



Terer v Director of Public Prosecutions & another (Anti-Corruption and Economic Crime Petition 01 of 2022) [2022] KEHC 14488 (KLR) (Anti-Corruption and Economic Crimes) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14488 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 01 OF 2022
EN MAINA, J
OCTOBER 27, 2022

BETWEEN

NEWTON SAM KIPLAGAT TERER PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

JUDGMENT

1. This Petition was originally filed in the Constitutional and Human Rights Division but was transferred to this Division due to the fact that it arose from charges brought against the Petitioner in the Anti-Corruption Court and hence within the mandate of this Division.
2. The Petitioner seeks to halt his prosecution in the Milimani Chief Magistrate Anti-Corruption Case No. 39 of 2019. He also seeks a permanent injunction to restrain the Respondents whether by themselves and/or their agents from prosecuting him in regard to the purchase of maize for the Strategic Food Reserve for the Financial year 2017/2018. He also prays for general damages and the costs of the petition.
3. The Petitioner narrates the facts upon which the Petition is premised as follows:-
 1. The Petitioner was the Managing Director and Accounting Officer of the National Cereals and Produce Board appointed in accordance with the *National Cereals and Produce Board Act*.
 2. The Petitioner's case is that he has been the target of unfair, un-procedural and grossly flawed investigations for alleged procurement related, and other offences by the 1st and 2nd



Respondents; and that the 2nd Respondent has recommended the Petitioner's prosecution by the 1st Respondent based on the impugned investigations.

3. The Petitioner avers that the said investigations arose out of performance of an Agency Agreement between National Cereals Produce Board and Strategic Food Reserve Oversight Board previously known as Strategic Grain Reserve Fund for purposes of purchasing and management of maize stocks domiciled under the Ministry of Agriculture, Livestock, Fisheries and Irrigation, Government of Kenya.
4. The Petitioner states that the said 5th Agency Agreement is for the period 1st July, 2015 to June 30, 2017 executed on 19th October, 2016 and to the effect that the Strategic Food Reserve would occasionally contract the National Cereals Produce Board to purchase and store for it grain cereals as and when instructed.
5. The Petitioner states that under the 5th Agency Agreement, the role of the National Cereals Produce Board was clearly stipulated at Article 3 of the Agreement which included;
 - 3.1 Providing a dedicated store staff in Nairobi to receive and store and keep store records of the Principal's goods.
 - 3.2 Presentation of the stores for proper and hygienic storage that shall entail, inspection, grading handling, 'fumigation', and quality maintenance;
 - 3.3 Transport of stored items from the point of initial storage to 'mutually' agreed designated storage locations;
 - 3.4 Issuing stored items to the nominated parties;
 - 3.5 Transfer of goods to any other designated locations on instructions and facilitation from the Principal;
 - 3.6 Similar services with regard to any other goods which the Principal may wish to be undertaken by the Agent.

Clause 5.2 of the Agency Agreement provided that the Principal ie, The Strategic Food Reserve would provide funds to the Agent through appropriate budgetary allocation which shall take into account among others the amount of funds requested for the planned operations and where necessary provide 'financial charges' for all agreed operations.

4. The Petitioner states that it was therefore the duty of the Principal Secretary Strategic Food Reserve to state the budget for maize purchases in terms of quantity and price it allocated for the purchases so as to enable the agent National Cereals Produce Board carry out its obligations under the 5th Agency Agreement.
5. The Petitioner states that the SFR Act creates a Board and designates the Principal Secretary as the Administrator of its Fund. The NCPB as an institution is not co-opted in the Board of SFR so as to know its internal operations. Its only when the officers of the NCPB are required to attend any SFR Board meeting on invitation that they were required to attend.
6. That in the instant case, the officers of the NCPB would occasionally attend the SFR Board meetings to update them of quantity of purchases and status of the stores at given times.
7. The Petitioner states that under the 5th Agency Agreement, the National Cereals Produce Board would wait for letters of instructions from Strategic Food Reserve on when to purchase maize, the quantity



requested and at what price. Such instructions were addressed to the National Cereals Produce Board through Strategic Food Reserve Secretariat headed by the Permanent Secretary in the Ministry of Agriculture, Livestock, Fisheries and Irrigation.

8. The Petitioner states that together with the obligations under the 5th Agency Agreement it was bound to comply with the instruction letters from the Permanent Secretary Ministry of Agriculture, Livestock, Fisheries and Irrigation on behalf of Strategic Food Reserve who would also indicate some terms of the purchase like the purchase price, quantity, source of maize to be bought, commencement dates for purchases and when such purchases were to stop.
9. The Petitioner states that for instance in the Financial Year 2015/2016 the instruction letter from the Strategic Food Reserve were communicated to National Cereals Produce Board vide letter dated November 11, 2015 written by Sicily K. Kariuki (MRS) MBS, Principal Secretary which gave out the following conditions for purchase of maize;

“As you are aware the Strategic Food Reserve Oversight Board approved the procurement of maize from farmers at a price of Kshs. 2,300/= per 90Kg and also directed that the maize should be bought from registered farmers, groups or cooperatives in view of the above, it has been decided that you purchase maize from:

 - i. vetted farmers’ groups, associations or cooperatives
 - ii. vetted individual farmers
10. The Petitioner states that the National Cereals Produce Board did strictly comply with the terms set out in the instruction letter from the Ministry of Agriculture, Livestock, Fisheries and Irrigation and the 5th Agency Agreement and purchased for Strategic Food Reserve the cereals requested and the matter was closed.
11. The Petitioner states that in the Financial Year 2017/2018 the National Cereals Produce Board received instructions letter dated 17th October, 2017 from the Principal Secretary Dr. Richard L. Lesiyampe PHD, CBS of the Ministry of Agriculture, Livestock, Fisheries and Irrigation with the terms of purchase as follows;

‘the Board approved the purchasing price of Kshs. 3,000 per 90Kg bag while the Government gave a rebate of Kshs, 200 per bag giving a total of Kshs. 3,200 per 90Kg bag.’

Further the letter states as follows;

‘The purpose of this letter is to authorize you to implement this approval and give a weekly progress report on the implementation.’
12. The Petitioner states that the National Cereals Produce Board just like before proceeded to purchase the maize strictly in accordance with the 5th Agency Agreement and the instructions letter dated October 17, 2017 from the Principal Secretary.
13. The Petitioner states that according to the letter of instruction from the Principal Secretary, the price of each bag of maize to be purchased was duly indicated whereas the quantity of how many bags to be purchased was not indicated. It was the duty of the Strategic Food Reserve to indicate the quantity to be purchased or when to stop the purchases upon reaching their limit since the Strategic Food Reserve were being given weekly progress reports on purchasers through the regular meetings on invitations and written updates between the Strategic Food Reserve and National Cereals Produce Board.



14. The Petitioner states that the quantity to be purchased would either be communicated by the Strategic Food Reserve either by indicating the exact quantity or by indicating when to stop the purchases since they had information on quantities purchased weekly.
15. The Petitioner states that as was expected from the Strategic Food Reserve, it was only on April 3, 2018 when the Principal Secretary on behalf of the Strategic Food Reserve wrote to the National Cereals Produce Board through the petitioner to now stop the purchases and the Petitioner promptly and immediately stopped the purchases as instructed. (Emphasis his)
16. The Petitioner states that he acted on the letter of instructions from the Principal Secretary to stop the purchases and honestly believed that 'the Strategic Food Reserve through the Principal Secretary must have by then achieved the quantity they desired to be purchased by the National Cereals Produce Board Secretary did not specifically indicate the exact quantity they desired.
17. The Petitioner states that he was later shocked and surprised to learn that the 2nd Respondent was carrying out investigations on allegations that the Petitioner through National Cereals Produce Board bought more quantity of maize than had been budgeted and that the maize were bought from persons who were not supposed to be bought from since any farmer or maize supplier from all over the country would deliver their maize to National Cereals Produce Board silos. (Emphasis his)
18. The Petitioner states that the 2nd Respondent in exercise of its powers carried out investigations on Petitioner's performance of his functions as the Chief Executive officer of the National Cereals Produce Board and in relation to the purchase of the maize under the Financial Year 2017/2018 and recommended to the 1st Respondent to prosecute the Petitioner on account of breach of unspecified and non-existence provisions of the 5th Agency Agreement, the instruction letters and the law.
19. The Petitioner states that the 1st Respondent approved the arraignment of the Petitioner in Court to answer to various charges arising from his performance of the obligation under the 5th Agency Agreement and the Letter of instructions yet the said obligations are not anchored in any written law but have been crafted as if they relate to breaches of the *Anti-Corruption and Economic Crimes Act* and *Public Procurement and Asset Disposal Act* in order to camouflage the illegalities.
20. The Petitioner avers that he has been charged with counts which do not have offences prescribed in any Law.
21. The Petitioner states that the charge of conspiracy relates to action taken under the Agency Agreement and the letters of instructions whereby the Petitioner only acted as the Chief Executive Officer of National Cereals Produce Board.
 - i. The 2nd Respondent in exercise of its powers carried out investigations on Petitioner's performance of his functions as the Chief Executive officer of the *National Cereals Produce Board Act* and in relation to the purchase of the maize under the Financial Year 2017/2018,
 - ii. The 2nd Respondent recommended to the 1st Respondent to prosecute the Petitioner on account of breach of unspecified and non-existence provisions of the 5th Agency Agreement, the instruction letter dated October 17, 2017 and the law.
 - iii. In further violation of *the Constitution*, the 1st Respondent approved the arraignment of the Petitioner in Court to answer to various charges arising from his performance of the obligation under the 5th Agency Agreement and the Letter of instructions,
 - iv. The said Count crafted as if they relate to breaches of the *Anti-Corruption and Economic Crimes Act* and Public Procurement and Disposal Act in order to camouflage the illegalities



breaching Articles 10 19 20 22 27 28 30 47 and 50 of *the Constitution* of Kenya. (Emphasis his)

22. The Petitioner states that he has been charged with breaching National Cereals and Produce Board Guidelines on Grain Intake Operations Issue No. 1/9/2016 during purchase of maize for the season 201 2018 on buying maize from registered farmers, farmers' groups, associations or societies which is not a prescribed offence at the time of the alleged commissions. (Emphasis his).
23. The Petitioner states that in relation to Count I on Conspiracy to commit an offence of Economic Crime Contrary to Section 48(1) of the *Anti-Corruption and Economic Crimes Act*, 2003 is merely by association as he was the Managing Director and Accounting Officer at the time of the alleged commission and his specific role in the purported offence has never been disclosed to him to date.
24. The Petitioner states that in the letters instructing the Petitioner to purchase maize in FY2017/18, there was no requirement to purchase maize from vetted/farmers unlike the instructions of 2015/16 signed by Sicily Kariuki which required purchase to be from vetted farmers. The 'vetting done in 2017/18 was thus an administrative decision but was not a requirement and does not constitute a criminal act under any law. (Emphasis his)
25. The Petitioner further states that in all the letters of instructions whether 2017/18 or prior, neither the budget nor the quantities were specified and the only requirement was regular update which was always done. The only disclosure made in all the letters was the purchase price. The Petitioner is being charged with breach of a requirement which was never made known to him nor is available in any law or regulation.
26. The Petitioner avers that the decision to commence and or stop purchase (temporarily or permanently) always emanated from the Ministry on behalf of Strategic Food Reserve to the Managing Director of National Cereals Produce Board on behalf of the Agent.
27. The Petitioner states that Regular updates on purchase position were given to the Permanent Secretary in writing and the Strategic Food Reserve Board in their periodic meetings but none of them raised any concerns on either the quantities already purchased in relation to the budget they had or the identity of the suppliers of the maize that they were not farmers.
28. The Petitioner further states that Payments to farmers was done on receipt of funds from the Ministry for payment purposes. At no time did the ministry indicate they were short of funds or that budget was being exceeded. This is also the case with Strategic Food Reserve as shown in their Board minutes. The petitioner is being charged with exceeding budget he was not administering nor controlling.
29. The Petitioner states that Agriculture is a devolved function thus any registration and vetting of farmers if needed required the collaboration of the national government via Ministry of Agriculture and Livestock, Fisheries and Irrigation and the county government and not the National Cereals Produce Board which was merely an agent.
30. The Petitioner states that any failures associated with the budget should squarely be placed on the doorsteps of Strategic Food Reserve who were the holders of the budget as well as owners of the purchased maize. Registration and vetting of farmers which currently does not exist in any Law or Regulation exist requires development of guidelines on process, public participation in developing the guidelines, approval by Parliament and gazettelement. This cannot be said to be duty of the Agent but the Principal.
31. The Petitioner states that the obligation executed and/or carried out by the National Cereals and Produce Board in accordance with applicable laws.



32. The Petitioner states that it is only the National Cereals and Produce Board and a few of their staff members, including the Petitioner, who have been singled out for investigations by the 2nd Respondent, leaving out all the other government institutions involved in the procurement, planning and execution of the said purchase of maize for the year 2017/2018.
33. The Petitioner's case is that 'the Respondents in their actions and conduct towards the Petitioner are in breach of the national values and principles of governance for failing to adhere to the rule of law, and to be accountable and transparent in their investigations and ongoing prosecution of the Petitioner.
34. The Petitioner further states that the Respondents have denied the Petitioner the right to equal benefit and equal protection of the law, and are discriminatively, selectively and unfairly targeting the Petitioner for investigations and recommending his prosecution, for works carried out by a multi-ministerial and multi-agency government taskforce.
35. The Petitioner states that the Respondents in their prosecution and investigations of the Petitioner have subjected the Petitioner to administrative action that is unfair, inefficient and unlawful, through non-disclosure of all relevant facts and denying the Petitioner the right to present his case.
36. The Petitioner avers that the Respondents have failed in their statutory and constitutional duty to carry out thorough and comprehensive investigations against the Petitioner and have presented half-baked information to the 1st Respondent as the basis of proposed criminal charges against the Petitioner,
37. The Petitioner Farther avers that the 1st Respondent has breached its Prosecutorial Policy and the Constitutional requirement of its independence through its acceptance of the 2nd Respondents' incomplete investigations and its decision to arrest, charge and prosecute the Petitioner based thereon.
38. The Petitioner states that the Petition has high likelihood of success, and that unless this Court intervenes, the Petitioner will suffer irreparable harm, which cannot be compensated by way of damages, and that the balance of convenience tilts heavily in favour of preserving the rights and fundamental freedoms of the Petitioner which cannot be restored once infringed upon and/or contravened."

4. In regard to violation of his constitutional rights the Petitioner contends that:-

- 1) The petitioner is a citizen of the Republic of Kenya, Male adult of sound mind residing and working for gain in Nairobi County who envisages a society that is informed of their rights, practices, democratic doctrines and respects the will and rule of law as a means to just society. His address of service for purpose of this suit shall be care of Messrs Koceyo & Company Advocates, Queensway House, 4th Floor, Kaunda Street, P.o Box 73088-00200 Nairobi.
2. The 1st Respondent is the National Prosecuting Authority in Kenya which has been mandated by the Article 157 of *the Constitution* of Kenya to prosecute all criminal cases in the country. (service of Summons shall be effected through the petitioner's Advocates office.)
3. The 2nd Respondent is a public body established under Section 3(1) of the *Ethics and Anti-Corruption Commission Act*, 2011 mandated to combat and prevent corruption, economic crime and unethical conduct in Kenya through law enforcement, prevention, public education, promotion of standards and practices of integrity, Ethics and Anti-corruption (service of summons shall be effected through the petitioner's Advocates office.)



The case for the Respondents

1st Respondent opposed the petition through grounds of opposition dated November 21, 2021 as follows: -

.....

3. That every case investigated by the 2nd Respondent and a decision made by the 1st Respondent on whether or not to prefer criminal charges is based on whether or not there is sufficient evidence to make such a decision.
4. That the decision to charge made by the 1st Respondent in Chief Magistrates ACC No. 39 of 2018, Republic v Newton Sam Kiplagat Terer (Petitioner herein) and Others was based on the sufficiency of evidence with a realistic prospect of conviction.
5. That the prosecution of the petitioner was instituted with reasonable and probable cause and was not actuated by any malice from the 1st Respondent which independently reviewed the evidence and made a decision to charge based on the fact that there was incriminating evidence connecting the Petitioner to the offence charged in Chief Magistrate's ACC No. 39 of 2018.
6. That prosecution of the petitioner was motivated by the 1st Respondent's obligation to ensure that public interest is served through prosecution of a complaint whether there was evidence indicating a realistic prospect of conviction and for the petitioner to have the opportunity to defend themselves in a court of law.
7. That in making the decision to charge, the 1st Respondent had not abrogated, breached, infringed or violated any provision of *the Constitution* or any human and fundamental rights of the petitioner or any other written law or regulations made thereunder.
8. That in applying the evidential test, the 1st Respondent, in line with the National Prosecution Policy, objectively assessed the totality of the evidence both for and against the suspect at that time of making a decision to charge and satisfied themselves that it established a realistic prospect of conviction.
9. That the accuracy and correctness of evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of the evidence adduced in support of the charges in the event of a criminal prosecution. The charges preferred will be subjected to a criminal trial process.
10. That some of the issues raised by the Petitioner amount to a defence which ought to be canvassed before the trial court.
11. That the presumption of innocence and protection of the Petitioner's fundamental rights and freedoms are guaranteed and jealously guarded by *the Constitution* and do not vanish by their prosecution before a competent court of law: he is therefore not prejudiced in any way.
12. That the Petitioner had delayed in presenting this petition for a case that commenced back in 2018, delay defeats justice.



13. That 10 witnesses have so far testified so far and there is no proof that violation of rights have been occasioned to the Petitioner.
 14. That the petitioner seeks to merely curtail the mandate of the 1st Respondent as set out in *the Constitution* by attempting to circumvent a foreseeable trial process against him without any justifiable reasons as he has failed to demonstrate how the 1st Respondent has acted ultra vires his mandate.
 15. That this petition is capricious, a legal misadventure and an abuse of the court process intending to delay the prosecution and any consequent criminal process by engaging in frivolous sideshows.
 16. That the orders sought as against the 1st Respondent are not tenable as the Applicant/Petitioner has failed to demonstrate how the 1st Respondent has acted ultra vires his mandate in the matter herein.
 17. That this petition is frivolous, vexatious and a gross abuse of the court process as it is devoid of any legal or factual merit.
 18. That this petition is based on a reactionary afterthought and is not founded on any genuine concerns or legal principles.”
39. On its part the 2nd Respondent relied on a replying affidavit sworn by Jared Mbare on December 9, 2021 where he states that he is a Forensic Investigator with the 2nd Respondent and the investigating officer assigned to investigate allegations that officers of the National Cereals and Produce Board in the period 2017 – 2018 were purchasing maize from brokers and unregistered farmers who had not been vetted to supply maize to the National Cereals and Produce Board and that he conducted investigations and found inter alia:-That the process used by the National Cereals and Produce Board in purchasing maize from farmers across the country was tainted with illegality in that:-
- i. That the Strategic Food Reserve Oversight Board (SFR) is a Board established in line with the Legal Notice Number 15 of 12th February, 2015 under the *Public Finance Management Act*, No. 18 of 2012.
 - ii. The SFR fund is responsible to arrange for procurement, storage and sale of food commodities. It also responsible for resource mobilization to support strategic food reserve and related activities among other responsibilities as detailed in the Legal Notice No. 15.
 - iii. The PS State Department for Agriculture is the Administrator SFR Fund, *Ex-officio* and the Secretary to the SFR Oversight Board.
 - iv. The Investigation revealed that the relationship between SFR Oversight Board and NCPB is in line with its objects and purpose as stipulated under the Legal Notice Number 15. Specifically, the Board uses NCPB for the purposes of procurement, storage and sale of food commodities including white maize.
 - v. It was further established that the relationship between SFR Oversight Board and NCPB is formalized *vide* an Agency Agreement. During the Season 2017-2018, the Agency Agreement that was used is the 5th Agency Agreement for the Period July 1, 2015 to June 30, 2017 which governs the provision of technical and managerial services. The Agreement was Signed on October 19, 2016 and was to be effective for a period of two (2) years from the date signing (a copy of the 5^h Agency Agreement is attached marked as "JM2").



- vi. The Agreement was signed between the Principal Secretary, Ministry of Agriculture, Livestock and Fisheries, State Department of Agriculture and the Managing Director, National Cereals and Produce Board. The Agreement entitles NCPB to commission for the services they render as captured under Page 11 of the Agreement.
- vii. That on October 17, 2017 *vide* a letter of authority Ref. MOA/LCD/ 9/12/VOL.IV, the Permanent Secretary (PS), Ministry of Agriculture (MOA) instructed the Petitioner herein to commence the 2017/2018 Strategic Food Reserve (SFR) maize purchase.
- viii. The purchase price was Kshs. 3,000/- per 90kg bag and a rebate of Kshs. 200/- per bag bringing the total to Kshs. 3,200. The letter did not specify the quantities to be purchased.
- ix. Vide an email dated October 16, 2018 from the operations Manager NCPB, NCPB communicated to Depots and Silos the commencement of the purchasing season and the Conditions of Purchase of SFR maize from farmers (a copy of the email dated 16th October 2018 from Ag operations Manager NCPB is attached marked as "JM3")
- x. The email from the then Ag. Operations Manager NCPB to NCPB officials directed NCPB officials to purchase maize only from registered and vetted farmers. Lists of the registered farmers was circulated to the Depots and Silos.
- xi. That upon receipt of the PS's letter Ref. MOA/LCD/9/12/VOL.IV dated 17th October, 2017, the Finance Manager NCPB issued an into-depot/ silo buying price Circular for maize during the FY 2017 /2018 vide a circular ref. NCPB/26/2/VOL.XIV/22 dated October 18, 2017 (a copy of a circular ref. NCPB/26/2/VOL.XIV/22 dated 18th October, 2017 is attached marked as "JM4")
- xii. Based on the Circular by the Ag. Finance Manager's, the amount payable to the farmer for 90kg bag is Kshs. 3, 170/ = after deducting the County Government Produce Cess of 1% of the maize price (Kshs. 3,000/=) per 90kg bag. The Cess is only applicable on the basic price of Kshs. 3,000/ = and not on the rebates.
- xiii. The investigation revealed that the SFROB approved Budget/Work Plan for purchases of maize during the Season 2017-2018 was Kshs.6Billion for 2Million Bags of Maize (a copy of SFROB approved Budget/Work Plan for purchases of maize during the Season 2017-2018 was Kshs.6Billion is attached marked as "JM5")
- xiv. The total quantities purchased as at 17.05.2018 is 6,479,801 bags by 50 Kgs, translating to a commitment of Kshs.11,365,879,918.81/- which was almost double the budget of Kshs.6Billion put in place. (a copy of NCPB schedule on purchased maize during 2017/2018 FY showing transfers in and out is attached and marked as JM 6)
- xv. That as at the same date, the total amount paid to farmers is Kshs. 7,027,830,140.98/= and the outstanding payments to farmers as at the same date is Kshs.4,338,049,777.83/-.
- xvi. The SFROB did not sit to revise its budget nor approved any amendments thereto as required in the regulations.
- xvii. The Legal framework and Guidelines under which NCPB and SFROB Operates provided that Maize were to be purchased from local, registered and vetted farmers only.
- xviii. Investigation revealed that purchases were made from a few farmers who were not registered and who did not qualify to make SFR Maize deliveries to NCPB. The few farmers who made



deliveries did not own land in the areas of delivery and were not vetted. The purported vetting forms used to make deliveries at NCPB were Irregular. (A Copy of extract of Weighbridge Register-B118 collected from NCPB Eldoret, indicating how one farmer made a total of 892 deliveries between the month of November 2017 and December 2017 is attached and marked "JM7").

- xix. The said farmer as outlined in JM6 used two irregular forms to make deliveries, she did not own a farm in the local area purported, and if the said two (2) forms were indeed genuine, she qualified to deliver 40,000 bags of 50 Kgs, she instead delivered an excess of 179,235.56 bags of 50 Kgs.
 - xx. It was established that the NCPB has clear and precise guidelines on Gram Intake Procedures which it communicated to its staff but were not fully complied with by its official during the 2017-2018 SFR Maize Purchases Season.
 - xxi. Investigations revealed that the Petitioner herein who was the Accounting Officer NCPB neglected his functions and in consequence an abused flawed vetting process thrived making it possible for a few cartel members to supply maize beyond authorized quantities.
 - xxii. It was established that a conspiracy existed among few individuals, and in fact relatives who executed a conspiracy to take advantage of the systems and benefit themselves from SFR maize deliveries instead of local farmers.
 - xxiii. The Investigations further revealed that the Petitioner, as the Managing Director NCPB failed in ensuring that the Institutions guidelines were adhered to and in consequence a total of Kshs.458, 866,027.50 was irregularly paid out to only four individuals, money which would have benefitted genuine vetted local farmers.”
40. It is also the 2nd Respondent’s case that: -
- a) the Petitioners herein are using the constitutional court to determine issues of fact which are within the province and competence of the trial court.
 - b) Contested matters of fact are issues for determination by the criminal court and do not constitute grounds for preventing the prosecution of the petitioners.
 - c) The High Court is not a forum to hold a pre-trial to determine whether there is sufficient evidence to charge persons suspected to have committed criminal offences if charged.
 - d) The Petitioner herein is using the Constitutional Court to subvert the criminal law process.
 - e) Petitioners have not shown bad faith, dishonesty, malice or some other exceptional circumstance, that would warrant intervention of the High Court.
 - f) The Petitioners shall be afforded the opportunity at the criminal trial to defend themselves of the allegations levied against them.
 - g) *The Constitution* and the Criminal Procedure Code among other laws have adequate mechanisms for securing the rights of accused persons as the trial.”
41. Parties consented to canvass the petition through written submissions. Those of the Petitioner were received in this Division on July 13, 2022, those of the 1st Respondent on July 13, 2022 and those of the 2nd Respondent on July 15, 2022.



Submissions of The Petitioner

42. Learned Counsel for the petitioner framed the following issues for determination: -
- a. Whether the Respondents charged the Petitioner unfairly and without justifiable cause and/or with counts which do not disclose offences known in law.
 - b. Whether the Respondents infringed the rights of the petitioner.
43. On issue (a) Learned Counsel for the Petitioner submitted that the Petitioner was unfairly prosecuted in that the conduct charged related to action taken under an Agency Agreement and letters of instruction and the Petitioner had merely acted as the Chief Executive Officer of the National Cereals and Produce Board; that the Petitioner was charged for performing his duty under the 5th Agency Agreement and the letter of instruction; that there is no offence like purchasing maize from unregistered farmers, farmers' groups, associations or societies; that in the letters instructing the Petitioner to purchase maize in the Financial Year 2017/2018 there was no requirement to purchase maize from vetted farmers unlike the instructions of 2015/2016; that the vetting done in 2017/2018 was therefore an administrative decision but was not a requirement and does not constitute an offence. Further that at no time did the concerned Ministry indicate it had no funds or that the budget was being exceeded and hence any failures associated with the budget should squarely be placed on the Strategic Food Reserve but not the Petitioner.
44. Counsel submitted that the Petitioner is being charged with exceeding a budget he was neither administering nor controlling; that the Petitioner carried out his obligation within applicable laws and as such the Respondents have subjected the Petitioner to Administrative action that is unfair, inefficient and unlawful through non-disclosure of all relevant facts and by denying him the right to present his case. Further that the 2nd Respondent has failed in its statutory and constitutional duty to carry out thorough and comprehensive investigations and has presented half-baked information to the 1st Respondent as the basis of the proposed criminal charges. Counsel also asserted that the 1st Respondent has sacrificed its prosecutorial policy and its constitutional independence through its acceptance of the 2nd Respondents' incomplete investigations. Counsel cited the case of *Ankush Manoj Shah v Republic* [2016] eKLR in support of the above submissions and urged this court to find that the charges against the Petitioner ought to be dropped. Counsel also placed reliance on the case of *Agnes Ngenesi Kinyua aka Angnes Kinyua v Director of Public Prosecution* [2019] eKLR.
45. On issue No. (b) Counsel submitted that the Respondent's violated the Petitioner's rights by unfairly and unprocedurally conducting flawed investigations for alleged procurement related and other offences. Also that the right of the Petitioner under Articles 2, 3, 10, 19, 20, 22, 27, 28, 30, 47 and 50, 157, 238 and 249 of *the Constitution* were violated. Placing reliance on the case of *International Centre for Policy and Conflict Vs Attorney General & others* Nbi Misc. Civil Case No. 226 of 2013 learned Counsel urged this court to uphold justice and fairness and to defend the letter and spirit of *the constitution* by halting the criminal proceedings in Milimani ACC No. 39 of 2018.

Submissions of The 1st Respondent

46. Although Counsel for the 1st and 2nd Respondents submitted separately they both contend that the issue of whether or not the charges preferred against the Petitioner exist or whether or not they are true is the preserve of the trial court. Counsel for the 1st Respondent submitted that the offences charged are provided for in Section 45 (2) (b) of the *Anti-Corruption and Economic Crimes Act* and that the 1st Respondent shall also be seeking to prove that the Petitioner's conduct contravened Section 79 of the *Public Finance Management Act*. Counsel submitted that the petition is not based on violation of



rights but on arguments on the facts of the case in the lower court; That the issue of the framing of the charges should be left to the trial court under Section 214 of the *Criminal Procedure Code*. Counsel submitted that the petition does not meet the threshold laid in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR both in the manner it is drafted and the merits. Counsel asserted that the issues raised in this petition should be argued in the trial court. She placed reliance on the case of *Ngunjiri Maina v Director of Public Prosecutions & 2 others* [2019] eKLR.

47. On the investigations, Counsel for the 1st Respondent relied on the case of *David Gathu Thuo v Attorney General & Another* [2021] eKLR to state that merely citing the Articles of *the Constitution* is not sufficient to warrant the court to grant orders as sought by the Petitioner. Counsel urged this court to dismiss the petition with costs.

Submissions of The 2nd Respondent

48. For the 2nd Respondent it was emphasized that the prosecution against the Petitioner is not selective, arbitrary and discriminatory; that the 2nd Respondent recommended for prosecution persons who according to its findings were liable; that there was no malice against the Petitioner and that the Petitioner has not adduced evidence to show that the criminal proceedings were mounted for an ulterior purpose. Counsel contended that the petition is an abuse of the court process and is merely intended to unduly frustrate and stifle the expeditious hearing and determination of ACC No. 39 of 2018 and hence should be dismissed with costs to the Respondents.

Analysis and Determination

49. It was held by the Supreme Court in the case of *John Florence Maritime Services Limited and Another v Cabinet Secretary Transport and Infrastructure & 3 others* [2021] eKLR, that: -

“When determining a constitutional petition, a court is empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision.”

50. I have borne the above principle in determining the two issues framed by Counsel for the Petitioner and adopted by Counsel for the Respondents.
51. The gravamen of this petition is that the Charges brought against the Petitioner in ACC No. 39 of 2018 are a violation of the Petitioner’s rights because firstly those charges do not disclose any offences and secondly because he is being prosecuted for merely carrying out his duties as the Managing Director of the National Cereals and Produce Board. I have looked at the charges as replicated in paragraphs 22, 24 and 26 of the Petition and I am not persuaded that there is basis in the contention that they do not disclose any offences known to the law. The offences of Conspiracy to commit an offence of economic crime, Neglect of official duty, Willful failure to comply with procurement laws/regulations and the laws and procedures and guidelines relating to management of public funds all exist in the statutes. Whether the particulars alleged in the charge sheet give rise to those offences is of course a matter of evidence and in my view the determination whether the evidence adduced prove the charges is a question that is best left to the trial court.
52. Whether the Petitioner was merely carrying out his responsibilities is also a matter of evidence. It is trite that the law would not come to his aid for acts not done in good faith – See Article 236 of *the Constitution*. In my view that he was merely carrying out his duty is a defence that the Petitioner must raise in the trial court as the facts placed before this court are not sufficient for it to interrogate the issue. A court can only determine if the Petitioner exceeded his mandate or whether he acted in good faith if all the evidence pertaining to the issue is placed before it but not otherwise.



53. The jurisdiction of this court to interfere with the 1st Respondent's decision to charge must be exercised sparingly and in the clearest of cases, the reason being that power to institute and undertake criminal prosecution is bestowed upon the 1st Respondent solely by Article 157(6) of *the Constitution*. Similarly, Article 252(1) of *the Constitution* and Sections 11, 12 and 13 of the *Ethics and Anti-Corruption Commission Act* bestows investigative powers upon the 2nd respondent and in exercise of those powers the commission does not act under the authority of any person. It is only where it is demonstrated that the Office of the Director of Public Prosecutions and the Ethics and Anti-Corruption Commission have acted arbitrarily, oppressively or contrary to public policy that this court would be entitled to find that they have acted in violation of the subject's rights and hence interfere with their decision: short of that the prosecution must be allowed to proceed.
54. In the instant case this court is being asked to halt the proceedings on grounds that, as I have stated, the facts do not disclose any offences known to the law and that the Petitioner was merely carrying out his duties. I have already made a finding that the offences brought against the Petitioner are known to the law, that whether the facts brought before the court give rise to those offences is a matter of evidence which is best left to the trial court and further that whether the Petitioner acted in good faith is also a matter of evidence that is also best left to the trial court.
55. In the premises I am not persuaded that the prosecution of the Petitioner in Milimani ACC No.39 of 2018 amounts to a violation of the Petitioner's rights. In my view, there is no evidence to prove that the prosecution was actuated by malice or any ulterior motive or purpose besides public interest. Accordingly, I find no merit in the petition and the same is dismissed with costs to the Respondents. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF OCTOBER, 2022.

E N MAINA

JUDGE

In the presence of:-

Mr. Koceyo for the Petitioner

Ms Ndombi holding brief of Mr. Kinyanjui for the DPP 1st Respondent

MS Ashitiva for EACC2nd Respondent

Potishoi - Court Assistant

