



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 26 OF 2016

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

THE ETHICS & ANTI CORRUPTION COMMISSION.....1ST INTERESTED PARTY

ATTORNEY GENERAL on behalf of the Chief Magistrate's

Anti-Corruption Court, Milimani Law Courts, Nairobi.....2ND INTERESTED PARTY

AND

JOSPHAT SIRMA.....EX PARTE APPLICANT

RULING

1. The ex parte Applicant **JOSPHAT SIRMA** has through the Notice of Motion dated 18th November, 2016 moved this Court for;

(i) An Order of **CERTIORARI** to remove and bring this Honourable Court for the purposes of quashing the decision of the 2nd Respondent and to recommend to the 1st Respondent that the ex-parte Applicant be charged with various anti-corruption offences and the decision of the 1st Respondent to direct the prosecution of the ex-parte Applicant contained in the charge sheet in the case of **Anti-Corruption Case No. 22 of 2015 Republic of Kenya –Vs- Josphat Sirma & 4 Others before the Chief Magistrate's Court (Milimani Law Courts) Nairobi**.

(ii) An Order of **PROHIBITION**, directed to the 3rd Respondent by himself, his servants and/or agent or any other Judicial Officer prohibiting them from the time being seized of hearing and/or proceeding and/or the conduct of **Anti-Corruption Case Number 22 of 2015 Republic of Kenya – Vs- Josphat Sirma & 4 Others Before The Chief Magistrate's Court (Milimani Law Courts) Nairobi** from trying and/or carrying on any further proceedings as against the ex-parte Applicant based on the facts related thereto and in particular over the award of Tender No. Ref **SU/QT.3097F/13** which resulted in the signing of a contract, a Local Purchase Order No. **4500068941**, between Kenya Pipeline Company Limited and Redline Limited.

(iii) An Order of **PROHIBITION** directed to the 1st Respondent, prohibiting the 1st Respondent by

themselves, their servants and/or agents or any other acting under their authority from proceeding with the conduct and/or prosecution of **Anti-Corruption Case No. 22 of 2015 Republic Of Kenya – vs- Josphat Sirma & 4 Others before the Chief Magistrate’s Court (Milimani Law Courts) Nairobi** as against the ex-parte Applicant based on the facts related thereto and in particular over the award of Tender No. Ref **SU/QT/3097F/13** which resulted in the signing of the contract, Local Purchase Order No. **4500068941**, between Kenya Pipeline Company Limited and Redline Limited.

(iv) Any such further order or other relief as this Honourable Court may deem just and expedient to grant in the circumstances.

(v) Costs of and incidental to the Applicant be proved for.

2. The Application is supported by the grounds on its face. It is also supported by the Statutory Statement and the Verifying Affidavit of the Applicant filed together with the Chamber Summons Application for leave dated 19th September, 2016.

THE APPLICANT’S CASE

3. What comes out of the Applicant’s Statutory Statement and the Supporting Affidavit as the grounds for filing the Judicial Review are as follows;

(i) He participated in the procurement process involving the three auto transformers in a few and not all stages.

(ii) He was wrongly charged in his capacity as Chief Engineer for acts that were in line with his duties as Chairman of Goods Inspection and Acceptance Committee as provided for under Public Procurement Disposal Rules (PPDR) 2006 Regulation 17 and the Public Procurement and Disposal General Manual 2009.

(iii) That the contract – Local Purchase Order No. 4500068941 was prepared as per the decision of the Tender Committee and there was no requirement for the contractor (Redline) to carry out any installation.

(iv) That the Applicant is by law allowed to sign the completion certificate on behalf of his colleagues.

(v) The investigations were not conducted in good faith and in a professional manner as the investigators failed to follow the law.

(vi) Finally, the Respondent and the Interested Party were malicious, irrational and abused the law in their investigation as they did not apply the segregation of duties for different offices and committees in the procurement cycle.

4. The Applicant has in his Affidavit explained all that he believes took place in respect to the tender No. Ref. SU/QT/3097F/13 or contract LPO No. 4500068941. He says he cannot be held accountable because he did not prepare the LPO nor the completion certificate. Further, that the completion certificate should not be mistaken to be a payment certificate.

5. He avers that had the Respondent and 1st Interested Party done their work well, they could not have had him charged. He maintains that the contract that was signed did not contain a provision for installation of the transformers.

1ST INTERESTED PARTY’S CASE

6. **Mr. Andrew Lekamparish** filed a Replying Affidavit sworn on 5th December, 2016 on behalf of the 1st

Interested Party for whom he works as a Forensic Investigator. His work includes conducting investigations into complaints of alleged corruption and/or economic crimes.

7. He has in his Affidavit explained the role he played in the investigation of the case at hand. He averred that from the tender documents (AL3), the tender was for the supply and installation of line 2 pump station auto-transformers. He explains the rest of this at paragraphs 18 – 28 of his Affidavit.

8. What is curious is how the Tender Committee could unanimously decide to exclude installation from the LPO No. 4500068941. He also points out that the Applicant was appointed to the Negotiation Committee on 13th August, 2013 and he in fact chaired the said Committee and did a Memo forwarding the Negotiation Committee Report to the Tender Committee. The said report is dated 19th August, 2013. In the Applicant's Memo dated 19th August, 2013 he refers to the supply and installation of line 2 pump station auto-transformers.

9. He also raises issue with the completion certificate that was issued and signed by the Applicant certifying that all associated works related to the Tender Quotation No. SU/QT/3097F/13 which included supply, installation and commissioning of line 2 pump station auto-transformers had been completed.

10. Further, he states that on 10th February, 2014, the Applicant uttered a false document by preparing an inspection report No. 43368. The said report was purportedly signed by the Inspection and Acceptance Committee, to show a successful completion of the works.

The above is just a highlight of the very detailed Affidavit of Mr. Andrew Lekamparish.

THE RESPONDENT'S CASE

11. *M/s Hellen Mutella* filed a Replying Affidavit sworn on 24th October 2016 on behalf of the 1st Respondent. She averred that the file in respect of the subject matter herein was forwarded to the Respondent by the 1st Interested Party. The former independently perused the file giving full consideration to the evidence therein and found that there was sufficient evidence against the Applicant and others and gave directions for their prosecution.

12. From paragraph 8 – 15 of her affidavit, she explains all that was revealed from the inquiry file. In summary, the revelation was that the transformers were not installed, tested and commissioned as per the terms of the tender documents. Further that the Applicant high jacked the work of the Inspection and Acceptance Committee and single handedly came up with an inspection report No. 43368 and a Certificate of Completion.

13. That the other members of the Inspection and Acceptance Committee were not involved in the inspection of any transformer or in the compilation of the inspection report. All this resulted in the said Redline Company being irregularly paid for work not done thereby improperly conferring a benefit of **EUROS 8,695** to the company contrary to Section 46 of Anti-Corruption & Economic Crimes Act.

14. That the Applicant has been arraigned in court on criminal charges and the matter is due for hearing.

THE APPLICANT'S SUBMISSIONS

15. The Application was canvassed by way of oral submissions. *Mr. Chema* for the Applicant submitted that in the contract, LPO (JS4) was omitted the word "installation" for reasons unknown to the Applicant. According to him, the transformers were only to be supplied and not installed, as per the contract.

He submitted that the Applicant complied with the law and has been charged for doing so. Further, he said, the 1st Interested Party did not act in good faith. He referred to the case of *Thomas Mboya & Others, Nairobi HCCC No. 1729 of 2009* cited the case of *Praxidis Namoni Saisi 2016 eKLR* to support his argument.

16. He faulted the Respondent for charging the Applicant in his capacity as the Chief Engineer yet he was only acting as the Chairman of the Inspection Committee. He referred to the case of ***Arap Ngeny –vs- Attorney General, High Court Civil Application No. 406 of 2001*** as referred to in the case of ***Praxidis Saisi***.

17. In referring to the case of ***Republic –vs- Director of Public Prosecution & 2 Others, ex parte Nyaboga Mariaria [2014] eKLR***, he submitted that the Applicant did not prepare the LPO; was not on the Tender Committee and was not involved in the payment.

Counsel also submitted that the Applicant was never invited by the Public Procurement Authority to make a presentation but was only called to the EACC to record a statement, thus violating his right to be heard.

18. That the officers of the 1st Interested Parties not being procurement experts did not understand the procurement processes and procedures and they committed procedural impropriety.

19. In referring to the case of ***Michael Sistu Kamau & 12 Others –vs- Ethics & Anti-Corruption & 4 Others (2016) eKLR***, he submitted that the EACC (1st Interested Party) was not well constituted when the decision was made.

1ST INTERESTED PARTY'S SUBMISSIONS

20. ***Miss Ocharo*** for the 1st Interested Party opposed the Application. She submitted that the case of ***Praxidis Saisi*** which the Applicant had relied on can be distinguished from the present one. It was her submission that in the ***Praxidis*** case, the Applicant therein had the power and authority to attest to the document, while the Applicant before this Court had no capacity to sign for the other members of the Inspection and Acceptance Committee.

21. That in total disregard to the law and his membership and as Chair of the said Committee, he forged the signatures of the other members. She referred the Court to the Materials Inspection Report (AL19) and the Document Examiner's Report (AL8).

22. She stated that Article 252 is clear on what their mandate is and the Applicant had failed to prove that the Judicial Review meets the parameters to be established before the Orders sought are granted.

She submitted that the Application had no merit for the following reasons;

(i) *Certiorari* issues when a decision is *ultra vires* or where natural justice rules have not been complied with. In referring to the case of ***Kenya National Exam Council & the Republic, ex parte, Geoffrey Gathenyi Njoroge & 9 Others Civil Appeal No. 266 of 1996; paragraph 6 of the Replying Affidavit and Article 252***, she submitted that the 1st Interested Party has the legal constitutional mandate to conduct investigations.

(ii) The Order of *Prohibition* cannot issue because that would be tantamount to ordering the Respondent not to carry out its duty.

23. She referred the Court to the cases of ***Penina Ndadako Kiliswa –vs- Independent Electoral & Boundaries Commission & 2 Others 2015 eKLR*** and ***Lameck Okeyo & Another –vs- Inspector General of Police & 2 Others 2016 eKLR*** and submitted that the Applicant had failed to show that the 1st Interested Party acted illegally, irrationally and unreasonably. That what he had raised were matters of fact and evidence for the trial court. See ***Thuita Mwangi & 2 Others –vs- The EACC Nairobi Petition No. 369 of 2013***.

24. She submitted that the Applicant was unknown to them prior to the commencement of the investigation. That their recommendations were only based on the evidence and documents in their possession and nothing else and that all the documents were collected from Kenya Pipeline.

25. It was her submission that the Applicant purposely failed to disclose his participation in tender No. SU/QT/309F/13 e.g. a site visit with a representative of Redline Co. Ltd; participated as member and Chair of the Evaluation Committee; was also member and Chair of the Inspection and Acceptance Committee as well as the Negotiating Committee. That he prepared the Negotiation Report to the Tender Committee and all along knew there was installation of the transformers.

26. Finally the charges he faces relate to his forging of reports and certificates while he well knew the installation had not been done.

THE RESPONDENT'S SUBMISSIONS

27. **Miss Akolo** for the Respondent submitted that the 1st Interested Party duly conducted investigations and compiled a file which was forwarded to the Respondent. The Respondent acted on it as mandated under Article 157 of the Constitution and considered the following evidence before having the Applicant charged;

(i) The Applicant as an official of Kenya Pipeline committed illegal acts;

(ii) The Applicant purported to have conducted an inspection of the installation. He did so on his own behalf and behalf of others;

(iii) He then purportedly signed the documents by forging signatures of others yet no inspection had been done. He therefore, involved himself in an illegal activity;

(iv) There were site visits, signing of documents/certificates.

All these omissions and commissions by the Applicant were considered and a decision made in accordance with the law based on the material in possession of the Interested Party and Respondent.

28. She submitted that the Applicant was not charged because he is a Chief Engineer and payments should not have been made without installations being done to date. She further submitted that it had not been shown that the Respondent acted unlawfully, maliciously and unreasonably. Relying on the **Michael Sistu case (supra)**, she submitted that it's not the source of the evidence that is material, but rather the evidence itself. Citing the case of **Republic –vs- Director of Public Prosecution & 6 Others, George Peter Opondo Kaluma ex parte Nairobi Judicial Review No. 34 of 2013**, she stated that their decision to prosecute was independent.

THE APPLICANT'S REPLY

29. Mr. Chemas in his reply reinstated that the Applicant has been charged in his capacity as the Chief Engineer and not the Chair of Inspection and Acceptance Committee. Further, that the 1st Interested Party could only investigate but not make recommendations in the absence of a Chair. He also submitted that installation was not done because it was not part of the contract. Finally, he stated that the Applicant had made out a case deserving of the Orders sought.

30. After considering the Application, Affidavits, Annexures, the rival Submissions and Authorities, I find the following to be the issues for determination are;

(i) Whether the decision of the 1st Interested party to recommend to the Respondent that the ex parte Applicant be charged with various offences under the ACECA was unlawful, irrational and unreasonable;

(ii) Whether the decision by the Respondent to direct the prosecution of the ex parte Applicant vide **Nairobi Chief Magistrate's ACC No. 22 of 2015 Republic –vs- Josphat Sirma & 4 Others** was unlawful, irrational and unreasonable.

31. **Odunga J.** very well explained what Judicial Review is all about in the case of **Republic –vs- Director of Public Prosecution & 2 Others ex parte Praxidis Namoni Saisi 2016 eKLR** when he stated;

“It is, in my respective view, important to understand the principles which guide the grant of the orders in the nature sought herein before applying the same to the circumstances of this case. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt a criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.”

32. Issue No. (i) ***Whether the decision of the 1st Interested part to recommend the Respondent that the ex parte Applicant be charged with various offences under the ACECA was unlawful, irrational and unreasonable;***

The Applicant’s case is that he was not wholly involved in the procurement process of the tender No. SU/QT/3097F/13 and yet he has been charged with offences in relation to the office of Chief Engineer.

He has heavily relied on the Local Purchase Order No. 4500068941, to support his position that Redline Company Ltd. was only to **supply and not to install** the transformers. Through this Local Purchase Order the Applicant is justifying his action of signing the completion certificate which to him is not a basis for any payment.

33. There is no dispute that the Applicant was appointed as the Chief Engineer of Kenya Pipeline on 10th December, 2013. His letter of appointment (JS1) is titled **RE: POSITION OF CHIEF ENGINEER (INSTRUMENTATION AND CONTROL) – JOB GROUP 3.**

The said letter outlines the Applicant’s duties and responsibilities as follows:

“As the Chief Engineer (Instrumentation & Control), you will be responsible for attainment of maximum availability of instrumentation and control equipment/installations and ensuring uninterrupted operation through continuous maintenance and servicing and for promptly attending to any breakdowns and promptly attending to emergencies in the section for efficient and effective pumping of white petroleum products. This will entail inter alia;

- ***Respond and attend to all emergencies, in accordance with the laid down KPC emergency procedures.***
- ***Ensure proper running of region’s I & C installations through coordinating and directing the activities of staff in the station.***
- ***Co-ordinate the repairs and maintenance of all I&C equipment/systems to ensure that downtime is minimized.***
- ***Preparation of procurement documents for works and services.***
- ***Commissioning of new equipment and projects.***
- ***Inspect all equipment in the station and ensure that preventive maintenance of all I&C equipment is well scheduled, carried out and documented.***

34. From this letter of appointment, it is clear that the Applicant played a key role as far as issues of supply and installation of equipment at Kenya Pipeline were concerned. It is his case that the only document which should be relied on is the contract which he breaks down to be the LPO. To him, this LPO does not contain the words “INSTALLATION” hence Redline Ltd. were not supposed to install the transformers. A perusal of this LPO (JS5) at page 3 which is a continuation of the terms and conditions shows the following:

Item	Description	Unit	Qty	Unit Price	Total Price
1	Supply & Installation of autotransformers for use in starting 3.3kv, 1200kw motor, in line 2 pump station	No.	3	60,000€	180,000€
6	Freight, Insurance, Taxes, Duties etc and all other costs required for installation of the autotransformer at the line 2 pump station	LS	1	41,940€	41,940€

These terms clearly show that Redline Company Ltd. was to **supply** and **install** the transformers.

35. By virtue of his position at Kenya Pipeline the Applicant was involved with this tender from the beginning to the end. The annexures that have been produced herein by both the Applicant and Respondents show that the tender was about – “**SUPPLY & INSTALLATION OF LINE 2 STATION AUTOTRANSFORMERS**”. The reason that made the tender to go for direct procurement was that the former transformer had got extensively damaged after it caught fire on 24th May, 2013. A request was then made for purchase of three auto-transformers for line 11 pumps station (AL1).

36. The Applicant was on 19th July 2013 appointed as member and chair of the Evaluation Committee and he filed a report (AL 10) whose subject was “**Supply and Installation of Line 2 – Pump Station Auto-Transformers**”. In its recommendation, this is what the report states:

“Following the above observations, the Evaluation Committee recommends the Tender Committee awards the supply and installation of Line-2 auto-transformers to M/s Redline Limited at the quoted price of 29,239,887.04 inclusive of all duties and taxes on the basis of their technical compliance.”

37. He attended the Tender Committee Meeting of 6th August 2013 which discussed and approved the **supply** and **installation** of the transformers (AL 11) and recommended that negotiation start.

He was again appointed as a member and chair of the Negotiation Committee (AL 12) which did a report on the same subject (AL 13). After all this documentation, site visit and the award of the tender the Applicant signed the Certificate of Completion on 30th January, 2014 (AL 18). This is the wording of the said certificate of completion;

“The Kenya Pipeline Company Limited hereby certifies that Redline Limited have satisfactorily completed all associated works related to the project – Supply, Installation and Commissioning of Line 2 Pump Station Auto-transformers (SU/QT/3097F/13) on 30/01/2014. Signed by the Chief Electrical Engineer”

38. The Signing of a Completion Certificate signifies that the works have been completed to the satisfaction of the client. In essence, the contractor’s services are then due for payment. It is therefore insincere for the Applicant to turn around and say the signing of the Completion Certificate did not signify that any payment was to be made and further that it’s not him who prepared it.

39. Part of the Applicant’s duties was preparation of procurement documents for works and services. The LPO is one of such documents. He claims that the LPO was not prepared by him but by the procurement office. Could this document have gone out without his knowledge of it?

If indeed the word installation was omitted as he claims, this is not something he could have failed to note because the word features in each and every document and discussion in respect of this tender.

40. The 1st Interested Party armed with all this evidence made recommendations to the Respondent in respect of their findings, for the necessary action by the Respondent. The Applicant faults the 1st Interested Party for the recommendations made. It is clear that the Applicant by virtue of his office at Kenya Pipeline was involved in this tender, from the beginning to the end. For any shortfalls and queries arising, he is in a better placed position to explain. He can't run away from that responsibility. He has not shown any unreasonableness, irrationality and/or illegality in the steps taken by the 1st Interested party. I will therefore answer the 1st Issue in the negative.

41. Issue No. (ii): ***Whether the decision by the Respondent to direct the prosecution of the ex parte Applicant vide Nairobi Chief Magistrate's ACC No. 22 of 2015 Republic –vs- Josphat Sirma & 4 Others was unlawful, irrational and unreasonable.***

The Applicant has heavily relied on the case of ***Republic –vs- DPP & 2 Others, Exparte Praxidis Namoni Saisi (Supra)***. In the Praxidis case, the Applicant did not participate at all in the tendering process. As an advocate and company secretary, she attested to the signing of the documents by other parties.

In the present case, the Applicant participated in procurement process. It is further alleged that he signed a document purporting it to have been signed by the other committee members. The Respondent evaluated all this evidence and made a decision to have the Applicant charged with those offences.

42. The Applicant must understand that in whatever committee he sat, he did so in his official capacity as the Chief Engineer and had to act as such in giving whatever technical advice that was required. That is why the charges are framed the way they appear. Any contestants on this should be presented to the trial court.

43. The 1st Interested Party has been given powers to investigate cases involving anti-corruption and economic crimes. It then makes recommendations to the Respondent. The Respondent independently re-evaluated what has been presented to it and makes a decision. Both parties must act independently of each other. They should not be directed by any person. Article 157 of the Constitution provides:

“10. 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.

11. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

The Applicant however claims that the Respondent acted unfairly, unreasonably, irrationally and improperly in charging him and wants this Court to intervene by issuing the Orders he seeks.

44. In De Smith's Judicial Review (sixth edition) at page 559 its stated thus;

“Although the terms irrationality and unreasonableness, are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up – in which in other words, there is an error of reasoning which robs the decision of logicless extreme example of irrational decisions include those which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons displace no

adequate justification for the decisions or where there is absence of evidence in support of the decision.”

45. Irrationality, unreasonableness bias or procedural impropriety may be observed from the face of the record, without a party having to give evidence, or make his defence.

The Applicant herein in an effort to prove these allegations against the Respondent ended up mounting his defence which this Court as a Judicial Review Court, cannot get into by analyzing the merits of the Applicant’s defence. He was very selective with the documents he presented to the Court in support of his case. In response, the 1st Interested Party and Respondent laid before the Court all the documents that they were able to obtain from Kenya Pipeline in respect of this matter. On the face of them, this Court finds no unreasonableness, unlawfulness and irrationality in the Respondent’s decision. I also answer issue no. (ii) in the negative.

46. My finding is that the EACC and the DPP have clearly placed before this Court material to justify their decision in this matter. It is the trial Court that will determine the innocence or culpability of the Applicant.

47. In his submission, Mr. Chemas told the Court that the 1st Interested Party had no Chairperson at the time of making its recommendation to the Respondent. That because of that, its recommendation could not stand. Besides making this statement, there was no material he presented to the Court to substantiate his claims. It was not for the Court to carry out an investigation. It was his duty to put forward his case to enable the 1st Interested Party to respond to it. In this case, he did not.

48. I therefore find no merit in the Application dated 18th November, 2016 and dismiss it with costs to the Respondent and Interested Parties.

Signed, date and delivered this 25th day of January 2017 at **NAIROBI**

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HEDWIG I. ONG’UDI

HIGH COURT JUDGE