

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NUMBER E150 OF 2024

FRANCIS AWINO.....
PETITIONER

VERSUS

NIXON MUGILWA.....
RESPONDENT

AND

ETHICS & ANTI-CORRUPTION COMMISSION.....
INTERESTED PARTY

J U D G M E N T

Introduction

1. The Petition dated 18th March 2024 is supported by the Petitioner’s affidavit in support of even date.
2. The substance of this Petition is that the Respondent, who is the Acting Chief Executive Officer of the Bomas of Kenya, has violated the provisions of Chapter 6 of the Constitution through acts of gross misappropriation and misuse of public funds and various corrupt practices.
3. In view of the foregoing, the Petitioner brings this Petition against the Respondent seeking the following relief:

- i. A declaration that the Respondent has violated the principles enshrined in Articles 10, 73 and 232 of the Constitution by failing to uphold and account for his administrative actions.***
- ii. A declaration that the Respondent is not fit to hold office due to his corrupt dealings.***
- iii. A declaration that the continued stay in office of the Respondent as the Acting Chief Executive Officer of the Bomas of Kenya is against the public interest.***
- iv. An order do issue requiring the Kenya National Audit office (KENAO) to carry out an audit of the funds used by the Respondent and ones found to have misused public funds to be held personally liable and be surcharged accordingly.***
- v. An order of declaration that the Respondent be surcharged for misapplying public funds.***
- vi. An order directed to the Interested Party to conduct investigations against the Respondents with speed and/ or within a time frame as the Honorable Court may provide.***
- vii. An order that the Respondent be compelled to step aside to allow free and credible investigations to be conducted at the Bomas of Kenya.***
- viii. The Court be pleased to issue a permanent order of Prohibition prohibiting the Respondent from taking any further management of the Bomas of Kenya.***

- ix. The Court be pleased to exercise its powers under Article 23(3) of the Constitution, to issue any other appropriate relief.**
- x. An order that the Respondent do pay the costs of this Petition.**

Petitioner's Case

- 4. The Petitioner avers that there has been overwhelming illegalities, irregularities and circumvention of the law by the Respondent at the Bomas of Kenya due to questionable payments amounting to tens of millions.
- 5. The Petitioner states that the Respondent has committed gross tendering malpractices, financial irregularities and brazen embezzlement of public funds and abuse of office that have been going on relentlessly. He claims that the Respondent has made suspicious and dubious payouts through vouchers and even paid air tickets for two women who accompanied him to Dubai yet are not staff members. Additionally, that various payments were made through bankers' cheques or Electronic Funds Transfers (EFT) from the Bomas of Kenya bank account to the private accounts.
- 6. For instance, it is alleged that the Respondent was paid Sh.201, 560 as per diem for a training he attended in Mombasa which he never attended. In addition, other

irregular payments paid by the Respondent include expenses paid vide voucher No. A3904 paid through Cheque No. 023947 of Sh.187,150 between 2020-2021, voucher No. A3902 paid through Cheque No.023945 of Sh.139, 600 and voucher No. A3888 paid through Cheque No.023942 of Sh.263, 765. Equally, that questions have been raised over authenticity of voucher No.A3887 paid through Cheque No.023939 of Sh.297, 680 and voucher No.A3832 paid through Cheque No.023929 of Sh.233, 000.The Petitioner asserts that the Respondent was unable give an account and justify these payments.

7. Furthermore, the Petitioner relying on the Auditor General's Report, averred that the Report found that the Bomas of Kenya had paid Ksh.2,000,000 for a non-existent Enterprise Planning (ERP) information system which was confirmed by its ICT system in an internal Memo dated 12th October 2020 and a subsequent Report dated 26th June 2020. It is noted that the Respondent did not also provide a status report on implementation of the said system or adduce any evidence to support the existence of the same.
8. The Petitioner further asserts that there is an intricate web of corruption at the Bomas of Kenya as allegedly perpetrated by the General Manager Peter Gitaa Koria and Board chairman Josiah Magut.

9. The Petitioner avers that the Interested Party conducted investigations in this matter and the other allegations revolving around an irregular tender award and embezzlement of funds amounting to Ksh.8,587,831 and advised the Office of the Director of Public Prosecutions to charge the Respondent with other staff of the Bomas of Kenya with several counts that offend the AntiCorruption and Economic Crimes Act.
10. He alleges that despite the Interested Party issuing recommendations to the office of the Director of Public Prosecutions to charge the Respondent, they have failed and refused to do so.
11. In view of the foregoing, the Petitioner contends that the Respondent's conduct highlights his incompetence and the vital need for him to step down from office. Furthermore, be held accountable for his actions to curtail any further and future mismanagement of funds at the Bomas of Kenya. As such, the Respondent is accused of being in violation of in Articles 10, 73 and 232 of the Constitution.

Respondent's Case

12. The Respondent filed his response in his Replying Affidavit sworn on 28th October 2024.
13. He depones that the Petitioner's allegations against him are based on misinformed online publications by the 'The

Informer' published on 8th and 12th April 2022. In fact, he states that these allegations as outlined in the Petition are near verbatim reproductions of what was published by the author, Njoki Maina titled *Bomas of Kenya board Chairman, CEO Frustrate Efforts to Audit Graft Allegations* and *Auditor General Unmasks How Bomas of Kenya Paid For Non-existent ERP System* being Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20. Equally, what was published in the Capital News on 5th March 2024 by Amukohe Yvonne titled *Bomas Under EACC Radar Over Irregular Tender Awarded to CIC Insurance* being Paragraphs 20 and 21.

14. He contends that the fact that the Petitioner has flagrantly plagiarized the online articles without regard for truth and authenticity demonstrates that the Petition is frivolous, vexatious and an abuse of the Court process.
15. He depones that contrary to the Petitioner's allegations, the Interested Party's investigations at the Bomas of Kenya were with reference to the former Chief Executive Officer, Peter Gitaa Koria. He was thereafter suspended from the office by the Interested Party vide a letter dated 10th November 2023.
16. He depones that the Interested Party's investigations absolved him of any culpability in the matter, a testament as

to why he was not charged by the Office of the Director of Public Prosecutions.

17. He postulates that the Petitioner's allegations of his incompetence as based on rumors cannot render him incompetent to hold a public office. He denies any involvement in corrupt practices as accused by the Petitioner and that he neither violated the Constitution, the Leadership and Integrity Act and the Anti-Corruption and Economic Crimes Act. He for this reason, urges the Court to dismiss the Petition as it lacks merit.

Interested Party's Case

18. The Interested Party's response and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

19. The Petitioner filed submissions dated 18th March 2025 in support of his Petition wherein he submitted that the case not only revolves around individual misconduct but also the sanctity of a public office since it strikes at the very core of these constitutional principles.
20. As such, he set out the issues for determination as: *whether the Respondent violated the Constitution and other relevant*

laws governing public office, whether the Respondent's actions amount to abuse of office, economic crimes, and gross misconduct, whether the Respondent is fit to continue holding office and whether the Court should grant the reliefs sought in the Petition, including his removal from office, institution of criminal proceedings, and a forensic audit of public funds.

21. On these issues, the Petitioner reiterating the assertions regarding the Respondent in the Petition, submitted that the actions are not mere procedural errors but constitute grave violations of public trust and accountability in breach of Articles 10, 73 and 232 of the Constitution.
22. He asserted that the Supreme Court in **Martin Wanderi & 106 Others v Engineers Registration Board & 10 Others [2018] eKLR** affirmed that public officials are bound by the principles of good governance and transparency. In this matter, the Petitioner asserted that the Respondent had violated these principles.
23. In reaction to the Respondent's reply, the Petitioner submitted that media reports serve as early indicators of corruption as investigative journalism has played a critical role in exposing public sector corruption worldwide.

24. He further argued that his assertions were not solely based on media reports but also corroborated by the Auditor General's report and Interested Party's investigations. The Petitioner argued thus that the Respondent had failed to rebut this claim as guided by the Court of Appeal in **Peter Kariuki v Attorney General (2014) eKLR**.
25. The Petitioner further maintained that the Respondent who was previously the Finance Officer was involved in the financial transactions making him complicit in the fraudulent activities and which continued under his leadership as the acting CEO. The Petitioner emphasized that the Supreme Court in **Martin Wanderi** (supra) held that public officials cannot evade responsibility by blaming their predecessors, as such the Respondent must be held accountable.

Respondent's Submissions

26. The Respondent's submissions to the Petition are not in the Court file or Court Online Platform (CTS).

Analysis and Determination

27. Having considered the pleadings and submissions herein, the Court framed the following issues for determination:
- i. Whether this Court can assume jurisdiction over the subject matter of this Petition given the specific mandates of other relevant Independent constitutional bodies.***

- ii. Whether the allegations of violation of Articles 10, 73 and 232 of the Constitution were proved against the Respondent.**
- iii. Whether the Petitioner is entitled to the reliefs sought.**

Whether this Court can assume jurisdiction over the subject matter of this Petition given the specific mandates of other relevant Independent constitutional bodies.

- 28. The thrust of this Petition is the Respondent's alleged corrupt practices, misappropriation of funds and abuse of office as the CEO, Bomas of Kenya, conduct that the Petitioner asserts run afoul **Articles 10, 73 and 232 of the Constitution.**
- 29. Are questions of gross tendering malpractices, financial irregularities and brazen embezzlement of public funds, including the allegation that the Respondent paid air tickets for two women to accompany him to Dubai yet they are not staff members, matters that should directly be filed in this Court to determine if they violate the Constitution or are they matters that are best dealt with the requisite investigative bodies?
- 30. Justifiability doctrine enables the Court to make an assessment of the dispute and consider whether it is a

matter that is suitable for adjudication through the judicial process or not. For instance, dispute may be non-justiciable because it is premature (unripe), or moot (where the controversy no longer exists) or abstract (merely raising hypothetical questions as opposed to real or actual controversy) or involving a political policy matter or that which the Court considers that it falls with other coordinate branches or bodies of government can resolve.

31. In **Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others (2016) eKLR** the Court explained the word justiciability as follows:

“By justiciability it is meant a matter “proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”: see Black’s Law Dictionary 9th Ed, pp 943-944. In other words, courts should only decide matters that require to be decided. Thus in Ashwander -v- Tennessee Valley Authority [1936] 297 U.S 288, the US Supreme Court stated that courts should only decide cases, which invite “a real earnest and vital controversy”.

Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.

Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much-sought judicial time...”

32. The Court went further to discuss as follows:

“The justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence. The court in John Harun Mwau & 3 Others vs AG & 2 others HCCP No. 65 of 2011 (unreported) stated as follows:

“We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.” ...The extensive quotations were deliberate. It is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justiciability dogma. There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.

It is however to be noted that the court retains the discretion to determine whether on the

circumstances of any matter before it still ought to be determined.”

33. The Petition alleges that the Respondent has committed acts of corruption, embezzlement of public funds and financial irregularities.
34. These are allegations of criminal nature involving conduct that constitutes crime both under the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and the Penal Code, Cap 63 Laws of Kenya. The Ethics and Anti-Corruption Commission and the National Police Service have both Constitutional and legal mandate to investigate such offences and take the necessary legal action. The National Police Service is established under Article 243 of the Constitution and the Constitution further gives Parliament in Article 245 (8) the authority to enact legislation to give full effect to these Constitutional provisions. Parliament thus passed the National Police Service Act No. 11 A of 2011 which under section 24 (e) empowers the Police to investigate crimes.
35. Further, the Constitution under Article 79 provides for enactment of legislation for establishment of the Ethics and Anti-Corruption Commission which shall have the powers and status of a Commission under Chapter 15 for purposes of ensuring compliance with, and enforcement of, provisions of Chapter Six of the Constitution. To give effect to this Article,

Parliament enacted the **Ethics and Anti-Corruption Act** whose preamble states:

“An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution, to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes.”

Section 13 (c) of Act specifies the powers of the Commission which include *‘the power to conduct investigations on its own initiative or on complaint made by any person’*.

36. The Petitioner has not indicated if he has lodged any complaints against the Respondent with any of the constitutionally recognized investigatory bodies that the law empowers to investigate commission of corruption or economic crimes. In my view, the Petitioner cannot be allowed to run away from institutions that are constitutionally and legally assigned the specific primary mandate of dealing with the issues raised in the Petition. This Court must exercise judicial restraint by showing deference to the coordinate branches of government, by abstaining from interfering with the core functions that are within the constitutional and statutory mandate of these bodies. This was well articulated by the Court in **William Kabogo Gitau v Ferdinand Ndung’u Waititu [2016] eKLR** as follows:

“In my view, while this Court enjoys unlimited original jurisdiction in criminal and civil matters by dint of Article 165 (3) (a) of the Constitution, that is not a substitute for other first ports of call in determining such civil and criminal matters. In the present case, the Petitioner alleges the commission of various criminal offences and thus concludes that the Respondent is guilty of the same and hence in violation of Articles 10 (2) and 73 of the Constitution.

49. I hold the view that the Petitioner’s contentions in regard to the commission of the alleged offences must be raised with the relevant authorities and this Court cannot at this juncture usurp the powers of such authorities. This Court cannot for instance sit to investigate matters of alleged forgeries of academic documents as invited by the Petitioner and neither can the Court make conclusions pertaining to those allegations in the absence of evidence for instance that the investigating agencies have made investigations and the relevant Court has made a finding as to the innocence or otherwise of the Respondent on those allegations.”

37. The other complaints cumulatively suggest that the instant Petition has been filed because the Respondent action is in violation of the values and principles required of public officers by the Constitution, and in particular, Chapter Six of the Constitution.

38. Again, the responsibility to undertaking an inquiry as to whether or not one has violated or contravened the

provisions on leadership and integrity under Chapter Six of the Constitution is a mandate vested on the Ethics and Anti-Corruption Commission. **Article 79 provides:**

“Parliament shall enact legislation to establish an Independent Ethics and Anti-Corruption Commission, which shall be and have the status and powers of a Commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, provisions of this Chapter.”

39. The Leadership and Integrity Act which was enacted to give effect to Chapter six of the Constitution provides in its preamble that it is intended to **“give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes”** equally, **under Section 4 (2), gives the responsibility for overseeing the implementation of the Act to the Ethics and Anti-Corruption Commission.**
40. it follows therefore that pursuant to the Leadership and Integrity Act that was enacted to ensure respect for values and principles of the Constitution by public officers, it is the Ethics and Anti-Corruption Commission that is legally mandated to oversee that public officers comply with the

values and principles under Chapter 6 of the Constitution and 232 among others. That should be the primary point where complaints of this nature must be laid and not before this Court.

41. This Court, under the doctrine of constitutional abstention is required to decline jurisdiction to entertain a Petition of this nature.

Whether the allegations of violation of Articles 10, 73 and 232 of the Constitution were proved against the Respondent.

42. A constitutional petition must be pleaded with sufficient particularity and precision so that it is not ambiguous This means that:

- a) *the exact acts or omissions complained of must be clearly set out*
- b) *the specific constitutional provisions alleged to have been violated stated, and the*
- c) *the exact manner of infringement occurred pleaded.*

43. The holding in the celebrated case of **R v Anarita Karimi Njeru (1979) KLR** affirmed this principle by stating thus:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure

that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

44. Over and above meeting the threshold of pleading a constitutional Petition, the Petitioner must adduce cogent, credible and admissible evidence to prove the allegations that he puts forth in the Petition by discharging that burden on a balance of probabilities. This is a requirement of the law of evidence, which places the burden of proof on the person that alleges the existence of a fact.

Section 107 of the Evidence Act Cap 80 provides thus:

- 1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist?*
- 2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence,

unless it is provided by any law that the proof of that fact shall lie on any particular person.

45. The Supreme Court affirmed the above position in **Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others [2020] eKLR** where held as follows:

“[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

46. Equally, in **Otieno v Airtel Kenya Limited [2018] KEHC 9063 (KLR)** emphasized as follows:

“65. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

47. The question thus becomes, has the Petitioner established the allegations of Constitutional violations particularly that the Respondent violated Article 73, 10, and 232 of the Constitution.
48. The Respondent in the replying affidavit contended that the Petitioners allegations against him were obtained and reproduced verbatim from online articles which included one written by Njoki Maina in the *'Informer'* on the 8th and 12th April, 2022 alleging that the Bomas of Kenya Board Chair and CEO on graft claims involving payment of non-existent ERP system as captured in paragraph 3-20 of the Petition and another by Amukohe in *'Capital News'* carrying a story titled Bomas under EACC scrutiny. The Respondent describes these sources of information as dubious insisting that he has not committed any wrongdoing and that there is no EACC investigation that has implicated him.
49. A reading of this Petition shows that the Petitioner principally anchors this Petition on the general conclusions made in the Auditor General's Report. However, the Audit Report itself is not exhibited, nor has the Petitioner provided verified annexures or evidence that authenticates and supports the conclusions made in the said Audit report.
50. In the absence of cogent, credible, verifiable and admissible evidence, the allegations remain hollow. There is no proof

of the allegations of corruption and unethical practices that the Petitioner cites against the Respondent.

51. The upshot is that this Petition lacks merit and is hereby dismissed.

52. Each Party shall bear its own costs.

Dated, signed and delivered virtually at Nairobi this 5th day of February, 2026.

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L N MUGAMBI

JUDGE