REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI COUNTY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCACECPET/E004/2024

CITATION: FREDRICK MULAA VS KENYA HUMAN RIGHTS COMMISSION AND ODPP AND 5 OTHERS

JUDGMENT

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This is a public interest litigation filed by way of a constitutional petition dated 8th August 2024 which is supported by an affidavit of the petitioner sworn on 8th August 2024. The petition has the following prayers;

1. That a declaration do issue that the 1st respondent's decision to review its decision to charge the 1st interested party with the offences of conflict of interest, abuse of office, money laundering and conspiracy to commit an offence of corruption contained in its letter dated 8th of July 2024 is illegal, irrational and unconstitutional.
2. That the Honourable Court do issue a writ of certiorari quashing the 1st respondent's decision to review its decision to charge the 1st interested party with the offences of conflict of interest, abuse of office, money laundering and conspiracy to commit an offence of corruption contained in its letter dated the 8th of July 2024.
3. A declaration to issue that the 1st respondent usurped the investigative mandate of the 2nd interested party by considering fresh evidence without subjecting it to further investigations subject to Section 5 of the Office of the Director of Public Prosecutions Act and Clause 30 of the Guidelines on Decision to charge.
4. An order of mandamus to issue compelling the 2nd interested party to publish in the Kenya Gazette all past and future corruption, economic crimes, bribery and money laundering cases where consent to charge was issued and subsequently withdrawn.
5. An order of prohibition to issue against the 1st respondent on withdrawing the consent to charge based on representations made by suspects without submitting the same to investigating agencies for further investigations.
6. That a declaration do issue that the 1st interested party's nomination to a state office in light of the illegal, irrational and irregular 1st respondent's review of its decision to charge, is inconsistent with the law and the Constitution on matters of leadership and integrity thus is devoid of procedural propriety and legality.

7. Each party to bear their own costs.

The 1st interested party was before the country's general elections held in August 2022, the governor of the Kakamega County. About two years later, he was nominated to the office of the Cabinet Secretary for Cooperatives, Micro, Small and Medium Enterprises Development by His Excellency the President of the Republic of Kenya. He underwent vetting by the National Assembly after which he was sworn in and substantively took office on 8th August 2024. As it is clear from the prayers cited above, the petitioner challenges the integrity of the appointment and the 1st respondent's suitability to hold that office.

The petitioner's case

The petitioner argues that the 1st interested party lacked suitability to serve in the office because he was before the nomination and appointment due for prosecution as the 1st respondent had made a decision to charge him for corruption, conflict of interest, abuse of office and money laundering which decision had been communicated to the 2nd interested party. The decision to charge was reviewed on 8th July 2024. The contemplated charges were said to be related to receipt of Kshs 56,740,325.00 from the directors of Sabema International Limited and Sesela Resources Limited. It is this decision which the petitioner says was whimsical and meant to sanitize the 1st interested party for the position he was appointed to.

The petitioner alleges that the review of the 1st respondent's decision to charge was against clause 3.1.2.2 of the 1st respondent's Guidelines on Decision to Charge 2019 in that the 2nd interested party as the investigative body and the victim of the offence were not consulted. He urges that this decision was therefore arbitrary, capricious, contrary to pubic interest and an abuse of the legal process. He adds that the conduct of the 1st respondent was tainted with illegality as it was devoid of adherence to the basic principles and tenets of the law including transparency, accountability, social justice, good governance and integrity.

It is on the above background that the petitioner avers that the nomination and subsequent appointment of the 1st interested party goes against the spirit of the Constitution hence the prayers sought. He cites violation of Articles 10, 73(1) and (2), 75(1), 76(2)(b), 157(11) of the Constitution and Sections 3(2) and 13 of the Leadership and Integrity Act.

1st respondent's case

The 1st respondent took the route of relying on grounds of opposition instead of filing a replying affidavit. The summary of its grounds of opposition dated 16-09-2024 are that the petition is misconceived in law and incompetent as it does not disclose the statutory and constitutional provisions that have been threatened with violation or have been infringed. It adds that the petitioner has not appreciated the constitutional and legal mandate of the 1st respondent in particular Section 6(4)(e) of the Office of the Director of Public Prosecutions Act Chapter 6B of the Laws of Kenya (hereinafter referred to as 'the ODDP Act') and Article 157(11) of the Constitution. The 1st respondent also claims that three of the annexures to the petitioner's supporting affidavit were obtained irregularly, illegally and in violation of the Constitution and the law. It also points out that the petition offends the doctrines of ripeness and exhaustion as the decision whether or not to charge the 1st interested party is still pending before the 1st respondent and the 2nd interested party.

The interested parties' response

The 1st interested party did not file any relying affidavit or any documents in response to the petition. On its part, the 2nd interested part responded to the petition through Mr. Wako Jattani's affidavit

sworn on 6th September 2024 which took the position of supporting the petition. The said deponent averred that, in exercise of its statutory and constitutional mandate, the 2nd interested party investigated the 1st interested party for receiving kickbacks from companies awarded tender by the County Government of Kakamega and award of contracts to companies associated with him in the financial years 2013/2014 to 2021/2022. It is alleged that upon receipt of the benefits and kickbacks, the 1st interested party used part of the money to purchase a property in Karen, Nairobi.

The 2nd interested party added that, upon concluding its investigations, it forwarded its recommendations to the 1st respondent pursuant to Section 35 of Anti-Corruption and Economic Crimes Act (hereinafter referred to as 'ACECA') as read with Section 11(1)(d) of the Ethics and Anti-Corruption Commission Act (hereinafter referred to as ÉACC Act) which was to the effect that the 1st respondent among others be charged with offences of conspiracy to commit an offence of corruption contrary to Section 47(a)(3) as read with Section 48(1) of the ACECA, conflict of interest contrary to Section 42(3) as read with Section 48 of the ACECA, abuse of office contrary to Section 46 as read with Section 48 of the ACECA and money laundering contrary to Section 2(B)(i) as read with Section 16(1) of the Proceeds of Crime and Anti-Money Laundering Act. The 2nd interested party adds that, the 1st respondent's case was among those reported in its quarterly report made pursuant Sections 35 and 36 of the ACECA covering the period 1st April 2024 to 30th June 2024 which report was published in its website and in Gazette Notice number 9792 dated 31st July 2024.

The deponent avers further that on 16th November 2023, the 1st respondent replied to their recommendation directing it to conduct further investigations upon which it complied and resubmitted the file to the 1st respondent on 4th December 2023. On 18th December 2023, the 1st respondent returned the duplicate inquiry file to the 2nd interested party and concurred with its recommendations to prosecute. In the meantime, the 1st interested party had obtained a conservatory order in Kakamega High Court constitutional petition number E019 of 2023 restraining the 2nd interested party and the 1st respondent from arresting, initiating or prosecuting any criminal charges against him pending the hearing and determination of the petition which stopped the 2nd interested party from effecting the consent to prosecute issued by the 1st respondent.

Upon receipt of the 1st respondent's letter dated 8th July 2024 directing it to close the file, the 2nd interested party through its letter dated 31-07-2024 reiterated its recommendation to prosecute. The 2nd interested party has in essence distanced itself from the 1st respondent's decision to review the decision to charge as it was not privy to the circumstances surrounding the review.

Mr. Jattani adds that, when the 1st interested party was nominated for the position in question, the 2nd interested party wrote to the National Assembly through a letter dated 29th July 2024 notifying it of the impending criminal prosecution as well as the pending civil proceedings vide this court's miscellaneous civil application number E040 of 2023 in which the 2nd interested party obtained orders preserving Kshs 28.9 million suspected to be proceeds of corruption. It is deponed that the letter dated 29th July 2024 was received by the National Assembly on 4th August 2024 before the National Assembly did the vetting.

By replying affidavit dated 27th August 2024 sworn by Sheila Masinde, the 3rd, 4th and 5th interested parties supported the petition and maintained that the action of the 1st respondent to review its decision was unconstitutional and the petition should be allowed. The deponent's averments are majorly repletion of the facts deponed in the petitioner's supporting affidavit.

Cross-petition

In addition to opposing the petition, the 1st respondent filed a cross-petition dated 16-09-2024 and

filed the same date seeking the following declarations;

1. That the Honourable Court can only rely on public documents when the same have been legitimately obtained in compliance with Article 35 of The Constitution and produced before court in compliance with Section 80 of the Evidence Act, Cap 80 Laws of Kenya.
2. That the use, production and reliance on the alleged public documents being the letter dated 8th July 2024 marked as "FM-2" the letter dated 18th December 2023 marked as "FM-3" and the letter dated 31st July 2024 marked as "FM-4" in the 1st respondent's supporting affidavit to the petition sworn on the 8th August 2024 without disclosing their source and/or their authenticity is a breach of the cross-petitioner's right to a fair hearing as guaranteed by Article 50 of the Constitution.
3. An order expunging from the record of the court the letter dated 8th July 2024 marked as "FM-2" the letter dated 18th December 2023 marked as "FM-3" and the letter dated 31st July 2024 marked as "FM-4" in the 1st respondent's supporting affidavit to the petition sworn on the 8th August 2024.
4. That the review of the decision to charge the 1st interested party in the petition, by the cross-petitioner was carried out in line with and in compliance with the Constitution, the Office of the Director of Public Prosecution Act, Cap 6B and any other attendant law and guidelines.
5. That the 1st respondent's petition dated 8th August 2024 together with the applications thereon dated 8th August 2024 be struck out with costs to the cross-petitioner.
6. That the 1st respondent's acts of irregularly and unlawfully accessing of the letter dated 8th July 2024 marked as "FM-2"; the letter dated 18th December 2023 marked as "FM-3" and letter dated 31st July 2024 marked as "FM-4" in his supporting affidavit to the petition sworn on the 8th August 2024 was a clear violation of the cross-petitioner's right to privacy under Article 35 on the Constitution of Kenya.
7. That the 1st respondent's acts of irregularly and unlawfully accessing of the letter dated 8th July 2024 marked as "FM-2"; the letter dated 18th December 2023 marked as "FM-3" and letter dated 31st July, 2024 marked as "FM-4" in his Supporting Affidavit to the petition sworn on the 8th August 2024 was a clear violation of the cross-petitioner's right to property under Article 40 of the Constitution of Kenya.
8. That the 1st respondent's acts of irregularly and unlawfully accessing of the letter dated 8th July 2024 marked as "FM-2"; the letter dated 18th December 2023 marked as "FM-3" and the letter dated 31st July 2024 marked as "FM-4" in his supporting affidavit to the petition sworn on the 8th August 2024 was a clear violation of the Section 6 and 8 of the Access to Information Act 2016.
9. That the 1st respondent's acts of irregularly and unlawfully accessing of the letter dated 8th July 2024 marked as "FM-2"; the letter dated 18th December 2023 marked as "FM-3" and the letter dated 31st July 2024 marked as "FM-4" in his supporting affidavit to the petition sworn on 8th August 2024 was a clear violation of Section 55 of the Office of the Director of Public Prosecutions Act Cap 6B.
10. That this Honourable Court be pleased to a declare and order that the 1st respondent's act of irregularly and unlawfully accessing of the letter dated 8th July 2024 marked as "FM-2"; the letter dated 18th December 2023 marked as "FM-3" and letter dated 31st July 2024 marked as "FM-4" in his supporting affidavit to the petition sworn on the 8th August 2024 was a clear violation of Section 29 of the Ethics and Anti-Corruption Commission Act Cap 7H.
11. That the 1st respondent's acts of irregularly and unlawfully accessing of the letter dated 8th July 2024 marked as "FM-2"; the letter dated 18th December 2023 marked as "FM-3" and letter dated 31st July 2024 marked as "FM-4" in his supporting affidavit to the petition sworn on 8th August 2024 was a clear violation of the rule of law as exposed under Article 10 of the Constitution of Kenya.

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12. That the use of the annexures on the 1st respondent's supporting affidavit to the petition sworn on the 8th of August 2024 marked as "FM-2", "FM-3" and "FM-4" is a violation of the cross-petitioner's rights to execute his lawful mandate under Article 157 of the Constitution.
13. That the use of the annexures in the 1st respondent's supporting affidavit to the petition sworn on the 8th August 2024 marked as "FM-2"; "FM-3" and "FM-4" is a deliberate attack and affront on the independence of the office of the cross-petitioner's rights under Article 157 of the Constitution.

I do believe that reference to 1st respondent in the prayers is meant to be reference to the petitioner in the main petition. In support of the cross petition, Mr. Akula Alex, a Senior Principal Prosecution Counsel in the 1st respondent's office swore a supporting affidavit dated 16th September 2024 and supplementary affidavit dated 9th January 2025. In the affidavits, Mr. Alex states that the letters in question were obtained irregularly and unlawfully and as such they should be expunged from the court's record. He avers that although documents and information held by a public entity ought to be disclosed to the public in compliance with the Constitution, the right under Article 35 may be limited in accordance with Articles 19(3)(c) and 24 of the Constitution. He alleges that the petitioner has not established that he obtained the said letters in compliance with the provisions of the Constitution, the Access to Information Act, the ODDP Act, the Evidence Act and EACC Act and in fact the petitioner did not disclose his source information.

It also argues that the limitation to the right to information is provided under Section 6 of the Access to Information Act with regard to disclosure of information held by the public entity which may undermine the public entity's ability to give adequate and judicious consideration to a matter which remains the subject of active consideration and any information that infringed professional confidentiality as recognised in law. The 1st respondent also cites Sections 46 and 55 of the ODPP Act, Sections 70, 80, 81 and 82 of the Evidence Act and Articles 50(4) and 259 of the Constitution and states that the petitioner's act of obtaining the official communication undermines the its right to privacy under Article 31 of the Constitution.

The petitioner filed an affidavit dated 25-11-1024 in reply to the cross-petition in which he depones that he has the right and indeed the public has the right to enjoy the fundamental rights and freedoms to the greatest extent and the respondents and the 1st interested party being public offices and state officers are open to public scrutiny. The petitioner adds that none of the impugned letters has any indication that they are private and confidential. He rebuts the 1st respondent's argument that the matter is still pending consideration by making reference to the letter dated 8th July 2024 which stated that the file should be closed.

The petitioner adds that the correspondences being communication between two public entities, nothing in them could constitute professional confidentiality. He depones further that the decision to charge was aired in the media and also cited by the 2nd interested party's quarterly reports which had already placed the matter in the public domain and further that the letters were published in the media.

Analysis and determination

I have read the pleadings of the parties, their affidavits, petitioner's submissions dated 25th November 2024, the 1st respondent's submissions dated 16th April 2025, the 2nd interested party's submissions dated 31st January 2025 and those of the 3rd, 4th and 5th interested parties dated 18th November 2024. I have formed opinion that I should begin with the cross-petition as my decision on it would determine the trajectory the court will adopt in determining the petition.

The only issues in the cross-petition are whether the letters in question were illegally obtained and

whether they should be expunged from record. The 1st respondent has not in its submissions prosecuted its cross-petition as it has not covered the issue of admissibility of the letters. This however does not stop the court from considering and determining the issue as the same was rightly placed before it through the pleadings and the petitioner has addressed it.

The cross-petition claims that the letters were illegally and irregularly obtained as they did not follow the process provided in Section 5 of the Access to Information Act. My understanding of Sections 4 and 5 of the Access to Information Act is that they provide for the right to information and the statutory information a public body is supposed to publish. Section 6 provides for limitation of the right to information while Section 8 provides for the procedure a party wishing to access information is supposed to follow. Where information has been published by a public entity as provided in the Act, the person in need of the information does not have to go through the process provided for in Sections 8 to 13 of the Act.

In my view, the provisions of the said Act relied upon by the 1st respondent in its cross-petition does not preclude members of the public from using or accessing information which is already in the public domain. Nothing restricts a public entity from releasing any information held by it to the public or a specific individual. The decision to release the information remains within the discretion of the public entity but where a person desires to have the information, Section 8 of the Access to Information Act comes in.

The letters in dispute in this matter were exchanged between the 1st respondent and the 2nd interested party which are both public bodies. As rightly submitted by the petitioner, there is nothing confidential or private about the letters. The same letters have been referred to by the 2nd interested party who has authored the one dated 31st July 2024. The information in the said letters is referred to in the 2nd interest party's replying affidavit at paragraphs 11, 13 and 14(e). There is no certainty that the letters were obtained from the 1st respondent's office. They could as well have been obtained from the 2nd interested party who has not complained and even if I were to expunge the letters from the supporting affidavit of the petitioner, the replying affidavit of the 2nd interested party would still be left intact with the same information.

In my view, the public interest in these circumstances would be better served in admitting the documents in evidence as the 1st respondent has not demonstrated how the same are prejudicial to performance of its functions, the public or security of the nation. The only reason I see behind the efforts to expunge the letters is desire or intention to weaken the petitioner's case. What is important is that there is proof and acknowledgment that the letters exist, more so considering that the 1st respondent has in its submissions made references to the same letters. I have also not seen any illegality in the petitioner having the letters in his possession as they are not marked as secret, private or confidential. On this basis, I find the cross-petition lacking in merits and the same is dismissed.

The petition has seven prayers and, in my analysis, the following are the issues arising therefrom;

1. Was the 1st respondent's decision to review its decision to charge the 1st interested illegal, irrational and unconstitutional.
2. Did the 1st respondent usurp the investigative mandate of the 2nd interested party?
3. Was the 1st interested party's nomination to a state office in light of the issues raised in the petition inconsistent with the law and the Constitution?
4. What final orders are appropriate in the circumstances?

The mandate of the 1st respondent on matters of criminal prosecution is enshrined in Article 157(6),

(7) and (8) of the Constitutional and Sections 5 of the ODDP Act. Article 157(6) of the Constitution provides;

The Director of Public Prosecutions shall exercise State powers of prosecution and may-

1. *institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*
2. *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; and*
3. *subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

Section 5(2) of the ODDP Act states that;

The Director shall exercise State powers of prosecution and may-

1. *notwithstanding the provisions of any other law in force for the time being, perform all that is necessary to be done for the purpose of performing the functions of the Director; and*
2. *direct that investigations be conducted by an investigative agency named in the direction.*

Section 23 of the same ODDP Act is also clear that the 1st respondent shall have control over criminal prosecutions where it states;

Notwithstanding the provisions of any other law, it shall be the function of the Director to –

1. *decide to prosecute or not to prosecute in relation to an offence;*
2. *institute, conduct and control prosecutions for any offence;*
3. *carry out any necessary functions incidental to instituting and conducting such criminal prosecutions; and*
4. *take over and conduct a prosecution for an offence brought by any person or authority, with the consent of that person or authority.*

The above constitutional and statutory provision leaves no room for speculation on who has the constitutional mandate over criminal prosecutions. Distinction however must be had between prosecutorial and investigative mandates. The cited Sections of ODPP Act are clear that when it comes to matters investigations, the 1st respondent mandate begins and ends with directing the relevant investigative bodies and making decision on whether to prosecute or not. The 1st respondent does not have any powers to conduct investigations but controls the prosecution process including making a decision not to prosecute.

The petitioner's complaint is based on the letter dated 8th July 2024 which directed that the file be closed. In order to answer the 1st issue, one has to look at the process through which the decision the subject matter of this petition was reached and the reasons informing it. For a decision to be said to be illegal and unconstitutional, it must have been made without authority or against the enabling provisions of the Constitution. An irrational decision is that which goes against facts or logic or that is made through emotions or biases or considerations other than sound judgment.

It is not for this court to analyze the merits or demerits of the decision as that is outside its judicial authority. The petition is not an appeal from the impugned decision and the circumstances, the court can only look at its standing against the tenets of the enabling legal and constitutional provisions.

This petition was triggered by the nomination of the 1st interested party to the position of a Cabinet Secretary. The law provides for the institutions which should play a role in the process of nomination, approval and subsequent appointment of a Cabinet Secretary and the court is not one of these institutions. The merits of the issues raised by the petitioner on the suitability of the 2nd interested party are better tackled by the said institution the National Assembly being one of them. The court's mandate on such processes should be limited to checking the legality and constitutionality of the process.

This court has been told that the 1st interested party was vetted by the National Assembly where the 2nd interested party made presentations and brought to the attention of the National Assembly the existence of the intended proceedings against the 1st interested party. None of the parties has supplied this court with the proceedings of the vetting process but the fact that the 1st interested party was approved means that the National Assembly considered the facts and evidence produced before it and proceeded to approve his suitability. In that case, this court has no jurisdiction to interrogate the merits of the process of nomination, approval and subsequent appointment of the 1st interested party to the said office unless the constitutional and statutory imperatives were not adhered to.

Having said the above, the court however holds that the process leading to the 1st respondent's decision contained in the letter dated 8-07-2024 is not shielded from the intervention of the court as far as adherence to the Constitution is concerned. It is true that Article 157(11) of the Constitution shields the 1st respondent from control by any person or authority but that does not mean that it is immune to scrutiny of its processes and actions. The Constitution is supreme and must be adhered to by all the persons, state agencies and public entities. Where an act or omission goes against the word and spirit of the Constitution, the actors cannot claim constitutional independence when they are called upon to account for their said actions or omissions.

The 1st respondent has formulated guidelines on how to exercise its powers to review its decision to charge. These are contained in Guidelines of Decision to Charge 2019 (hereinafter referred to as 'the guidelines'). These guidelines have been disseminated to the public and the 1st respondent has not suggested that it has abandoned their use. In that regard, one would be justified to say that the public has legitimate expectation that the 1st respondent would, in reaching a decision of whether or not to charge or review its decision to charge, be guided by the guidelines. At the same time, the guidelines cannot be used selectively or discriminatively when it comes to specific individuals or institutions. If the 1st respondent is found to be in violation of the guidelines, the court should not hesitate to find that the decision resulting from that violation was irregular and against the constitutional principles of transparency and accountability.

The petitioner has argued that the 1st respondent did not follow the guidelines in that it failed to consult the complainant. This would therefore be in violation of the clause 3.1.2.2 of the guidelines which states that;

'If a prosecutor decides not to charge, reasons shall be given in writing and where appropriate the Investigating Officer and the victim shall be consulted.'

The 1st respondent has not countered the petitioner's position on consultation other than stating that it has the constitutional and statutory discretion to review its decisions to charge. The complainant in this matter is the public in general and the people of Kakamega County in particular, whose resources and funds were said to have been used in a process that amounted to corruption. The people of Kakamega in this process were represented by the 2nd interested party who has the statutory mandate to protect public property.

It is indisputable that the 1st respondent's letter dated 8-07-2024 was written without consulting the 2nd interested party. The 2nd interested party has confirmed as much while the 1st respondent has neither exhibited any evidence of such consultation nor made any averment to that effect. Even without such confirmation, the wording of the letter is clear that the decision was informed by a request by the 1st interested party's advocates through their letter dated 3-07-2024. It also claimed that the Bungoma Chief Magistrate's Court civil case number E005 of 2024 was also a factor of consideration in the said decision. This information and evidence are said to have been gotten from the 1st interested party's advocates and a decision on the same reached without consulting or alerting the 2nd interested party.

The 1st respondent has argued that the matter has not been closed as submitted by the petitioner and as such the petition is premature as the process of investigations remains open. However, a look at paragraph 8 of the letter dated 8-07-2024 leaves no doubt that there was no intention of further consideration of the matter. The paragraph states as follows;

'In the circumstances and bearing in mind the standard of proof required in criminal cases which is proof beyond any reasonable doubt, the Director of Public Prosecutions finds that it will be an uphill task to secure a conviction in this matter and has reviewed the decision to charge all the suspects in the matter and directed that the file be closed for lack of sufficient evidence unless there is further evidence to necessitate further inquiry.'

This is letter is clear that the 1st respondent's decision was to bring the process of investigations to a close. If that was not so, then there is an obvious ambiguity on the position which this court must cure for the benefit of and the interest of the public by issuing appropriate orders.

None of the parties has challenged the 1st respondent's mandate over criminal prosecutions. There is no prayer for compelling the 1st respondent to institute criminal prosecution against the 1st interested party. While acknowledging the investigative powers of the 2nd interested party, the 1st respondent has cited the case of ***Geoffrey K. Sang v Director of Public Prosecutions & 4 others (2020) KEHC 9213 (KLR)*** where one of the court's holdings was to the effect that the investigative powers of the 2nd interested party does not take away the powers of the 1st respondent over prosecution of corruption related offences. In advancing that argument, the 1st respondent has missed the point here if not deliberately trying to distort the nature of the petition. The court held in the said authority that;

'In my view, the mere fact that those entrusted with the powers of investigation have conducted their own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the investigating agencies have formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution. See **The International and Comparative Law Quarterly** *Vol. 22 (1973).'*

I agree entirely with the above holding but it is clear to me that the petitioner's claim is that the impugned decision was reached in a manner that violated the law, procedure and the Constitution. The 1st respondent submits that the law does not require it to remit files back for further investigations if, in its professional judgment, the evidential threshold has not been met. That is the correct position but it is not what the petition herein is about. If the 1st respondent had decided not

to prosecute and ended it there, the case would be different. However, the situation we have in this petition is that the 1st respondent had made decision to prosecute based on evidence collected by the 2nd respondent but before the charges were drawn, the 1st respondent received what it referred to further evidence from the suspect through his lawyer and made a decision to review.

A constitutional or statutory body should not exercise its powers or discretion whimsically or capriciously and without regard to interests of the other players or actors in the matter involved. The powers donated to the 1st respondent by the Constitution belongs to the people and the 1st respondent exercises those powers on behalf of the people of Kenya and in that case, it has a constitutional duty to explain to the people the reasons and justification for its actions. That is what the principle of accountability entails

In view of the above, it is my finding and holding that whereas this court cannot term the decision contained in the 1st respondent's letter dated 8-07-2024 as irrational, the same was not done within the confines of the law and was in breach of the 1st respondent's duty to act transparently and with accountability. It was shrouded in mystery and therefore worked against public interest hence in violation of Article 157(11) of the Constitution.

Based on the above, I hold that the answer to the first issue is in the affirmative. The 1st respondent's decision to review its decision to charge the 1st interested did not take into consideration the interest of the public as it was not open, transparent and accountable. I do not hesitate to hold the process as unconstitutional.

The second issue is whether the 1st respondent usurped the powers of the 2nd interested party. It is common ground that the case in question was being investigated by 2nd interested party who is an independent constitutional commission established under Section 3 of EACC Act pursuant to Article 79 of the Constitution.

I have held elsewhere above that the 1st respondent has no investigative powers. In my view, once the 1st respondent received the request to review its decision to charge, the correct, legal, lawful and constitutional procedure it should have adopted was to direct the 2nd interested party pursuant to Section 5(2)(b) of the ODDP Act to investigate the fresh evidence and reconsider its recommendations.

Only after the 2nd interested investigated the alleged fresh evidence, would the 1st respondent be constitutionally mandated to make a decision based on the same. That is what in my view would have served public interest pursuant to Article 157(11) of the Constitution. Anything short of that would be usurping the constitutional and statutory powers of the 2nd interested party, a separate constitutional and independent body.

I am alive to the position that the court is not an investigative agency and should not interfere with the mandate of other public bodies but I hold the position that the court has powers under Article 165(7) of the Constitution to keep public bodies, state and public officers within their constitutional and statutory mandates and boundaries. Where a public body is apparently in breach or violation of the law and established constitutional principles, this court has jurisdiction and powers to intervene. Honourable Justice John Mativo as he then was, held as follows in ***Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (2022) KEHC 5 (KLR);***

'The rule of law principle requires that all government action must comply with the law, including the Constitution. Government action includes the exercise of public power. As such, the exercise of all public power is subject to the Constitution. The Constitution contains constitutional obligations such as those in Article 47, and 232 of the Constitution. The standards demanded by the Constitution

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for the exercise of public power are that it should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given. Whether a decision is rationally related to the purpose for which the power was given calls for an objective inquiry. In relation to the exercise of power by the Respondent, the rule of law requires that the exercise of public power should not be arbitrary, and that the decision taken must be rationally related to the purpose for which the power was given. The Respondent must carry out its constitutional obligations in line with the rule of law.'

Having said the above, the inevitable conclusion is that the 1st respondent usurped the powers of the 2nd interested party when it received alleged fresh evidence and unilaterally decided to review its decision to charge without reference to the 2nd interested party. It assumed powers it does not possess either in the Constitution or statute. The second issue is thus answered to that extent.

The third issue borders on prayer 'f' of the petition. I am not convinced that the petitioner merits prayer 'f' which seeks a declaration that nomination and appointment of the 1st interested party lacked procedurally propriety and legality. I have mentioned above that this court has not been supplied with the proceedings of the National Assembly neither is there evidence that would have stopped the President of the Republic of Kenya from nominating the 1st respondent. Of course, the court has jurisdiction to test and interfere with decision of the appointing authority if there is evidence of impropriety, irregularity, illegality or unconstitutionality. In ***Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae) (2012) KEHCV 2480 (KLR),*** it was held that;

'Chapter six of the Constitution sets forth principles on the leadership and integrity requirements of public officials. Included in these provisions is article 73 which requires that State officials be selected "on the basis of personal integrity, competence, and suitability." This is an independent and substantive criterion for appointment. To illustrate this point, the court may look at a similar article within chapter six, which states that a State officer must be a citizen of Kenyan (except for Commissioners and judges, and persons who cannot opt out of dual citizenship). The Executive may breach this mandate in two ways: either it fails to investigate the nominee to determine whether this Article is fulfilled, or it knowingly appoints a State officer who does not meet these standards.'

In the case before me, the appointment of the 1st interested party followed the constitutional process provided for in Article 152(2) of the Constitution and as I have stated before, without the benefit of seeing the reason advanced to clear him for the position, this court would be overstepping on the mandate of the executive if it were to allow prayer 'f' of the petition, yet the National Assembly is not a party to the petition. I am persuaded and agree with the holding of Honourable Justice M. Thande in ***Njenga v Inspector General of Police & 3 others; Kimani (Interested Party) (2023) KEHC 487 (KJLR)*** where she stated that;

'While constitutional and statutory bodies must be allowed to discharge their mandate unhindered, such discharge must be within the confines of the Constitution and the law. In this regard, our superior courts have often been called upon to examine the lawfulness of the discharge by the Respondents, of their mandate and make pronouncements thereon.'

The recommendations of the 2nd interested party were not put into action and as such remained just recommendations. The 1st interested party was not charged in court or convicted although absence of this should not be a bar to intervention of the courts in matters of this nature. Since this court has no basis to fault the appointing and the vetting authorities, it would be unfair and travesty of justice to condemn the process which would impact negatively on the 1st interested party.

Similarly, this court sees no basis for prayer 'd' of the petition which asks for an order of mandamus

to compel the 2nd interested party to publish past and future cases where consents have been given and later withdrawn. There have been no allegations of the failure by the 2nd interested party to publish its reports as required by the law. Such a general prayer is not plausible especially considering that, in respect of the matter before me, the 2nd interested party had published its quarterly report. It is also not possible for the 2nd interested party to publish future cases as that would be too speculative. An order of mandamus can only issue where a public body has failed to perform its statutory or constitutional duty and is not available to a party unless a right or duty has accrued. It cannot be issued in respect of the anticipated future. In ***Republic v Attorney General & another ex-parte Stephen Wanyee Roki (2016) KEHC 6856 (KLR),*** it was held that.

'What comes out clearly from the foregoing is that the Court only compels the satisfaction of a duty that has become due. In other words where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass.'

Based on the above, this court finds that this petition is merited to the extent of issues discussed and proceeds to issue the following orders;

1. A declaration is hereby issued that the 1st respondent's decision to review its decision to charge the 1st interested party with the offences of conflict of interest, abuse of office, money laundering and conspiracy to commit an offence of corruption contained in its letter dated 8th of July 2024 is irregular and unconstitutional and therefore null and void.
2. A writ of certiorari is hereby issued quashing the 1st respondent's decision to review its decision to charge the 1st interested party with the offences of conflict of interest, abuse of office, money laundering and conspiracy to commit an offence of corruption contained in its letter dated the 8th of July 2024.
3. A declaration is hereby issued that the 1st respondent usurped the investigative mandate of the 2nd interested party by considering fresh evidence without subjecting it to the 2nd interested party for further investigations.
4. Prayers 'd', 'e' and 'f' are denied.
5. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this **16th** day of **September** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of;

Miss Karue holding brief for Mr. Chimei for the petitioner;

Miss Ntabo holding brief for Mr. Tamaatwa for the 1st respondent; and

Miss Cherono for the 2nd interested party.

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SIGNED BY: HON. JUSTICE BENJAMIN MWIKYA MUSYOKI

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