



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC PETITION. NO. 34 OF 2018

PETER KENNEDY OMBATI.....APPLICANT

VERSUS

NIXON KIPKEMOI SIGEY1ST RESPONDENT

MAGDALENE MUTHOKA2ND RESPONDENT

SAMUEL KAMINDU ICHURA.....3RD RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....4TH RESPONDENT

MINISTRY OF INDUSTRY-TRADE & COOPERATIVES5TH RESPONDENT

INSPECTORATE OF STATE CORPORATIONS6TH RESPONDENT

AND

NEW KENYA COOPERATIVE CREMERIES.....INTERESTED PARTY

JUDGMENT

Background

1. Peter Kennedy Ombati (herein after referred to as the petitioner) is a Kenyan citizen who has filed this petition in his private capacity allegedly in public interest pursuant to Articles 2, 3, 10, 19, 20, 21, 22, 27, 41, 73, 159, 165, 227, 232, 258, 260 of the Constitution. The petitioner who is a lawyer by profession was formerly and up to until 31st March 2018 working as company secretary of the Kenya Co-operative Creameries Ltd (herein referred to as the interested party). The 1st, 2nd and 3rd respondents are all current employees of the interested party working in various capacities.

2. The 1st respondent one Nixon Kipkemoi Sigey is the Managing Director of the Interested Party whose overall duties and mandate is to oversee the day to day operations of the company (interested party) as well as providing leadership to senior management in the organisation.

3. The second respondent Magdaline Muthoka is the Chief Manager Human Resource and Administration of the interested party tasked with the overall responsibility of managing the provision and efficient human resource and administration services to the organisation, review and implementation of human resource strategic policy and planning including, performance Management, succession planning, career development and optimal utilization of human resource and guidance on human resource policies and procedures.

4. The 3rd respondent Samuel Kamindu Ichura is the Chief Manager Finance whose duties entails safeguarding the interested party's assets, revenue collection, liabilities and payment controls, evaluation of all financial systems, and Chief Finance advisor to the 1st respondent and the management board.

5. The 4th respondent EACC is a public body corporate established under Section 3(1) of the Ethics and Anti-Corruption Commission Act

(EACCA) charged with the key mandate of investigation and recommendation of prosecution of cases relating to corrupt conduct.

6. The 5th respondent is the ministry of industry, trade and co-operatives which is a state department in charge of industry, trade and co-operatives that oversees the management and operations of the interested party among other organizations as the parent ministry.

7. The 6th respondent (“the inspectorate”) is established under the state corporations Act cap 446 whose core mandate and function is to advise government on all matters affecting running of state corporations. On the other hand, the interested party with 100% public share holding owned by government pursuant to the State Corporations Act also registered under the Companies Act is engaged in the business of processing milk and other products.

8. On 19th June 2018, the petitioner approached this court through a petition of even date seeking various reliefs particularized as hereunder:

1. A declaration that the 1st, 2nd and 3rd respondents have violated the principles enshrined in Articles 10, 73 and 232 of the Constitution of Kenya 2010 by failing to uphold and account for their administrative actions and affording adequate and equal opportunity for appointment.

2. A declaration that the 1st, 2nd and 3rd respondents are not fit to hold office due to their corrupt dealings.

3. A declaration that the continued stay in office of the 1st and 2nd and 3rd respondents as the Managing Director, Chief Manager, Human Resource & Administration and Chief Manager Finance respectively is against the public interest.

4. An order do issue requiring the Kenya National Audit office (KENAO) to carry out an audit of the funds used by the 1st, 2nd and 3rd respondents and those found to have misused public funds to be held personally liable and be surcharged accordingly.

5. An order of declaration that the 1st, 2nd and 3rd respondents be surcharged for misapplying public funds.

6. An order that the 4th, 5th and 6th respondents failed in their oversight role over the 1st, 2nd and 3rd respondents.

7. An order that the 4th respondent do conclude investigations against the 1st, 2nd and 3rd respondents with speed and/or within a time frame as the honourable court may provide.

8. An order that the 1st, 2nd and 3rd respondents be compelled to step aside to allow free and credible investigations to be conducted at New Kenya Co-operative Creameries Limited.

9. This honourable court do issue such further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the Constitution and in the context of the declaration made.

9. In response, the 1st, 2nd and 3rd respondents filed their grounds of opposition on 26th November 2018 challenging the petition. Equally, the interested party filed their grounds of opposition on 19th November 2018. On their part, the 4th respondent filed a replying affidavit sworn by Ferdinand Kiwanuka the investigating officer on 29th August 2018 and filed the same day. However, the 5th and 6th respondents did not enter appearance hence did not take part in these proceedings.

10. Meanwhile, on 22nd October 2013, the petitioner filed a notice of motion dated 18th October 2018 seeking a mandatory injunction to be issued directing the 1st, 2nd and 3rd respondents to step aside from their offices pending completion of investigations by the 4th respondent into the allegations or complaints made against them in the petition and that the 4th respondent be directed to complete investigations on the conduct of the 1st, 2nd and 3rd respondents within a time span that this honourable court will deem fit to order. The application was grounded on the basis that the 1st, 2nd and 3rd respondents were likely to tamper with investigations if left to continue serving hence important to step aside.

11. In response, the 1st, 2nd and 3rd respondents and the interested party told the court that their respective grounds of opposition would serve as their responses both to the main petition and application dated 18th November 2018. The 4th respondent also intimated of relying on their replying affidavit sworn on 29th November 2018.

12. However, on 17th January 2019 on advice from the court, the application dated

18th November 2018 was compromised in favour of the hearing of the main petition. Parties then agreed to canvass the hearing in respect of the petition through written submissions which they did and then highlighted on the same on 11th March 2019.

Petitioner’s case

13. The petitioner’s suit is predicated upon grounds and particulars set out on the face of the petition and a supporting affidavit sworn by Kennedy ombati the petitioner herein on 19th June 2018. The genesis of the matter is the allegation that on diverse dates, the petitioner in his

capacity as company secretary and Chief Manager legal affairs received numerous complaints from whistle blowers and employees of the interested party over disturbing allegations of abuse of office, payment malpractices and other corrupt conduct at the interested party perpetuated by the 1st respondent. In particular, he referred to an a mail message he received on 4th November 2015 from whistle blowers and employees of the interested party complaining over the aforesaid allegations against the 1st, 2nd and 3rd respondents.

14. That the said information (complaints) were brought to the attention of the 4th, 5th and 6th respondents vide a demand letter authored by the Executive Director of Kenyans for justice and development Mr. Okiya Omtatah Okoiti dated 9th February 2018 detailing complaints and accusations made against the 1st respondent.

15. That the said letter was also copied to the 4th respondent who through their letter in response thereto dated 7th March 2018 undertook to institute investigations into the said allegations and take necessary action. That to date the 4th respondent has not acted nor has any response been supplied regarding the progress or status of investigations thus protecting the ills committed by the 1st respondent.

16. Further, the petitioner accused the 1st respondent of practising nepotism by engaging in irregular staff recruitment. He claimed that since the 1st respondent joined the company the year 2015, out of 803 employees recruited, 322 hail from one region.

17. That the 1st respondent is also engaged in practising discrimination and favouritism in the award of jobs and high grades to employees from a particular tribe in blatant disregard of laid down procedures thus causing the interested party to incur unnecessary expenditure hence loss of funds.

18. He further claimed that the 1st respondent does not follow internal processes and policies in carrying out employee reviews on performance. That he (1st respondent) does discriminately award contracts to friends and renew the same in collusion with the 2nd respondent without following due process.

19. The petitioner gave a breakdown of promotions given to some staff through the 1st respondent's influence and which the board approved hence promoting people from one tribe and upgrading their positions to a bigger level than other departments of equal status thus awarding them higher salaries. Among the employees referred to as beneficiaries of nepotism and ethnicity are Dominic Menjo, Caroline Rotich, Weldon Kiptoo Rotich and Dr. Magdaline Muthoka (2nd respondent) who irregularly awarded herself illegal salary arrears backdated to 3 years amounting to Kshs.1,431,186/- contrary to a board resolution passed in 2012.

20. The petitioner further claimed that the 1st, 2nd and 3rd respondents who are charged with the management of the payroll have used and abused the payroll to reward themselves and their friends contrary to the law and procedures to the extent that employees in the same job group earn different salaries.

21. That between 3rd and 6th August 2017, the 1st respondent fraudulently and with the intention of defrauding the interested party did defraud the company by hiring a chopper at Kshs.2,600,000 (USD 25,000) for services not rendered or proved as the board was not invited to accompany the government team that was allegedly involved in inspection of modernisation of milk facilities in Mombasa, Nyahururu and Eldoret factories in August 2017.

22. He stated that the procurement process in hiring the choppers and the manner in which payment was processed under LPO No. 4300028122 of 3rd August 2017 was in total disregard of procurement laws in particular Section 146 of the public Procurement Act 2015.

23. That the 1st respondent acted negligently in payment of approximately Kshs.35,000,000/= interest and costs in acquisition of an 1/8 Oracle Exdata hardware by directly interfering with the existing contract leading to a civil suit against the company resulting to payment of extra Kshs.35,000,000/= for breach of contract hence misuse of public funds.

24. That the 1st and 2nd respondents colluded and without following laid down procedures authorised transfer of Kshs.475,150,742/= being employees' contributions from Liberty Life Assurance Company Ltd to Britam Life Insurance. That such transfer by the 1st, 2nd and 3rd respondents without member's consent was tainted with corrupt considerations.

25. That due to the negligence or failure by the 1st – 6th respondents to perform their duties with due diligence, the interested party has suffered loss and continues to suffer thus threatening its stability.

26. The petitioner particularized negligence and or failures of the respondents as follows: **1st respondent** failure to act within laid down policies and procedures of the corporate leading to institution of legal proceedings against the company, acting beyond his powers and usurping the role of the corporation; failure to provide pragmatic leadership of the company leading to massive loss of funds and being incompetent in decision making. **2nd respondent** – failure to provide prudent leadership to the board on existing human resource manual governing employment; promotion and discipline; misleading the management and the board on the existence of human resource services and awarding herself huge and illegal salary arrears. **3rd respondent** – unjustly according herself huge salary pay upon assuming office as Chief Manager Finance from Kshs.380,000/= to 444,000/=, failure to offer pragmatic and prudent financial advice. **4th respondent** – failure to carry out timely investigations upon receipt of reported incidences of corruption at the corporation. **5th respondent** – that being the parent ministry in charge of co-operatives failed to respond to various whistle blowers incidences of corruption under its control; failed to take action after the letter of 9th February 2018 brought to the attention of the PS requesting for investigations on allegations of abuse of office hence failed to play role of oversight properly. **6th respondent** – failing to advise government on all matters affecting the running of the corporation even after receiving the demand letter of 9th February 2018 requesting for investigations; failed to report to the Auditor General to monitor expenditure of government grants to the corporation and failure to conduct special investigations on issues of Corruption.

27. The petitioner therefore urged the court to find that the respondents had acted in violation of the Constitution, Sections 146 and 147 of the Procurement Act 2015 and Sections 9 and 10 of the Leadership and Integrity Act Cap 82 Laws of Kenya which requires a state officer to carry out the duties of the office efficiently, honestly, in a transparent and accountable manner, keep accurate records and take personal responsibility for the consequences of his actions.

1st, 2nd and 3rd Respondents' Case

28. In response to the petition, the 1st, 2nd and 3rd respondents filed their grounds of opposition as hereunder:

- 1) **The petition herein has been prematurely filed given that all the issues raised therein are the subject to presently on-going investigations being undertaken by the 4th respondent in line with its constitutional mandate under Article 252 (1) (a) of the Constitution; and Sections 11(1) (d) and 13(2) (c) of the Ethics and Anti-Corruption Act, 2011 respectively.**
- 2) **This honourable court therefore lacks the jurisdiction to grant prayers number 1, 2, 3, 4, 5 and 6 of the Petition in so far as it would only be able to determine whether or not to grant these prayers after venturing into a new and separate investigation of its own into the allegations made by the Petitioner; yet an investigation into the said allegations is currently being undertaken by the 4th Respondent.**
- 3) **This honourable court lacks jurisdiction to grant prayer number 7 of the petition and prayer number 3 of the application against the 4th respondent which is an independent Constitutional Commission; by virtue of the express provisions of Article 249 (2) (b) of the Constitution.**
- 4) **The petitioner is impeded by the doctrine of estoppels from adducing majority of the documentary evidence he relies upon to support his allegations given that these information and/or documents are confidential and were confidentially obtained by the petitioner purely by virtue of his position of being the Company Secretary of the Interested Party and an integral member of its Board prior to expiry of his employment contract.**
- 5) **The petitioner has failed to indentify which of his constitutional rights have been infringed upon or are threatened with infringement by the 1st, 2nd and 3rd respondents; and how the said rights (if any) have been violated or threatened with violation.**
- 6) **The allegations levelled against the 1st, 2nd and 3rd respondents regarding promotion of employees and any other human resource related allegations are actuated by sheer spite and malice by the petitioner who is a disgruntled ex-employee of the Interested Party given that all the impugned human resource related decisions complained of by the petitioner were made at the board level of the interested party (where he was a member); yet the petitioner has for his own ulterior motives elected to single out the 1st, 2nd and 3rd respondents and accuse them of wrong doing.**
- 7) **There exists another legally competent body being the office of the Auditor General with the Statutory mandate under Section 9(1) (a) of the Public Audit Act to investigate on its own motion or at the instigation of any third party; any complaints or allegations of financial impropriety made against any state corporations or government body such as the interested party; though the petitioner has chosen to bypass this channel by filing the instant petition disguised as a legitimate constitutional petition filed in the public interest.**
- 8) **The legal doctrine of constitutional avoidance and the ripeness doctrine both enjoin this honourable court to resist the invitation to entertain the instant petition where there exists a parallel forum and/or remedy available to the petitioner to ventilate or redress his grievances.**
- 9) **The concept of stepping aside of public officers in the course of any active investigation being undertaken against them is not recognized or sanctioned by the constitution or any statute. Accordingly, this honourable court lacks jurisdiction to grant prayers number 8 of the petition and prayer number 2 of the application respectively.**
- 10) **The instant petition is consequently incompetent, bad in law and its filing has been done mala fides and amounts to an abuse of court process.**

4th Respondent's Case

29. The 4th respondent challenged the petition herein vide a replying affidavit sworn on 29th August 2018 by Ferdinand Kiwanuka a member of the investigative team tasked with the responsibility of carrying out investigations regarding complaints raised in the petition herein. The officer averred that besides the petitioner submitting whistle blowers' complaints to the 4th respondent, the interested party (KCC) have not lodged any complaint to the 4th respondent. He claimed that the petitioner is not justified to challenge the 4th respondent's delay for a complaint he has never raised by himself nor enquired to know the progress.

30. Nevertheless, he admitted that the 4th respondent did receive a letter dated 15th February 2018 from Okiya Omutatah Okoiti of Kenyans for justice and development requesting for investigations on acts of corrupt practices at the interested party. That on 7th March 2018, the 4th respondent responded to Omtatah confirming that investigations would be initiated and appropriate action taken.

31. That the 4th respondent on 18th May 2018 opened an investigation file Ref. No. EACC 1/ PI/INQ/41/2018. As a follow up, the 4th respondent alleged that they had written to the interested party requesting for personal files of the affected officers. A copy of the said letter marked ER1 was attached.

32. That having initiated investigations and considering the complexity of the complaint and amount of work involved, the 4th respondent needs ample time to complete investigations and forward their recommendations to the DPP for necessary action. He denied any element of laxity or inactivity on the part of the 4th respondent.

Interested Party's Case

33. Relying on the grounds of opposition filed on 19th November 2018, the interested party stated as follows:

(a) That the petitioner has not clearly illustrated the alleged constitutional violations against the interested party and that the petitioner is trivialising the constitutional jurisdiction of the court hence abuse of the court process.

(b) That the court cannot be asked to interfere with its main resource function without justifying circumstances to warrant such drastic intervention.

(c) That petition amounts to an abuse of court process as it seeks to bypass primary channels to address the grievances. That where an interior dispute resolution mechanism exists, the same should be exhausted first before going to court.

(d) That the 4th respondent having commenced investigations, the same should be left to continue unless proved that the 4th respondent has breached the law in exercise of its powers.

(e) That the 1st, 2nd and 3rd respondents should not be removed from office before conclusion of investigations hence declaration of incapacity to hold office as premature.

(f) That no single Article as drawn has been infringed.

(g) That the petition as drawn seeks reliefs against entities who are not party to these proceedings.

(h) That as drawn the petition is speculative and hypothetical, and should be dismissed.

(i) That the petition is misconceived, incompetent and bad in law.

Submissions

34. Having agreed to canvass the petition by way of written submissions, the petitioner lodged his submissions dated 24th January 2019 and filed the same day through the firm of Khalwale and Co. Advocates. The 1st, 2nd and 3rd respondents filed theirs dated 4th February 2019 and filed same the day by Kisilu Wandati Advocates. The 4th respondent also filed theirs dated and filed on 4th February 2019 through Nyoike and Co. Advocates and the interested party equally filed theirs dated 4th February 2019 and filed the same day by Waweru Gatonye and Co. Advocates.

Petitioner's Submissions

35. During highlighting of submissions, Mr. Khalwale representing the petitioner reiterated the averments contained in the petitioner's particulars in support of the petition as well as the affidavit in support. Mr. Khalwale submitted that the 1st respondent's acts of nepotism and favouritism in recruitment of the interested party's staff on ethnic considerations and lack of proper accountability for any administrative actions undertaken by not offering all tribes equal opportunities in appointment, training and procurement is a clear breach of Article 232 of the Constitution which establishes values and principles of public service and Article 73 (2) (b) regarding leadership and integrity.

36. Counsel submitted that the irregular hiring of a chopper to purportedly take government inspection team on an inspection tour on KCC facilities in various parts of the country without following proper procurement procedures as enshrined under Sections 146 and 147 of the PPDA 2015 amounts to as an assault to Article 227 of the Constitution.

37. Regarding the question of slow pace of investigations by the 4th respondent, Mr. Khalwale argued that the problem is the slow pace at which it is being done contrary to the Fair Administrative Actions Act thus requiring judicial intervention by way of constitutional reference. Without connecting any of the two cited authorities with any specific arguments in support of his submissions, Mr. Khalwale filed a list of authorities on 11th March 2019 in which he attached judgments in respect to the cases of **James Kamangu Ndimu vs Margaret Wanjiru Ndimu and Another (2007) eKLR** and **Thomson Karongo & 2 others vs James Omariba Nyaega and 3 others (2017) eKLR**.

1st, 2nd and 3rd Respondents' Submissions

38. Mr. Wandati for the 1st, 2nd and 3rd respondents also adopted their grounds of opposition aforesaid and their written submissions dated

4th February 2019. Counsel submitted that the petitioner having acknowledged that there are independent institutions charged with tasks of undertaking investigations on the complaints raised, he should let them do their work. Learned counsel submitted that the suit was premature and that the petitioner was to blame for having failed to report the allegations of corruption to the relevant authorities in time and that the 4th respondent having received the complaint in February 2018 cannot be said to have delayed in taking action.

39. In support of his submission to prove that the suit is premature, counsel quoted the case of **Communications Commission of Kenya and 5 others vs Royal Media Services Ltd (2015 2 EA 104 at Page 158** where the court held that:

“The appellants in this case are seeking to invoke “the principle of avoidance also known as “constitutional avoidance”. The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis”.

Mr. Wandati made further reference to a decision In South Africa Constitutional Court, in **S.V Mhlungu, 1995 (3) SA 867 (CC)** where Kentridge AJ articulated the principle of avoidance in his minority judgment as follows: (at Paragraph 59):

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reading a constitutional issue, that is the course which should be followed”.

Counsel further referred to the case in the US Supreme Court between **Ashwander vs Tennesse Valley Authority 297 USA 288, 347 (1936)** where the court held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of.

40. To expound on the same principle on constitutional avoidance, counsel referred the court to the case of **Four Farms Ltd vs Agricultural Finance Corporation (2014) eKLR** which cited with approval the decision in **Demian Beltfont vs Attorney General of Trinidad and Tobago** where it was held:

“where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made includes some feature which makes it appropriate to take that course. As a general rule, there must be some feature which at least arguably indicates that the means of list redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse and an abuse of the court process”.

41. As concerns stepping aside by the 1st, 2nd and 3rd respondents, Mr. Wandati stated that; investigations are not complete nor have the respondents been charged hence that concept cannot apply thus the ripeness doctrine is applicable.

42. To buttress that position, learned counsel referred to the case of **Alfred N. Mutua vs Ethics and Anti Corruption Commission and 4 others (2016) eKLR** where the court of appeal dismissed the claim for governor Mutua to step aside based on allegations of corruption which was not ripe yet as the governor he had not been arrested nor charged.

4th Respondent’s Submissions

43. Mr. Nyoike counsel for the 4th respondent basically adopted the replying affidavit sworn on 29th August 2018 and their written submissions dated 4th February 2019. He submitted that the petitioner is to blame for impunity as he received complaints from whistle blowers sometime 2015 but failed to report to relevant authorities. That the 4th respondent only received the complaint from another source in February 2018 and commenced investigations which are ongoing. That there is no inordinate delay in concluding investigations and make necessary recommendations.

44. Mr. Nyoike stated that the 4th respondent has not acted in breach of any constitutional provision to warrant this court’s intervention. To bolster his preposition, counsel referred the court to the case of **Paul Ng’ang’a Nyaga & 2 others vs Attorney General and 3 others (2013 eKLR)** where the court had this to say.

“Having said so, I maintain therefore that this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they were acted in contravention of the Constitution”.

To support same argument, counsel quoted the case of **George James Kang’ethe and Another vs Inspector General of Police & 2 others (2014) eKLR**.

45. It was Mr. Nyoike’s submission that Section 35 of ACECA as read with Section 11 (1) (d) of EACCA empowers the 4th respondent powers to investigate corruption related complaints and report to the DPP for prosecution. He therefore urged the court to allow the 4th respondent to complete investigations.

46. Regarding suspension of the 1st, 2nd and 3rd respondents, counsel referred the court to Section 62, 63 and 64 of ACECA which prescribes circumstances when a person said to have committed a criminal offence can be suspended or vacate office.

Interested Party’s Submissions

47. Mr. Waweru Gatonye for the interested party opposed the petition relying on their grounds of opposition aforementioned and written submissions dated 4th February 2019 together with annexures thereof. Mr. Gatonye submitted that the suit was a non starter, premature and a vendetta directed at the interested party and its management. Counsel submitted that the interested party was wrongly joined to the suit.

48. Mr. Gatonye contended that the suit lacks clarity as to the reliefs sought and the nature of injury suffered. To establish that fact, counsel referred the court to the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others (2013) e KLR** and **Hassan Ali Joho vs Inspector General of Police and 3 Others (2017) eKLR**.

49. Touching on removal of the 1st, 2nd and 3rd respondents from office, counsel contended that that is a no go zone as the interested party has sufficient human resource department charged with that responsibility. To support that argument, Mr. Gatonye made reference to the case of **Goeffrey Mworira vs Water Resources Management Authority and 2 others (2015) eKLR**.

50. Concerning the 4th respondent's mandate, Mr. Gatonye urged the court to allow the body to exercise its statutory and constitutional mandate without direction and where supervisory power is exercised, the same should be done with caution. Counsel anchored his argument on the decision in the case of **R vs Ethics and Anti-Corruption Commission Exparte Nairobi City Council Assembly and 13 others (2019) eKLR**.

51. Lastly, learned counsel opined that the petition as framed does not disclose any proper allegation of violations of the Constitution and that none of the orders sought in the petition are against the interested party.

Analysis and Determination

52. I have considered the petition herein and affidavit in support and the respondents' responses together with written and oral submissions. The only issue that emerge for determination is whether this court is seized of the jurisdiction to hear and determine the petition herein and grant the reliefs sought.

53. The suit herein has been brought pursuant to alleged breach or violations of the petitioner's various constitutional rights. Literally, the respondents have raised concern with invocation of this court's jurisdiction in determining the issues in controversy and whether it has the power to make or issue the declarations and reliefs sought.

54. Article 22 (1) of the Constitution provides that every person has a right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been violated, denied or infringed or threatened. Article 23 (1) further confers the high court with jurisdiction exercisable with Article 165 to hear and determine applications for redress of a denial, violation, infringement of or threat to a right or fundamental freedom in the bill of rights. Equally, Article 165 (3) (a) bestows unlimited jurisdiction to the high court in criminal and civil suits.

55. The plain reading of the above constitutional provisions suggests that this court has jurisdiction to hear any dispute touching on breach of a constitutional right or fundamental freedom. In this case the petitioner has raised issue with breach of both constitutional and statutory provisions among them Public Procurement Act 2015 and the Leadership and Integrity Act.

56. I am alive to the fact that, jurisdiction is a key component in litigation. Where a court is of the opinion that it has no jurisdiction to entertain a certain matter, then it should fold its hands and move no further step. **See Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR**.

57. The suit herein is kind of a mixed grill seeking some declarations to which this court is seized of jurisdiction and none to some. In the circumstances, this court's jurisdiction is not wholly diminished or ousted.

58. It is now settled that for somebody to seek redress from the high court on a matter which involves a reference to the Constitution, the same should be set out with reasonable precision stating the provision said to be infringed and the manner in which it is alleged to be infringed (**See Anarita Karimi Njeru vs R (No.1) (1976 – 80) (URL)**). This position has been restated in several other cases among them **Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others (Supra) where the court held that:**

“yet the principle in Anarita Karimi referred (Supra) underscores the importance of defining the dispute to be decided by the court...cases can not be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and the tenet of substantive justice, as they give fair notice to the other party. The principles in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing the issues in constitutional petitions is an extension of this principle”.

59. The burden of proving violation of certain constitutional rights or fundamental freedom lies with the petitioner.

60. In his petition, the petitioner is claiming that, sometime February 2015, while working with the interested party as Company Secretary and Manager legal affairs, he received information via email from whistle blowers and company employees that the 1st, 2nd and 3rd respondents were engaged in tribalism, favouritism and discrimination on ethnic grounds in recruitment, appointment, promotion of staff and embezzlement of company funds.

61. The petitioner went ahead and listed grievances against each of the 1st, 2nd and 3rd respondents. That on 9th February 2018, Okiya Omtatah a civil activist made the same complaints to the 4th to 6th respondents a fact that was not disputed. A perusal of the said letter which is marked as Annexure PKO1 attached to the supporting affidavit to the petition shows that it was addressed to the PS Ministry of Industry,

Trade and Co-operatives, state corporations advisory committee, Ethics and Anti-Corruption Commission, Inspectorate of State Corporations and the board of directors KCC analysing every detail of the alleged malpractices and corrupt conduct or behaviour committed in the company by the 1st, 2nd and 3rd respondents.

62. Among the complaints raised were that:

(1) One Dominic Menjo was irregularly given a promotion and awarded a salary higher than his departmental counterparts; that Caroline Rotich was employed as head of national sales in August 2016 and after six months probation, she was promoted and given a salary of 235,000/= per month which salary was not within the approved structures; that the reinstatement of Weldon Kiptoo Rotich was irregular and was done without due background check as he had been charged before hence lacked integrity; that Dr. Magdaline Muthoka was irregularly awarded salary arrears amounting to Kshs1,431,186/= and lastly, that the 1st respondent employed people from one ethnic background and hired a chopper at over 2.6 million for a national team tour for inspection of its facilities countrywide contrary to procurement rules.

63. Having carefully assessed the grievances raised, among them issues touching on employment or recruitment, promotion and salary payment, it is my finding that these are issues that fall within the ambit of the organisational structures applying internal dispute resolution mechanisms or procedures. Where internal mechanism fails, the same can be castigated to a higher level to the employment and labour relations court being an employment and labour relations dispute between an employee and employer.

64. This court cannot be called upon to intervene and take over duties and responsibilities that are by law reserved for certain institutions or organisations with clear internal or statutory mechanisms of dispute resolution. For instance, issues of promotion, irregular recruitment and audit of financial operations are governed by clear rules and regulations in personnel and finance management. Equally, where the acts or omissions complained of are criminal in nature, there are designated authorities e.g. police department, DCI or EACC to independently deal with them. A constitutional court cannot overlook or superintend such organisations with clear functional or jurisdictional mandate unless proved that they have acted in breach of the law.

65. A party therefore cannot bypass the same institutions and seek constitutional redress which should be the last remedy after exhausting all other internally or statutorily provided mechanisms for redress in a dispute. (**See Geoffrey Mworira vs Water resources management authority and 2 others (Supra)**). The same position shall apply to the procurement of the chopper for services that the petitioner claimed were not rendered and was in breach of the procurement process. The Public Procurement Act 2015 has an elaborate procedure or mechanism in challenging irregular tendering process which the petitioner as a legal advisor never followed or even lodged complaints against.

66. This court cannot be asked to declare the award to the chopper services provider as irregular without sufficient evidence which is the subject of investigation currently ongoing before the 4th respondent. To allow that will amount to usurping the powers of the procurement administrative review board or even the various criminal investigative agencies who should act independently. Concerning recovery of the alleged embezzled funds, there are mechanisms for internal or external audit which will deal with the issue. It is not for this court to direct recovery. The law has clear mechanisms for recovery of proceeds of crime.

67. It is trite law that parties should make use of available procedures under various laws to pursue their redress as an alternative remedy instead of everybody moving to the constitutional court (**See Alphonse Mwangemi Munga and 10 others vs African Safari Club (2008) eKLR**). This position was further reinforced in the case of **Speaker of National Assembly vs James Karume civil application NAI 92/99** where the court held that:

“where there is a clear procedure for redress of a particular grievance prescribed by the constitution or an Act of Parliament, the procedure should strictly be followed”.

68. From the above case law and several others quoted by the respondents, the allegations and or grievances raised herein should have been addressed by the other available alternative remedies or methods of redress.

69. In any event, the petitioner has not shown which of his constitutional right or fundamental freedom has been infringed and injury suffered. Although the suit seems to be anchored on the principle of public interest, he has not shown what injury or loss he suffered as a consequence. He did not even lodge any complaint himself since 2015 February when he received the whistle blowers email. He waited until Okiya Omtatah complained the year 2018 February. Whereas the petitioner is appearing to be concern with the interested party's welfare, his silence over the same complaints while in office is questionable. The manner in which he handled the complaints as a chief legal advisor of the company reflects a man who did not do much to help the situation by giving proper legal guidance to the employer. He can not purport to be concern when he has left employment yet he condoned all manner of illegalities while in office.

70. Did the 4th respondent take reasonable steps to carry out investigations and make appropriate recommendations? The 4th respondent admits that they received the complaint from Okiya Omtatah vide a letter dated 15th February 2018. They allegedly responded to the letter and promised to institute investigations which they did.

71. That in the course of their investigations, their team collected some documents from the interested party but upon perusal, it turned out that the documents were photocopies. Consequently, on 7th June 2018, they did a letter (annexure ER2 of the replying affidavit of 29th August 2018) to the 1st respondent seeking to be supplied with original documents and information. They stated that before completion of their investigations, they were confronted with the suit herein which they termed as premature.

72. It is the respondents' argument that the 4th respondent should be given time to conclude investigations and that this court cannot direct an independent body on what to do and how to do it. There is no doubt that the EACC is an independent body whose mandate under Section 11

(1) EACCA is to investigate corruption related crimes and recommend to the DPP for prosecution if necessary. Their powers are not subject to control, direction or influence from any quarters including the court unless proved that they did not act or failed to act in accordance with the law. In this case EACC is accused of having delayed in concluding investigations within 6 months.

73. Whereas EACC is enjoined under Article 47 of the Constitution to exercise fair administrative actions that is expeditious, efficient, lawful, reasonable and procedurally fair in service delivery, the same should be determined on the basis and circumstances of the issues involved. The word reasonable is subjective. For instance, the question is whether a period of six months in investigating a long and complex case such as the one claimed by the 4th respondent is unreasonable delay.

74. I take judicial notice that EACC's mandate in investigation of crimes covers complaints from all over the country. With the crime trend in the country where complaints are flowing in daily at an alarming rate, six months can not be said to be unreasonable delay to investigate and make recommendation. I do not find any inordinate delay. The petitioner was a bit haste in the circumstances and the petition therefore prematurely filed.

75. As stated earlier, EACC is an independent body which should be left to make independent decisions without direction from anybody or authority. In the case of **Kenya Commercial Bank Ltd and 2 Others vs Commissioner of Police and another Nairobi No. 218/2018 (203) eKLR** the court held that the office of the DPP and that of the National Police are independent offices and the court would not interfere in the running of their offices and exercise of their discretion within the limits provided by law unless the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.

76. After perusing the entire petition, I am not persuaded sufficiently that the 4th respondent did anything wrong. They responded to the complaint and investigations commenced. As to how long investigations should take is not pronounced in any law save for the requirement under Article 47 of the Constitution and fair administrative Actions Act that the same should be efficient, expeditious and undertaken within reasonable time. Delay of six months from the date of reporting to the date this suit was commenced is not unreasonable in my view to warrant drastic directions or intervention in the name of mandamus which is not even prayed for. There is no proof of breach of any constitutional provision or statute by EACC in the circumstances. This court cannot exercise and exert constitutional supervisory authority in situations where there is no clear breach of constitutional or statutory power conferred upon a certain institution or body.

77. Regarding the 1st, 2nd and 3rd respondents stepping aside pending the outcome of investigations, the same is subject to internal organisational or institutional regulatory mechanism under the human resource department. The petitioner has not moved the human resource department for necessary action. In any event, there is no known law governing employees stepping aside based on allegations not yet fully investigated, arrested or charged before a court of law. What the law recognizes is Suspension of an employee which is regulated by labour laws or individual organisation's employment regulations and rules. To the 1st, 2nd and 3rd respondents, they have not been arrested and charged in a court of law to warrant suspension under Section 62 of ACECA. **(See Alfred N. Mutua vs Anti-Corruption Commission and 4 others (Supra).)**

78. If employees were to be forced to step aside based on allegations or suspicion without first following due process, there will be anarchy in the employment sector where employees will be under siege and nobody will be safe as that principle will be abused and misused to settle scores. It would amount to venturing into murky waters if a constitutional court were to step into the arena of determining labour related disputes in a constitutional petition touching on issues where there are institutions tasked by law and have the full mandate to deal with such situations. On that ground alone the issue of stepping aside cannot apply.

79. Regarding failure by the interested party to file a replying affidavit, the same is not fatal considering that the respondent has filed grounds of opposition challenging the petition on points of law. When a replying affidavit is not filed, it means the facts in issue are not controverted which the interested party confirmed in the affirmative. The fact that a petition is not challenged through a replying affidavit is no guarantee that it will succeed. The burden of proof still remains and it is not any lesser merely because the interested party did not file a replying affidavit. I do not find any prejudice suffered on the interested party's side nor the petitioner. For those reasons that ground is dismissed.

Conclusion

80. Having held as above, it is my finding that none of the prayers sought is capable of granting. In a nutshell, the prayers sought are basically not applicable and the petition herein is not merited hence the same is dismissed. However, considering that the petition was filed in the spirit of addressing public interest related issues, I will direct that each party bears own costs.

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF MAY, 2019.

J.N. ONYIEGO

JUDGE