REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MICSELANEOUS CRIMINAL APPLICATION NO. 20 OF 2014

STEPHEN MBURU NDIBA…….……. APPLICANT

VERSUS

ETHICS & ANTI-CORRUPTIONCOMMISSION…...…1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION….....2ND RESPONDENT

JUDGMENT

The applicant filed an application by way of a notice of motion dated 4th July, 2014 in which he sought four prayers which have been framed as follows:-

1. That this application be heard on priority basis.
2. That the honourable court be pleased to stay and/or quash the proceedings in Nyeri **CM A/C 5/2014** before the Chief Magistrate coming up for hearing on 24th and 25/7/2014 against the Petitioner/Applicant.
3. That the basis of the criminal charge is Nyeri High Court Civil Case No. 202 of 2013 where E.A.C.C is the plaintiff and the Petitioner/Applicant the 2nd Defendant and the complainant in second count is the 1st Defendant.
4. That in the High Court Civil Case, the petitioner is being defended by the office of the Attorney General, which application is supported by the affidavit of the Petitioner/Applicant one **STEPHEN MBURU NDIBA**.

As the motion is originating a suit and is basically a petition it ought to have been an originating notice of motion rather than a notice of motion; however, with the emergence of **articles 22(3) (b)** and **159 (2) (d)** of the Constitution which, *inter alia*, prod the courts to administer justice without undue regard to procedural technicalities and are required to, as much as possible, relegate formalities of approaching court to the periphery whenever a question of breach of constitutional rights arises, the form in which constitutional matters are raised in court nowadays bears little significance; accordingly, nothing will turn on the manner in which the applicant chose to lodge his petition more so considering that none of the respondents has suffered any prejudice.

The motion is expressed to have been brought under **articles 165 (6) (7)** and **157(11)** of the **Constitution**; a careful look at the prayers would reveal that there are only two prayers, that is prayer (1) which was spent the moment the motion was heard and prayer (2) that is now due for determination. 'Prayers' (3) and (4) are more or less the grounds upon which the motion is based. The motion was, in any event, supported by the affidavit of Stephen Mburu Ndiba, the applicant herein.

According to the applicant, he is the accused in **Nyeri Chief Magistrates Court Anti-Corruption Case**

No. 5 of 2014. The complainant in that case is the applicant's co-defendant in a civil suit in this Court, being **High Court Civil Case No. 202 of 2013** in which the **Ethics & Anti-Corruption Commission** (the 1st Respondent) is the plaintiff.

The applicant says, that he has been advised by his counsel, which advice he believes to be true that since he is being represented by the Attorney-General in the civil suit, the same Attorney-General cannot purport to have consented to his prosecution in the anti-corruption case against him in the Chief Magistrates' court.

It is the applicant's case that in prosecuting him, the prosecuting authorities have disregarded sections **35(1) (2), 36** and **37** of the **Anti-Corruption & Economic Crimes Act, 2003** (hereinafter referred to as the "**Anti-Corruption Act**") and that the criminal case is in bad faith and prejudicial to him as a civil servant. For these reasons, he wants the criminal case terminated.

In response to this application, the first respondent filed grounds of opposition contesting the petitioner's petition. In summary, the first respondent says that the application before court is misconceived, frivolous, vexatious, incompetent, and bad in law and generally an abuse of the court process.

The 1st respondent has stated that under **section 193A** of the **Criminal Procedure Code (Chapter 75)** criminal proceedings can run side by side with civil proceedings and the fact that any matter in issue in any criminal proceedings is also in issue in a pending civil suit cannot be a ground for stay, prohibition or delay of the criminal proceedings.

It is also the first respondent's position that the basis of the criminal case against the petitioner is the investigation conducted by the 1st respondent and its recommendations to Director of Public Prosecutions to prosecute in accordance with **section 35** of the **Anti-Corruption Act; it does not matter that the petitioner is represented by the Attorney General in the civil proceedings.** In any case, so the first respondent has urged, that under **articles 156** and **157(10)** of the Constitution the office of the Attorney General and that of the Director of Public Prosecutions are independent of each other and as far as the latter office is concerned the holder thereof does not act under the control or direction of any person or authority.

It has also been urged on behalf of the first respondent that it is in the public interest that criminal or corruption cases be prosecuted to their logical conclusion. For these reasons the first respondent has asked this court to dismiss the motion herein as it is only intended to delay the hearing and determination of the criminal case against the petitioner.

On his part the second respondent also filed grounds of opposition in response to the applicant's application and by and large replicated the first respondent's position as far as the offices of the Director of Public Prosecutions and that of the Attorney General are concerned. It has been urged on behalf of the second respondent that the applicant was charged upon the directions and consent of the Director of Public Prosecutions pursuant to **section 35(1)** of the **Anti-Corruption Act**. Just like the first respondent, the second respondent has also invoked **section 193A** of the **Criminal Procedure Code** to argue that civil and criminal proceedings can run concurrently even when the same matter or fact is directly or substantially in issue in both proceedings.

When the application came up for hearing on 18th November, 2014 the parties' counsel asked the court to adopt their submissions in this application in **High Court Criminal Application No. 21 of 2014**, in which one Lawrence Kuria Warachi has also sued the Ethics & Anti-Corruption Commission and the Director of Public Prosecutions under the same circumstances and is also seeking prayers similar to those sought in the present motion.

In his submissions, Mr Njuguna Kimani for the applicant conceded that the office of the Attorney General and that of the Director of Public Prosecutions are independent of each other and they do not act under the control or directive of any other person apart from the officers who have been appointed to hold those offices. While he agreed that the Attorney General represents the national Government in court or in any

other legal proceedings to which the national Government is a party, counsel urged that he is not being represented by the Attorney General in the civil proceedings in **High Court Civil Case No. 202 of 2013** as the Government of Kenya.

Of particular concern to the applicant was what he alleges to be contravention of **section 35(1)** of the **Anti-Corruption Act**; counsel submitted that the alleged offence was committed in 2009 and therefore a report of the investigations on that particular offence ought to have been submitted to the Attorney General or the Director of Public Prosecutions in view of the amendments contained in **Statute Law (Miscellaneous Amendments) Act No. 12 of 2012** which now requires that such report be made to the latter officer rather than the Attorney General before one is charged. To the extent that no such report was submitted as required, it is urged that the applicant was charged without the requisite consent to charge him from either the Attorney General or the Director of Public Prosecutions. In this respect counsel cited the Court of Appeal decision in **Criminal Appeal No. 48 of 2008, Esther Theuri Waruiru & Another Versus Republic** and urged the Court to find that the criminal case against him was premature.

In view of the alleged contravention of **section 35(1)** of the **Anti-Corruption Act** and considering that he was only arraigned in court in 2014 when the alleged offence was committed in 2009 counsel for the applicant also submitted that the **Director of Public Prosecutions** had contravened **article 157(11)** of the Constitution which requires him to 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 in exercise of his prosecutorial powers.

Ms Faith Ng'ethe for the first respondent reiterated the respondent's position as articulated in the grounds of opposition; she added that the civil case against the applicant was for recovery of illegally acquired public property and that the facts upon which this case was based also revealed that a criminal offence had been committed. It is for this reason that it was necessary that the applicant be charged with the particular offence and at the same time a civil suit be instituted to reclaim the public property.

As far as the question of the consent to prosecute is concerned, counsel submitted that the consent had been duly obtained and this fact had been admitted by the applicant himself in the affidavit in support of the application; indeed the delay in prosecution of the application, so it was submitted, was occasioned by the delay in procuring the consent from the office of the Director of Public Prosecutions.

Mr Festus Njeru Njue for the second respondent submitted that contrary to the applicant's counsel's submissions, the Director of Public Prosecutions can consent to the prosecution of a public officer regardless of whether he is represented by the Attorney General in a civil suit arising from the same facts that would give rise to the criminal proceedings. Counsel argued that the charges and the prosecution of the applicant were brought in court by police officers exercising delegated authority from the Director of Public Prosecutions and therefore the issue of consent under **section 35(1)** of the **Anti-Corruption Commission Act** should not arise. On whether both the civil case and the criminal case can proceed concurrently, counsel agreed with the first respondent's counsel that under **section 193A** of the **Criminal Procedure Code** it is possible for the two cases to proceed at the same time.

When he rose to respond to the submissions by the respondents' counsel, Mr Njuguna for the applicant reiterated that though it had been submitted that **section 35(1) of the Anti-Corruption Act** had been complied with there was no evidence before court demonstrating such compliance; in the absence of any material that the respondents had complied with **section 35(1)** of the **Act**, he asked the court to allow the application and halt the criminal proceedings which in his view are an abuse the process of the court.

From the able submissions of the learned counsel for the applicant and the respondents, I gather that there is consensus amongst them on the independence and the extent of the functions and powers of the offices of the Attorney General and the Director of Public Prosecutions. What appears to be in contention are mainly two issues; first, whether the institution of the criminal case against the applicant was for purposes other than upholding criminal justice and second, whether any prosecution of an offence investigated by the **Ethics & Anti-Corruption Commission** in exercise of its mandate under the **Anti-Corruption Act** must be preceded by a consent from, initially, the Attorney General and now, the Director of Public

Prosecutions. The second question is at the heart of the application before the court and as a matter of necessity, it deserves considerable attention in this judgment. I propose to revisit it after I have addressed the first question which, going by the express provision of **section 193A** of the **Criminal Procedure Code** and the previous court decisions on this point, it is a question whose answer can be said to have been fairly well settled.

Section 193A of the **Criminal Procedure Code** states:

> ***193A. Concurrent criminal and civil proceedings***
>
> ***Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.***

It is beyond peradventure then that the existence of a civil suit *per se* cannot be a bar to criminal proceedings simply because the subject matter in the criminal proceedings is directly in issue or substantially in issue in the pending civil suit. Where civil proceedings exist side by side with criminal proceedings, the latter would only be stayed or terminated altogether if there is every indication that they were initiated to bring pressure to bear upon a party to settle the civil suit; in that regard, the criminal proceedings are for ulterior motives and not for the purpose of which they are meant, which is, upholding criminal law. It was so held in the case of **Cruisair Ltd versus CMC Aviation Ltd (Ltd), (1978)KLR 131** which was quoted in **Nairobi High Court Miscellaneous application No. 839 and 1088 of 1999 Vincent Kibiego Saina versus the Attorney General** where the Court of Appeal stated with regard to winding up proceedings, that:

> ***"…a winding up court is not to be used for debt collection purposes, or to exert pressure to force payment of a debt which is bona fide disputed and contested. A fortiori, to institute or sustain or prop criminal proceedings, like bring winding up proceedings, to exert pressure for the payment of a debt or sum which is disputed in good faith, that which is disputed on substantial and not insubstantial grounds, and the criminal proceedings cannot decide the disputed debt or sum, constitutes an abuse of the process of the court, is oppressive, mala fides…"***

Apart from the existence of the civil suit and the criminal case arising from the same matter, there is no evidence that the criminal case is meant to exert pressure upon the petitioner and compel him into submission in the pending civil suit. One of the exhibits attached to the affidavit in support of the application is a plaint in which the Ethics & Anti-Corruption Commission has sued the applicant for recovery of a parcel of land that was initially reserved and set aside for public use but which has been illegally alienated contrary to the provisions of the **Government Lands Act (Cap. 280)** and transferred to an individual. The petitioner is alleged to have been the architect of this alienation in collusion with the individual in whose name the land was transferred. The Commission is seeking, amongst other things, to have the transfer of this land cancelled and the land reverted to the Government.

The Ethics & Anti-Corruption Commission's action is no doubt consistent with its mandate under the Anti-Corruption Act; the issue whether its suit will succeed or not is left for the trial court. As far as the Attorney General's representation of the applicant in that suit is concerned, it is for the Attorney General himself to consider whether such representation is consistent with the functions of his office more particularly **article 156(4) (b)** of the Constitution which says:

> ***(4) The Attorney-General—***
>
> ***(a) …***
>
> ***(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings;***

It is noted that it was submitted on behalf of the petitioner that he is not being represented as the Government of Kenya in the civil proceedings against him; I need not say anything more than reiterate what constitution expressly states on this issue.

As far as the criminal case is concerned, the charge sheet exhibited to the petitioner's affidavit indicates that the applicant was charged with the offence of **abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act**. Section 46 states:

> ***46. Abuse of office***
>
> ***A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.***

If the applicant caused the illegal alienation of public property for the benefit of someone else by virtue of the office he held, then he is the kind of person that **section 46** of the **Act** has in mind; if, in the Director of Public Prosecution's view an offence has been revealed from the applicant's actions, he has an obligation to prosecute. I would in this regard adopt the words of the House of Lords(Lord Justice Laws) in **Reg. versus Director of Public Prosecutions, Ex Parte Kebilene & Others (2002) 2AC 326** at page 351 where it was said:-

> ***"In the ordinary way, certainly, it is the Director's duty generally to enforce criminal law. If he is to decide not to enforce some particular statutory provision, in my judgment he will be required on a judicial review to point to a particular context which he is entitled to regard as giving rise to an objective public interest justifying the decision. Obviously, he may not so decide merely because he entertains the subjective view that Parliament should not have criminalised the kind of acts in question. No doubt he would never do so…So long as an offence is on the statute book, it will ordinarily be presumed that it is to be made good by action against the offenders; and this is so notwithstanding the Director's wide discretion whether or not to prosecute in any individual case…"(Underlining mine)***

With these words I do not find anything amiss with the prosecution of the applicant in the **Nyeri Chief Magistrates Court Anti-Corruption Case No. 5 of 2014**; the fact that there exists a civil case arising from the same facts should not be a reason to halt or stay the criminal case which in my view was validly conceived.

I now turn to the second question on whether section **35(1)** presupposes the need for consent from the Director of Public Prosecutions before any prosecution particularly that which is based on investigations undertaken by the Ethics and Anti-Corruption Commission can be commenced. The best place to commence answering this question, in my humble view, is by critically interrogating this provision.

Section 35(1) of the **Anti-Corruption & Economic Crimes Act, 2003** provides as follows:

"Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of an investigation".

Two issues that quickly emerge from this provision are that firstly, the Commission must make a report and secondly, that report must be about the results of an investigation. Of concern to this judgment is that second aspect of the provision on 'the results of an investigation.'

What would 'the results of an investigation' in the report to the Director of Public Prosecutions entail? On the face of it and literary speaking, 'the results' of anything is simply an outcome of some action or process. **The Oxford Advanced Learner's Dictionary, New 8th Edition**, defines the word 'result' as '*a thing that is caused or produced because of something else'*. The Dictionary further describes the word as being synonymous with the words *'consequence'*, *'outcome'* and *'repercussion'*. '***The results of an investigation***' contemplated under **Section 35(1)** would therefore simply mean a *'consequence'* or an *'outcome'* or even a 'repercussion' of an investigation. An action taken at the conclusion of an

investigation would, in my humble view, constitute such a 'consequence' or an 'outcome' of an investigation.

It would thus be logical and legal for the Commission, in its report to the Director of Public Prosecutions, to report, for instance, that following a complaint of corruption against a particular individual, the Commission undertook investigations which established that an offence of corruption had indeed been committed; consequently, the Commission charged the offender with a corruption offence under the provisions of the **Anti-Corruption Act** or any other law under which the particular offence is defined. Simply put, the charging of the offender in court by the Commission would be the 'result', the 'consequence' or the 'outcome' of its investigations and would constitute a pertinent part of the report to the Director of Public Prosecutions as envisaged in **section 35(1)** of the **Act**.

That the law expressly provides that the Commission shall report 'the results of an investigation' to the Director of Public Prosecutions implies that the Commission's task does not end with the investigations alone. The Commission's task under **Section 35(1)** is not limited to a fact finding mission only; it has a further duty to analyse the facts gathered in the investigations and, where appropriate, take action in line with its statutory mandate. The action taken is what would properly be described as 'the results of an investigation' contemplated by the legislature under **Section 35(1)** of the **Anti-Corruption Act.**

The question that would then follow is, is there any legal basis for the Ethics and Anti-Corruption Commission to act on its investigations and charge any person with a corruption offence, where such an offence is established as a result of an investigation? My answer to this question would be in the affirmative; I would say yes to this question, and emphatically so, because there are unequivocal and unambiguous provisions both in the Constitution and in the **Anti-Corruption Act** that would buttress this view.

Starting with the **Anti-Corruption Act** itself, **Section 32** thereof is clear as to how far the Director of the Commission or any of the Commission's investigators can go where an offence is established from the investigations they have conducted. This provision of the law expressly states as follows:

> ***Without prejudice to the generality of section 23(3), the Director and an investigator shall have power to arrest any person for and charge them with an offence, and to detain them for the purpose of an investigation, to the like extent as a police officer.***

Without having to read between the lines, because there is no reason to do so, this provision appears clear to me that, apart from enjoying police powers, privileges and immunities in conducting investigations as provided under **section 23(3)** of the Act, the Director and an investigator can arrest any person and charge him with an offence. The same officers can detain any person for purposes of conducting an investigation just like a police officer would do; I suppose this is the reason why the commission premises are a gazetted police station. I must mention here that the investigation of a detained person referred to in the last part of this provision cannot possibly be referring to the same offence for which one has already been charged; the presumption is that a person is only charged once the investigations are complete and if for any reason an accused person is detained for purposes of an investigation, it must be for an investigation of an offence other than the one that he has been charged with.

It therefore follows that, at the very minimum, the statutorily identified results of an investigation as expressed in **Section 32** of the Act are the making of arrests and charging the suspects in a court of law in appropriate circumstances. The arrests and the charging will of course be made after investigations and all that the Commission will be required to report to the Director of Public Prosecutions as 'the results of an investigation' pursuant to **Section 35(1)** of the Act is that a suspect was arrested and charged in court with a corruption offence or an economic crime. The 'arrest' and the 'charge' would therefore logically constitute the 'results of an investigation'.

I am convinced that **Section 32** read together with **Section 23(3)** of the **Anti-Corruption & Economic Crimes Act, 2003** are tools available to the Commission to arrest and charge where, in the circumstances of the case, it is appropriate to do so. These provisions of the law would be rendered superfluous and bear

no meaning at all if it was to be argued that before any arrest and charge is preferred against any suspect, a report has to be made to the Director of Public Prosecutions. If that was the intention of the legislature it would have expressly stated so.

In my very humble view, it certainly cannot have been the intention of Parliament to clothe the Director of the Anti-Corruption Commission and the Commission's investigators with powers to arrest and charge suspects to the same extent as a police officer acting under the Police Act and in the same breadth require of the Commission to act on its investigations only after a report has been made to the Director of Public Prosecutions.

Better still, the statutory basis upon which the Commission can prosecute can easily be traced to the mother law, the Constitution. The Constitution is clear that the power to prosecute is not a preserve of the Director of Public Prosecutions; any person or authority can institute prosecution although the Director of Public Prosecutions can take over such prosecution with the consent of such person or authority. **Article 157(6) (b)** of the **Constitution** sheds more light on this; it says:

> ***(6) The Director of Public Prosecutions shall exercise State powers***
>
> ***of prosecution and may-***
>
> ***b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority;***

The implication here is that criminal proceedings can be commenced by any person or authority; the Director of Public Prosecutions does not always have to be the initiator of such proceedings. I would also think, that the Anti-Corruption Commission is the sort of authority that the Constitution has in mind when it speaks of criminal proceedings being instituted by an authority apart from the office of the Director of Public Prosecutions.

Article 157 (12) of the Constitution goes further to say that indeed Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions. As far as the Ethics & Anti-Corruption Commission is concerned, such legislation, conferring upon it powers of prosecution, can be found in **section 32** of the Act. I am minded that this Act was conceived much earlier than the Constitution and therefore the enactment of **section 32** of the Act cannot be said to have been legislated from **article 157(12)'s** perspective; however, prior to the promulgation of the Constitution, individuals and authorities including public authorities and a host of other public bodies could still institute and prosecute criminal cases against any person without any reference to the Director of Public Prosecutions or to the Attorney General before him. **Article 157 (12)** would, in my view, be not only a recognition by the Constitution of the existing state of law at the time it was promulgated but it is also a realization that, in the interest of the public and in order for authorities such as the Anti-Corruption Commission to execute their functions effectively, or for such other like reasons, it is necessary that other persons or authorities besides the Director of Public Prosecutions be allowed to exercise prosecutorial powers.

In the Court of Appeal judgment in **Criminal Appeal No. 48 of 2008, Esther Theuri Waruiru & Another Versus Republic** that was cited by the learned counsel for the applicant, the Court of Appeal held that the Commission's power under **Section 35** *"is limited to conducting investigations and making recommendations on, among other things, the prosecution of the person or persons under investigation"*.

The Court of Appeal continued that, the law reposes power on the Attorney General to direct and control all prosecutions and that it was his duty to authorise prosecutions on corruption cases if the interest of the country and the interests of justice so demanded.

The Court went further and compared **Section 12** of the repealed **Prevention of Corruption Act, Cap 65** which required the consent of the Attorney-General before any prosecution under that Act with **Section**

35 of the Anti-Corruption & Economic Crimes Act, 2003 requiring investigation reports to be made to the Attorney-General. According to the Court the two provisions are, in effect, similar. This is why in its judgment the Court stated, "*That power* (that is, the Attorney General's power under Section 12 of the Prevention of Corruption Act, Cap 65) *appears to have been retained when the Anti-Corruption and Economic Crimes Act was enacted. The powers of KACC to prosecute any person or group of persons was subject to the direction of the Attorney-General, hence the requirement under Section 35 of that Act, which a report of any investigation be made to the Attorney General with certain recommendations.*"

Section 12 of the repealed **Prevention of Corruption Act**, Chapter 65 which the Court referred to stated;

> ***"A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney General: Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and he may be remanded in custody or on bail, notwithstanding that the consent of the Attorney General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained."***

The legislature was categorical in this provision that a prosecution under the **Prevention of Corruption Act, Chapter 65** must be preceded by a written consent from the Attorney General; its intention is very clear from the outset and there is no doubt that any prosecution without such a written consent would have been fatal. There is no similar provision in the **Anti-Corruption Act**. **Section 35** of the **Act** which the Court of Appeal compared with **Section 12** of the **Prevention of Corruption Act** has nothing to do with the consent to prosecute any offence under the **Anti-Corruption & Economic Crimes Act, 2003** but only deals with reports to the Director of Public Prosecutions on the investigations undertaken by the Anti-Corruption Commission. Such reports shall include information on the outcome of the investigations and any action taken upon it, which in my view includes but not limited to arresting and charging suspects pursuant to **Section 32** of the Anti-Corruption Act.

It must also be noted that there was no provision in the Prevention of Corruption Act similar to **section 32** of the **Anti-Corruption & Economic Crimes Act, 2003** and I would opine that the existence of that provision in the current anti-corruption legislation is an additional reason against any attempted analogy between **Section 12** of the **Prevention of Corruption Act, Chapter 65** and **Section 35** of the **Anti-Corruption Act**; in the context of the current anti-corruption legal regime there is no comparison between the two either in form, substance or in effect.

One thing that is also clear from the judgment of the Court of Appeal is that the Court never made any reference at all to **section 32** of the **Anti-Corruption Act**; neither was there any discussion of the constitutional provisions of **articles 157(6) (b)** and **157(12)** on the exercise of powers to prosecute by the other persons or authorities such as the Anti-Corruption Commission. It could be that these provisions were not brought to the attention of the learned judges since, in any event, Mr Monda for the state conceded the appeal; I am of the humble view that had these provisions been urged the learned judges would not have interpreted **section 35(1)** of the Anti-Corruption & Economic Crimes Act in isolation and would have probably come to a different conclusion. The Court would certainly not have declared that the powers of the Attorney General in **Section 12** of the repealed **Prevention of Corruption Act, Chapter 65** were retained in **Section 35** of the **Anti-Corruption & Economic Crimes Act, 2003** law because as noted such a declaration would be inconsistent with the provisions of **section 32** of the of the **Anti-Corruption & Economic Crimes Act, 2003** which clothe the Director and investigators of the Commission with powers not only to investigate and arrest but also to charge. Such express provision was never found in the **Prevention of Corruption Act, Chapter 65** and it could not have been included in the law that succeeded that Act for cosmetic or superfluous purposes. Much as this court is bound by the decisions of the Court of Appeal by virtue of the doctrine of stare decisis, its decision in **Esther Theuri Waruiru & Another Versus Republic (ibid)** can be distinguished and validly be departed from for the reasons I have given.

I am also convinced that provisions such as **articles 157(6)(b), 157(12)** of the Constitution and **section 32** of the **Anti-Corruption Act** have deliberately been included in the current legal regime because

prosecution, for instance of offences such those related to corruption is not and shouldn't be an alien concept to any anti-corruption authority; considering the cancerous effect corruption has to the well-being of any country and in particular to its economy and considering how much we can achieve as a nation without corruption, it should not surprise anyone that a body established and appropriately equipped to eradicate this vice has powers to prosecute those in our society who find this vice palatable. If, for instance, County Governments and local authorities before them have prosecutorial powers and can prosecute people for such mundane offences like spitting on their streets or for relieving themselves in their alleys, our priorities as a nation would be questionable if a body specifically established to rid our society of corruption and which is generously funded and ideally equipped for that purpose is denied or is deemed to be deprived of what I consider to be the most effective tool in executing its primary mandate.

I am persuaded to conclude that I do not find any merit in the applicant's application; it is hereby dismissed with costs. This judgment shall be adopted and applied in the High Court Criminal Application 21 of 2014; accordingly this judgment shall be filed in that case. It is so ordered.

Dated, signed and delivered in open court this 6th February, 2015

Ngaah Jairus

JUDGE