations of soliciting a bribe of Kshs 15M, in respect to the said investigations, (AJO4). On 16 May 2017 he received from the 4<sup>th</sup> Respondent a Notice to show cause why disciplinary action should not be taken against him (AJO5), and he responded on 5<sup>th</sup> June 2017 (AJO6).

5. He subsequently tendered to the 1<sup>st</sup> Respondent a resignation letter on 1<sup>st</sup> February 2018 (AJO7) which was accepted (AJO8). He was issued with a certificate of service dated 12<sup>th</sup> March 2018 (AJO9). He immediately secured another employment with a Law Firm (AJO 10). However, before he could even report for work the 1<sup>st</sup> and 3<sup>rd</sup> Respondents made a malicious report to his new employer and he lost the job (AJO11).

6. He further avers that the investigations by the Respondents have taken too long and this has affected him mentally and psychologically (AJO12). That the 3<sup>rd</sup> Respondent sought warrants from the C.M's court (AJO14) to investigate his bank accounts, but he has never known the outcome of the said investigation.

7. He therefore depones that the actions by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents amount to holding him in servitude and abuse of his dignity as a

result of which his rights under articles 28 and 30 of the Constitution are violated.

8. In his oral submissions Mr. Muthama for the Applicant reiterated what the Applicant has stated in his affidavit. He further submitted that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Respondents in their replying affidavit have stated that the investigations are complete and the file forwarded to the 2<sup>nd</sup> Respondent. He added that in the grounds of opposition the 2<sup>nd</sup> Respondent has denied receiving the file.

9. Counsel also referred to an Application Misc No 3996/17 in the C.M.s court Milimani for investigation of the applicant's accounts. It was alleged that the Applicant had received money yet he was not an employee of the 1<sup>st</sup> Respondent then.

10. He referred to **Petition No 24 of 2016 Jeremiah Meme and Another vs DPP & Others** where the late Justice J.L. Onguto found the following to be the main principles to consider in issuance of a conservatory order. The Judge stated thus:

**Where faced with an application for conservatory orders, the guiding principles to be taken into consideration by the court are now relatively clear. I may shortly state the main principles as:**

**(i) The applicant has to demonstrate a prima facie case with a likelihood of success and further that the applicant would suffer prejudice as a result of the violation.**

**(ii) The court must consider whether allowing the application for conservatory orders would assist in enhancing constitutional values ad objects.**

**(iii) The court is also to consider the public interest in the matrix of the facts.**

**(iv) The court is also to consider whether the substratum of the petition would be rendered nugatory if he conservatory orders are not granted and**

**(v) Where necessary the court may invoke the doctrine of proportionality, even where the other requirements are not met.**

He therefore submitted that this court has jurisdiction and powers to stop any party that acts without the law.

11. He also referred to the case of **R v EACC & Another** exparte **Jennifer Karii Njagi Misc application No 19 of 2016** where the court held that to investigate a person for 8 months over a simple matter amounts to violation of his rights under articles 28 and 30 of the Constitution.

12. Counsel wondered to whom the soliciting was made i.e whether it was to a director or a counsel. It was therefore his submission that the Applicant had not been accorded a chance to respond to the new allegations.

13. The application was opposed by all the Respondents. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed a joint replying affidavit by One Rodgers Akaki, an assistant director of operations division and an investigator with the 1<sup>st</sup> Respondent. He restated the 1<sup>st</sup> Respondent's mandate in investigating corruption and economic crimes related cases.

14. He averred that prior to the Applicant's resignation the 1<sup>st</sup> Respondent had received a complainant alleging that he had solicited for a bribe of Kshs 15M from the director of Mwananchi Credit Ltd in order to compromise on an alleged investigation of tax evasion involving a colossal amount in tax.

15. That the Applicant was informed of the complaint and he duly recorded a statement (AJO 4). This was followed by a Notice to show cause as provided for in the 1<sup>st</sup> Respondent's Human Resource Policies (AJO5 and AJO6). The deponent denied that the 1<sup>st</sup> Respondent gave any report to the Applicant's prospective employer.

16. He averred that the investigations have been completed and a recommendation made to the 2<sup>nd</sup> Respondent for necessary action. The investigations cannot therefore be stopped.

17. In her oral submissions M/s Kenduiywa for the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents reiterated what has been stated in the replying affidavit. She added that the report and recommendations by the 1<sup>st</sup> Respondent had been made and forwarded to the 2<sup>nd</sup> respondent, who may not have received it because of the laid down procedures.

18. Counsel submitted that the Applicant had not established a prima facie case to warrant the orders being sought. It was their case that the Respondents were simply exercising their constitutional mandate in carrying out the investigations. That the issues raised by the Applicant were matters for the trial court in the event that any charges are preferred. She added that the issue of who the Applicant solicited money from were matters of evidence. Further that any issues in respect to the application before the Chief Magistrate's court should be addressed before the said court.

19. In reference to the case of **Jennifer Karimi Njagi** (supra) referred to by Mr. Muthama for the Applicant she submitted that he had not indicated under what circumstances the court had made that finding. She referred the court to the case of **Bob Kephias Otieno and another vs DPP & Anor ACEC petition No 18 of 2017** on conservatory orders.

20. Mr Ashimosi for the 2<sup>nd</sup> respondent relied on their grounds of opposition and submissions filed. He submitted that though the 1<sup>st</sup> Respondent had on 8<sup>th</sup> February 2019 forwarded its file, the same was yet to be received by the 2<sup>nd</sup> Respondent who should be given an opportunity to respond. Such an opportunity would enable him carry out his mandate as he had not done anything to warrant the orders sought against him.

21. In a quick rejoinder Mr. Muthama submitted that no complaint was annexed to the replying affidavit yet there are inconsistencies on the issue of the report. He submitted that the Applicant has established a prima facie case and the order sought ought to be granted since the Applicant lost his job and his health has deteriorated. On the application before the Chief Magistrates's court he submitted that the same was exparte and the Applicant was never served.

### **Analysis and determination**

22. The undisputed facts are that:

- The Applicant was an employee of the 1<sup>st</sup> Respondent having been employed on 1<sup>st</sup> January 2015.
- He recorded a statement on 4<sup>th</sup> May 2017 with the 3<sup>rd</sup> Respondent in respect to a complaint touching on his integrity.
- Subsequently on 16<sup>th</sup> May 2017 he was served with a Notice to show cause, and he responded to it on 5<sup>th</sup> June 2017.
- He resigned from the 1<sup>st</sup> Respondent's employment on 1<sup>st</sup> February 2018.
- He was subsequently employed by the Law firm of Cecil Miller & Associates w.e.f 5<sup>th</sup> March 2018. The same was terminated on 12<sup>th</sup> February 2018.
- The Applicant has been under investigation in respect to soliciting for a bribe allegations.

23. The Applicant has therefore filed this application seeking the above stated conservatory orders pending the hearing of his petition. In essence he seeks orders to stop the Respondents from conducting any further investigations, intimidating, arresting or charging him.

24. The Applicant in his supporting affidavit confirmed that he had been notified of the complaint against him to which he recorded a statement. In the replying affidavit the deponent has also confirmed the existence of the said complaint. It is not lost to the mind of this court that as at the time of the said complaint the Applicant was serving as a legal officer II and an appointed investigator with the 1<sup>st</sup> Respondent. I find this to have been a serious complaint which could not just be wished away. It had to be investigated.

25. The 1<sup>st</sup> Respondent is mandated under the Constitution, Ethics and Anti-Corruption Commission Act 2011, Anti-Corruption and Economic Crimes Act to investigate offences under the said law. This has not been disputed by the Applicant. His major complaint is that the process of investigation has taken too long.

26. The 1<sup>st</sup> Respondent has in response confirmed to the court that it has completed investigations and even forwarded the file to the 2<sup>nd</sup> Respondent (DPP) for his necessary action. The Applicant having worked with the 1<sup>st</sup> Respondent clearly knows and understands the procedure of forwarding the file with recommendations to the 2<sup>nd</sup> Respondent.

27. The file was forwarded on 8<sup>th</sup> of February 2019 which was a Friday. As at 11<sup>th</sup> February 2019 (Monday) when the parties were submitting before me the 2<sup>nd</sup> Respondent had not received the file. There cannot therefore be said to be a contradiction in the averments by the parties. That being the position can this court then issue an order stopping any further investigations? The answer is in the negative as investigations were already finalized.

28. The Applicant also seeks an order against his being charged and arrested. This falls under the duty of the 2<sup>nd</sup> Respondent which is derived from article 157(10) of the Constitution which provides:

**The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.**

Further under section 6 of the office of the Director of Public Prosecution Act which provides:

**Pursuant to Article 157(10) of the Constitution, the Director shall—**

**(a) not require the consent of any person or authority for the commencement of criminal proceedings;**

**(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and**

(c) be subject only to the Constitution and the law.

29. From these provisions it is clear that the 2<sup>nd</sup> Respondent has a clear mandate to recommend the charging of a person upon being satisfied from the evidence before him that an offence has been committed and by who. He is not under the direction of any other person while carrying out his mandate. See

(i) **Paul Ng'ang'a Nyaga v Attorney General 7 3 Others (2013) eKLR**

(ii) **Francis Anyango Juma v DPP & Another Pet NO 160 of 2012 [2012] eKLR**

(iii) **Kenya commercial bank Limited & 2 Others vs Commissioner of Police & Another, Nrb Pet NO 210 of 2012, [2013] eKLR**

30. This court would not at this stage consider the issues as to whether the complaint was made by the director or counsel of Mwananchi Credit Ltd. That is an issue of evidence. The Applicant was told what the complaint was and he understood it hence his response to the same in form of a statement.

31. The 2<sup>nd</sup> Respondent should be given an opportunity to consider the material forwarded by the 1<sup>st</sup> Respondent. It is clear that as at the time of hearing this application the 2<sup>nd</sup> Respondent had not received the file and hence no action taken. There is therefore no basis set out for this court to stop the arresting and charging of the Applicant since the 2<sup>nd</sup> Respondent has yet to act on the 1<sup>st</sup> Respondent's recommendations.

32. The 2<sup>nd</sup> Respondent has in the circumstances not been accused of any malice, bias and/or impropriety. In other words nothing has been placed before this court to show that the 2<sup>nd</sup> Respondent will act lawfully and fairly in making recommendations in respect to the Applicant's file.

33. On undue delay the Applicant relied on the case of **Jeniffer Karim Njagi** (supra) and submitted that the period taken by the 1<sup>st</sup> Respondent to investigate the case was inordinate. In the said case the court had found a period of eight (8) months to be sufficient for such investigations.

34. This is what the court stated in the said case.

**“From what has been presented before this court, the complaint against the police officers was not a complicated one. If the two male officers were arrested the same day why has it taken the 1<sup>st</sup> Respondent eight (8) months to complete investigations if indeed there was any incriminating evidence against the Applicant? I have read her recorded statement (JB2) and it has no incriminating element in it”.**

35. In the **Jennifer Karim Njagi** case, the Applicant's co-suspects had long been arrested and even charged on the same day yet 8 months down the line the EACC was still trying to establish the Applicant's involvement in the crime. The present scenario is quite different as it's only the Applicant who was being investigated over the said complaint.

36. After evaluating all the material presented before me and the fact that the 1<sup>st</sup> Respondent has finalized investigations and forwarded its file to the 2<sup>nd</sup> Respondent I find no justification for the issuance of the orders sought. I dismiss the application with costs to the Respondents.

**Dated and signed this 27<sup>th</sup> day of March 2019.**

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**H.I ONG'UDI**

**JUDGE**

**Delivered on 9<sup>th</sup> April 2019**

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**MUMBI NGUGI**

**JUDGE**