



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: KARANJA, KIAGE & MURGOR, JJA)**

**CIVIL APPEAL NO. 69 OF 2017**

**BETWEEN**

**THE ETHICS AND ANTI CORRUPTION COMMISSION.....APPELLANT**

**AND**

**TIOKO LOGORION .....1<sup>ST</sup> RESPONDENT**

**DAVID MORANGA..... 2<sup>ND</sup> RESPONDENT**

**JOSEAK KOSGEL.....3<sup>RD</sup> RESPONDENT**

**LAWRENCE LOLIL..... 4<sup>TH</sup> RESPONDENT**

**NANCY TATOL..... 5<sup>TH</sup> RESPONDENT**

**BENSON LOGEL..... 6<sup>TH</sup> RESPONDENT**

**STEPHEN GOLE.....7<sup>TH</sup> RESPONDENT**

**WILFRED LOKIYOTO..... 8<sup>TH</sup> RESPONDENT**

**PAUL NABUIN.....9<sup>TH</sup> RESPONDENT**

**ENG KERIO.....10<sup>TH</sup> RESPONDENT**

**PAUL NG'ASAKE..... 11<sup>TH</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION.....12<sup>TH</sup> RESPONDENT**

*(Appeal from the ruling of the High Court of Kenya, at Lodwar (S.N. Riechi, J) dated 29<sup>th</sup> March 2017*

**in**

*HC. JR Misc Civil Application No. 2 of 2016*

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**JUDGMENT OF THE COURT**

In this appeal *the appellant, The Ethics And Anti-Corruption Commission* is aggrieved by a ruling of the High Court that granted the 1<sup>st</sup> to 11<sup>th</sup> respondents, whom we shall hereafter refer to as “*the respondents*”; an order of certiorari quashing the appellant’s letter of 11<sup>th</sup> March 2016 that requested the respondents to produce various documents relating to construction contracts issued by the County Government of Turkana and also quashing the Press Statement of 15<sup>th</sup> January 2016 of the 12<sup>th</sup> respondent, *the Director of Public Prosecutions* that recommended that the respondents be charged with abuse of office, willful failure to comply with the laws of procurement and unlawful acquisition of public property; and an order of prohibition that prohibited the appellant, the Director of Public Prosecutions from charging or harassing the respondents, as well as the costs of the application.

By an amended Judicial Review application dated 5<sup>th</sup> October 2016, the respondents herein sought the following orders;

“1. That an order of certiorari do issue to remove to (sic) the High Court and quash the decision of the 1<sup>st</sup> Respondent ( the appellant) contained in its letter dated 11<sup>th</sup> March, 2016 demanding from the Applicants (the respondents) the production and subsequent collection by the 1<sup>st</sup> Respondent of the documents of the County Government of Turkana on its construction contracts and to further record statements and interview the Applicants on the documents on construction contracts, of the County Government of Turkana as contained in the 1<sup>st</sup> Respondent’s letter dated 11<sup>th</sup> March, 2016.

2. That order of Certiorari do issue to remove to (sic) the High Court and quash the decision and recommendations of the Respondents as contained in the press statement of 15<sup>th</sup> January, 2016 that the Applicants to be charged with abuse of office, willful failure to comply with the laws relating to procurement and unlawful acquisition of public property.

3. That an order of prohibition do issue prohibiting the Respondents whether by themselves, their servants, officers or agents from making any demands for collection of any documents from applicants on behalf of the County

Government of Turkana on any of its constructions contracts and interviewing the applicants and recording statements from them regarding the documents.

4. That an order of prohibition do issue prohibiting the Respondents, their servants and/or agents from harassing intimidating, arresting and/or charging the applicants in respect of any demanded documents and witness statements as contained in the 1<sup>st</sup> respondents decision and letter dated 11<sup>th</sup> March, 2016.

5. That an order of Mandamus do issue to compel the 1<sup>st</sup> Respondent to return to the applicants and the County Government of Turkana all the documents on construction projects taken away by the 1<sup>st</sup> Respondent last year while carrying out investigations in the County Government or Turkana on its construction projects.

The respondents’ complaint was premised on grounds that on 11<sup>th</sup> March 2016, in a letter addressed to the County Secretary of the County Government of Turkana, the appellant demanded for the production of various documents including the Evaluation Committee Attendance register, letters of employment, letters of appointment to the Evaluation and Tender Committees, among

other documents. The respondents claimed that the appellant invaded the County Government of Turkana's headquarters in Lodwar while carrying on investigations into the alleged irregularities of Tender awards pertaining to various construction projects, and carried away the documents which were therefore no longer in their possession; that thereafter, on 15<sup>th</sup> January 2016, the Director of Public Prosecutions issued a press statement recommending that the respondents be charged with abuse of office, willful failure to comply with the laws relating to public procurement and unlawful acquisition of property.

The respondents further complained that following the letter of 11<sup>th</sup> March 2016 and the press statement in the Daily Nation of 15<sup>th</sup> January 2016, the appellant published the results of a survey which declared the County Government of Turkana and Tana River as the only two counties where no bribery in exchange for services was reported.

As such, the respondents' grievance was that the continued demand for documents was unwarranted, irrational and unreasonable, made in bad faith and motivated by ulterior intent.

On the appellant's investigations, it was deposed that, the appellant had sought to investigate contracts regarding the *Lodwar-Napeikar- Moreuse Road*, where on 2<sup>nd</sup> December 2011, the Kenya Rural Roads Authority (KeRRA) had awarded Shabaa S.S. & Civil Engineering Limited Tender No. *TUR/RM/TC/2-26-11/12-226* for the light grading of the road. On completion of the light grading, a subsequent tender for heavy grading of the same road was advertised vide Tender No. *TCG/S1/16/2013/2014* and awarded to Lomia Energy Limited. The award was communicated in a letter dated 29<sup>th</sup> July 2013. The respondents deposed that the cost of rehabilitation of the road had significantly appreciated over the years due to increase in prices of commodities, high labour costs, transportation costs, and the cost of materials, all of which led to a change in the construction pricing. It was their contention that these were not matters that necessitated the investigations.

That furthermore, no complaints or review were lodged by aggrieved persons on the contract, and in any event, the proper body to hear and determine complaints concerning procurement matters was the Procurement and Administrative Review Board. That whereas the appellant was duly mandated to investigate criminal offences, the discretion must be properly exercised, so that, were a court to find that there was some collateral motive behind the exercise of such discretion, it should not hesitate to stop those proceedings; particularly since oppressive or vexatious investigations were contrary to public policy; that, the appellant's mandate did not extend to unreasonable conduct aimed at settling personal scores or intended to vilify the persons under investigation. The motion was supported by the verifying affidavit sworn on 26<sup>th</sup> February 2016, a further affidavit sworn on 2<sup>nd</sup> September 2016, and a second further affidavit sworn on 5<sup>th</sup> November 2016 by Nancy Tatoi, the Chairperson of the Tender Committee of the County Government of Turkana.

The appellant opposed the application, and in Grounds of Opposition dated 22<sup>nd</sup> April 2016, and an affidavit in reply sworn by Tom Gerald Mboya on 3<sup>rd</sup> May 2016, it was averred that the respondents' application was misleading since the request for documents had been made to the County Secretary and not to the respondents, that the appellant had indeed received documents and recorded various statements which the appellant had forwarded together with its recommendations to the Director of Public Prosecutions; that the respondents assertions that the appellant's representatives were harassing, intimidating, arresting and charging them was without basis and no material had been placed before the court in support of this contention or that demonstrated that the appellant had infringed upon their rights. Regarding the contention that the survey results had depicted the County Government of Turkana as being free of bribery, it was averred that it was of no probative value since nothing precluded the appellant from investigating reports of corruption.

In an affidavit sworn on behalf of the Director of Public Prosecutions by Hellen Mutellah on 5<sup>th</sup> September 2016, besides reiterating to a large extent the background leading to the decision to prosecute the respondents, it was deposed that the investigations into the *Lodwar- Napeikar- Moreuse Road* contract revealed that during the Financial Year 2013/2014 the County

Government of Turkana allocated Kshs. 350 million for construction and upgrading of feeder roads and bridges; that subsequent to this, the County Government advertised Tender No. TUR/CG/32/2013/2014 for upgrading of various roads including the *Lodwar-Napeikar- Moreuse Road*.

Upon considering the application and the party's submissions, the learned judge concluded that the letter of 11<sup>th</sup> March 2016, that demanded documents which had been taken away by the appellant and the decision to prosecute the respondents issued in the press statement of 15<sup>th</sup> January 2016 were irrational, unreasonable and an infringement of the respondents rights.

And in so finding the learned judge granted the orders of certiorari quashing the letter of 11<sup>th</sup> March 2016 which stopped any further investigations and also granted orders of prohibition that prohibited any harassment or charging of the respondents.

Dissatisfied with the ruling, the appellant brought this appeal faulting the learned judge for;

*i) wrongly merging a wider investigation into construction contracts by the County Government of Turkana with the specific investigation of the Tender No TUR/RM/TC/2-26-11/12-226 and TCG/S1/16/2013/2014 for the rehabilitation of the Lodwar-Napeikar- Moreuse Road and wrongly concluding that the documents called for in the appellant's letter dated 11<sup>th</sup> March 2016 were collected by the appellant's agent on an earlier date;*

*ii) wrongly merging investigations and recommendations to prosecute the respondents in respect to the contract for rehabilitation of Kalokol- Lobolo - Eliye Springs Road with the investigations into the rehabilitation of the Lodwar- Napeikar-Moreuse Road thereby wrongly concluding that despite the orders of the High Court of 24<sup>th</sup> March 2016, the Director of Public Prosecutions had charged the respondents in Eldoret Chief Magistrates Court Anti-Corruption Case No. 4 of 2016 Republic vs Tioko Logorion & 8 Others;*

*iii) finding that the appellant acted irrationally and unreasonably by requesting for interviews with the officers of the County Government of Turkana and for documents in relation to the County's construction contracts through a letter dated 11<sup>th</sup> March 2016 and in finding that the investigations carried out by the appellant amounted to harassment and intimidation which was an abuse of its discretion;*

*iv) granting an order of certiorari quashing the letter dated 11<sup>th</sup> March 2016 addressed to the County Secretary, Turkana County;*

*v) barring investigations into all construction contacts in the County Government of Turkana, and effectively granting immunity from any investigations and possible prosecution in respect of the construction contracts*

*vi) finding that the appellant's recommendation to the Director of Public Prosecution to prosecute the respondents was on the basis of failure to produce documents in relation to the County's construction contracts demanded by the appellant;*

*vii) finding that despite the stay orders of 24<sup>th</sup> March 2016, the respondents wrongly charged the respondents with offences of willful failure to comply with the law relating to procurement, abuse of office, and unlawful acquisition of public property;*

*iii) failing to appreciate that the earlier collection of documents by the appellant was not challenged as unlawful or improper and therefore the orders of stay of the case of Eldoret Chief Magistrates Court Anti-Corruption Case No. 4 of 2016 Republic vs Tioko Logorion & 8 Others was not in respect of the subsequent demand for documents and interview of the respondents; and*

viii) awarding costs to the respondents.

In the appeal that was heard on a virtual platform owing to the Covid- 19 pandemic, **Mr. B Murei**, learned counsel appeared for the appellant while learned counsel **Mr. A Omwoyo** appeared for the 9<sup>th</sup> respondent and also held brief for Mr. Nyachoti for the 1<sup>st</sup> to 8<sup>th</sup> and the 10<sup>th</sup> and 11<sup>th</sup> respondents. Learned counsel **Mr. S. Njeru** appeared for the Director of Public Prosecutions. The parties all filed written submissions, which they sought to rely in their entirety.

Briefly highlighting the appellant's submissions, Mr. Murei submitted that the respondent's application centered on the Director of Public Prosecutions' press statement dated 15<sup>th</sup> January 2016 and the appellant's letter requesting documents and interviews of 11<sup>th</sup> March 2016 addressed to the County Secretary.

Beginning with the complaint that the letter of 11<sup>th</sup> March 2016 was unwarranted and amounted to harassment because the documents demanded had already been taken away by the appellant, counsel submitted that this was not a valid reason to stop the investigations, as, the request was directed at the County Secretary, not at the individual respondents; that in addition, the request was with respect to other construction contracts and differed from the documents provided under the investigations into *Lodwar-Napeikar-Moreuse Road* contract; that in effect the documents requested were with respect to a different investigation. On the survey report, counsel stated that, no correlation was established between the survey report of 17<sup>th</sup> March 2016 and the letter of 11<sup>th</sup> March 2016. It was asserted that a travesty occurred when the High Court ordered a perpetual injunction against the appellant stopping all and any investigations and prosecutions into the construction contracts set out in the tender document, which orders were wrongful.

In its submissions, the Director of Public Prosecutions stated that the decision recommending prosecution of the respondents was made on 15<sup>th</sup> January 2016 after the evidence on the *Lodwar- Napeikar- Moreuse Road* contract was submitted; that the impugned letter dated 11<sup>th</sup> March 2016, was issued after the decision to prosecute the respondents had been made, and was in respect of other contracts. It was argued that the respondents had not contested the decision to prosecute or shown how the Director of Public Prosecutions had violated its constitutional mandate or any law.

Regarding the survey report, counsel pointed out that it concerned complaints of bribery, while the charges to be preferred against the respondents were for abuse of office and therefore the matters in contention were completely different. Counsel complained that the judge issued far reaching orders that stopped the Director of Public Prosecutions from carrying on with the conduct of its mandate.

In their written submissions, the 1<sup>st</sup> to 8<sup>th</sup> and the 10<sup>th</sup> and 11<sup>th</sup> respondents, opposed the appeal. It was submitted that the respondents' grievances were against the letter of 11<sup>th</sup> March 2016, demanding various documents and interviews, and the press statement of 15<sup>th</sup> January 2016 recommending that the respondents be charged with abuse of office, willful failure to comply with the public procurement laws and unlawful acquisition of public property in respect of the rehabilitation of the *Lodwar- Napeikar- Moreuse Road* contract and the continued harassment and intimidation by the appellant, together with its unreasonable and irrational demands for statements and interviews regarding the same contract. It was argued that since the appellant had concluded its investigations and had forwarded the file together with its recommendations to the Director of Public Prosecutions, who responded by releasing a press statement on 15<sup>th</sup> January 2016 indicating that it would be making decisions shortly, it was illogical, and unreasonable for the appellant to have issued the letter of 11<sup>th</sup> March 2016 demanding for documents and statements in respect of the same contract.

It was further submitted that the letter of 11<sup>th</sup> March 2016 was in respect of other construction contracts, yet the investigations

were only centered on one road, the *Lodwar- Napeikar- Moreuse Road* contract which had in any event been completed; that the letter of 11<sup>th</sup> March 2016 amounted to continued ‘changing of the goal posts’ which was dishonest and made in bad faith on the appellant’s part. The case of *DPP vs Crossely Limited & Another, Kisumu Civil Appeal No. 1 of 2003* was relied on to support the proposition that dishonesty and bad faith are sufficient grounds for interfering with criminal investigations and proceedings.

It was argued, that, the final demonstration of bad faith was when the appellant published the results of a survey report issuing the County Government of Turkana with “a clean bill of health” only for the appellant to go against its own report a few months later to reach a contrary finding.

Submitting on behalf of the 9<sup>th</sup> respondent, Mr. Omwoyo also opposed the appeal and stated that the High Court rightly found the appellant’s actions unprocedural, and the letter of 11<sup>th</sup> March 2016 to be unwarranted and irrational. Counsel further argued that *Part IV of Anti-Corruption and Economic Crimes Act ( ACECA)* specified the procedure to be adopted in the conduct of investigations, yet the appellant unlawfully raided the respondent’s offices and took away all the documents contrary to *sections 27 and 28* of the Act; that following the investigations, the appellant submitted its recommendations to the Director of Public Prosecutions, but had continued to demand for documents; that the respondents were entitled to seek the protection of the court against the appellant’s continued harassment.

In reply, Mr. Murei stated that the appellant was investigating various construction contracts and for which it was duly mandated by law and as such was entitled to request for the relevant documentation.

We have considered the parties’ submissions, and are of the view that central to this appeal is the question of whether in the exercise of his discretion, the learned judge rightly exercised his discretion to issue the orders of certiorari quashing the Director of Public Prosecutions’ press statement of 15<sup>th</sup> January 2016 and the appellant’s letter of 11<sup>th</sup> March 2016 to prohibit continued investigations and prosecutions. In determining this issue, we are guided by the principles espoused in the established case of *Mbogo & Another vs Shah [1968] EA, p.15*;

***“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”***

To discern if the learned judge properly exercised his discretion, it is necessary to determine i) whether the Director of Public Prosecutions’ press statement dated 15<sup>th</sup> January 2016 that recommended that the respondents be charged with abuse of office in respect of the rehabilitation of the *Lodwar-Napeikar- Moreuse Road* case and the letter dated 11<sup>th</sup> March 2016 issued by the appellant requiring production of various documents on construction projects of the County Government of Turkana were unprocedural, irrational and unreasonable; and ii) whether the learned judge rightly granted the orders of certiorari and prohibition.

At the outset, it is observed that the respondents instituted judicial review proceedings where they sought orders of certiorari and prohibition. Since judicial review is concerned with the decision making process, see *Biren Amritlal Shah & Another vs Republic & 30 others [2013] eKLR*, it is necessary to interrogate the processes that culminated in the Director of Prosecution’s press statement and the impugned letter of 11<sup>th</sup> March 2016.

We begin with the investigation process leading up to the press statement dated 15<sup>th</sup> January 2016. Without going into whether or not the reasons for recommending that the respondents be charged were properly founded, as this is not what is before us, according to the verifying affidavit in support of the application, Nancy Tatoi, the Chairperson of the County’s Tender Award Committee deposed that on 2<sup>nd</sup> December 2011 the KeRRA awarded Tender No. *TUR/RM/TC/2-26-11/12-226* for the light grading of the *Lodwar- Napeikar- Moreuse Road* to Shabaa S.S. & Civil Engineering Limited. On completion of the light grading, a

subsequent tender for heavy grading of the same road was advertised vide Tender No. *TCG/SI/16/2013/2014* and awarded to Lomia Energy Limited. The tender award was communicated to the contractor vide a letter dated 29<sup>th</sup> July 2013.

In reply, Tom Gerald Mboya, a Senior Forensic Investigator with the appellant deponed that, thereafter, the appellant received reports that the County Government of Turkana had awarded a contract for the rehabilitation of the *Lodwar- Napeikar- Moreuse Road* and had made inflated payments in respect of the contract; that investigations were carried out and documents relating to the contract were carried away, and that subsequently, on 15<sup>th</sup> January 2016 the Director of Public Prosecutions issued a press statement communicating its receipt of the appellant's recommendation in respect of the inquiry into the contract to rehabilitate the *Lodwar-Napeikar-Moreuse Road*. The appellant's recommendation stated that;

*"... the County Officials be charged with Abuse of Office and Willful Failure to comply with the laws relating to procurement and Unlawful acquisition of public property..."* and further that, *"...recovery proceedings be instituted against Lawrence Lolii to recover the money lost."*

Needless to say, before the charges were preferred, the respondents sought for and obtained orders prohibiting their prosecution and quashing the appellant's request for documents and to undertake interviews with the respondents which were the orders the trial judge granted and, the subject of this appeal.

To warrant the order of prohibition against prosecution, the respondents required to demonstrate that the appellant and the Director of Public Prosecutions, acted contrary to the law.

In *Joram Mwendwa Guantai vs The Chief Magistrate, Nairobi [2007] 2 EA 170* this Court stated;

***"It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only in excess of jurisdiction or absence of it but also from a departure from the rules of natural justice. It does not however lie to correct the course, practice or procedure of an inferior tribunal, or a wrong doing on the merits of the proceedings..."***

It is not disputed that following investigations into the rehabilitation for the *Lodwar- Napeikar- Moreuse Road* contract, a decision to charge the respondents was made on 15<sup>th</sup> January 2016. We have painstakingly considered the application and the various affidavits to discern the nature of the respondent's grievances against the appellant's recommendation of 15<sup>th</sup> January 2016, and can find no complaint or evidence of impropriety either on the part of the Director of Public Prosecutions or the appellant regarding the investigations, interviews and statement taking or the decision to prosecute the respondents for alleged irregularities surrounding the *Lodwar-Napeikar- Moreuse Road* contract. It is apparent therefore that no reason for prohibiting the prosecution of the respondents was established and, therefore, we find the orders of prohibition to have been unjustified.

Having said that, we turn to consider the complaint against the letter of 11<sup>th</sup> March 2016. At **paragraph 1** of the amended motion, the respondents' allege that after the decision was made to charge them, *"... on 11<sup>th</sup> March 2016 the Respondent served a demand on the Applicants requiring them to produce various documents including Evaluation Committee Attendance register, Letters of Employment, Letters of Appointment to the Evaluation and Tender Committees, among other documents whereas the said documents were confiscated and carried away by the Respondent's officers some time last year when the Respondent invaded the County Government of Turkana's headquarters in Lodwar while carrying on investigations on alleged irregularities on awards of Tenders on construction projects."*

At *paragraph 2* it was contended that;

“... in the said letter, the Applicants are also required to record statements on the documents which are not in their possession but in possession of the Respondents which action is mischievous, unfair, malicious, irrational and in bad faith...”

The respondents surmise at *paragraph 5* that;

“...in view of the above, it is obvious and clear beyond paraadventure that the demands for documents and statements now being made by the 1<sup>st</sup> Respondent regarding construction projects in the County Government of Turkana are actuated by ulterior motives with a view of achieving certain extraneous goals...in view of the fact that investigations had been carried out by the 1<sup>st</sup> Respondent, statements recorded, documents carried away and recommendations made to charge the Applicants culminating in the Press Statement by the 2<sup>nd</sup> respondent on 15<sup>th</sup> January 2016”.

Simply put, the respondents’ complaint was that having completed investigations into the *Lodwar- Napeikar- Moreuse Road* contract, and arrived a decision to charge the respondents with abuse of office *inter alia* on 15<sup>th</sup> January 2016, the appellant’s demand for further documents, interviews and statements outlined in the letter of 11<sup>th</sup> March 2016 was unwarranted, irrational and unreasonable.

As to whether the demands contained in the impugned letter of 11<sup>th</sup> March 2016 were irrational and unreasonable, which we note from its contents was mistakenly dated 11<sup>th</sup> March 2015, requires that the letter be reproduced *in extenso*.

It reads;

“EACC. 6/15/4 Vol. IX (51)

*The County Secretary*

LODWAR

RE: INTERVIEW OF WITNESSES AND COLLECTION OF

DOCUMENTS COUNTY GOVERNMENT CONSTRUCTION CONTRACTS

*The Commission is investigating allegations of irregularities in awarding of Contracts by Turkana County Government. To expedite our investigations, we request to interview the following County Officers and bidders on Monday March 14, 2016 commencing 10.000 am at the County Offices. (a) County Officers:*

i) *Paul Nabuin*

ii) *Nancy Tatoi*

iii) *Stephen Gole*

iv) *Eng. Kerio*

v) *David Gesuka*



vi) *Wilfred Lokiyoto*

vii) *Benson Logiel Lokwang*

viii) *Joseah Kipng'eno Kosei*

ix) *Paul Ng'asike*

(b) *Contractors:*

i) *Promise Development*

ii) *Namorrutunga Contractor*

iii) *Joleli Enterprises*

iv) *Yedida Investment Ltd.*

v) *Loine Investments Ltd.*

*Please also avail the following documents*

i) *Evaluation Committee Attendance Register.*

ii) *Letters of employment of the officers listed above*

iii) *Letters of Appointment to the Evaluation and Tender Committee of aforelisted officers.*

*Our officers Messrs. Tom Mboya and Stephen Yego will be available to interview, record statements and collect the requisitioned documents.*

*Yours faithfully,*

*John Lolkoloi*

*Deputy Director, Forensic Investigation*

*For Secretary/ Chief Executive Officer"*

As pointed out by the appellant, what stands out from the letter is that it was distinctly addressed to the County Government Secretary, and not to the individual respondents. Additionally, the contents of the letter disclose that it requested for documents and interviews with some and not all of the respondents. But more importantly, it sought interviews with several third party contractors awarded contracts by the Turkana County Government, who did not include the contractor awarded the *Lodwar- Napeikar- Moreuse road* contract and for which a decision was already made to charge the respondents. It becomes clear that the impugned letter concerned other investigations which the appellant was entitled to undertake.

Furthermore, on the allegation that the appellant had carried away the requested documents, besides indicating that the letter demanded the production of various documents including the Evaluation Committee Attendance register, letters of employment; letters of appointment to the Evaluation and Tender Committees, amongst other requisitions, the respondents did not provide any particulars in respect of when the requisitioned documents were carried away, or whether the documents carried away were the same documents as the documents pertaining to the *Lodwar- Napeikar- Moreuse road* contract that were taken away by the appellant. No inventory or movement register attesting to such assertion was produced. **Section 107 and 109** of the *Evidence Act* is pertinent. Whomsoever alleges must prove. And without such proof, the allegation remained unfounded and baseless, so that no viable reason was established to justify quashing of the letter.

Now, circling back to the trial court's ruling. Prior to granting the orders of certiorari and prohibition, the learned judge had this to say,

***“The Ex Parte Applicant were members of the Tender Committee of the Turkana County Government. The Respondent in pursuance to its mandate sought and took away all documents relating to the award of the contract. The Respondent then by order dated ... required the Exparte Applicants to submit the same documents, it was unfair to demand the same from them, and when unable to produce, made a recommendation for prosecution by the 2<sup>nd</sup> Respondent...”***

The judge continued,

***“...It would in my view constitute an abuse of the legal process which will enable the court stop the abuse. To demand the Ex Parte Applicants to produce documents held by the Respondent and (sic) is in my view irrational and unreasonable. Any subsequent recommendation to prosecute them on the (sic) basis and any prosecution based on this recommendation to the Director of Public Prosecution by the 1<sup>st</sup> respondent would in my view be a clear violation of their fundamental right to fair administrative processes and an abuse of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's discretion.”***

However, it is apparent from the sequence of events that, the learned judge misdirected himself when he granted the orders on allegations that were unsubstantiated. We say so because, firstly, in so far as the recommendation of 15<sup>th</sup> January 2016 to charge the respondents was concerned, as seen earlier, the respondents did not allege that the investigation process adopted or the decision to prosecute was improper, and nothing in the applications denotes that it was unprocedural, irrational, or unreasonable. Since no illegality or unprocedurality was established, there was no reason for the learned judge to have ordered a prohibition against the intended prosecution of the respondents.

Second, it is apparent that the learned judge failed to appreciate that the impugned letter was a request for documents in respect of investigations into various other contracts awarded by the County Government, and was not a continuing investigation into the *Lodwar- Napeikar- Moreuse road* contract, for which a decision had already been made.

**Article 252** of the *Constitution* and **sections 11 (d) and 13 (c)** of the *Ethics and Anti-Corruption Commission Act* are clear. They empower the appellant to undertake investigations on its own initiative or on a complaint made by a member of the public. So that if other investigations were warranted, it was entitled so to do.

In describing what would be considered irrational, in the case of the *Council of Civil Service Unions (CCSU) vs Minister of State for the Civil Service [1985]AC 374 HL*, Lord Diplock stated thus;

***“Judicial review I think has developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second irrationality, and the third ‘procedural impropriety’ ....By irrationality’ I mean what can by now be referred to a ‘Wednesbury unreasonableness’ ...”***

And in the case of *Re W (an infant)* [1971] AC 682 HL, Lord Hailsham of Marlebone explained that;

*“...unreasonableness can include anything which can objectively be adjudged to be unreasonable. It is not confined to culpability or callous indifference. It can include when carried to excess, sentimentality, romanticism, bigotry, wild prejudice, caprice, fatuousness, or excessive lack of common sense”.*

The appellant has not denied that it investigated and carried away documents relating to the *Lodwar- Napeikar- Moreuse road* contract, but that did not mean that it was estopped from conducting further investigations into other contracts or undertake interviews with other contractors and concerned county officials identified in the impugned letter. The investigations would also have entitled it to request for other documents and statements. In our view, there is nothing irrational or unreasonable about the request for documents and further interviews and we consider nothing in the letter of 11<sup>th</sup> March 2016 to have been unprocedural or that pointed to harassment of the respondents for an untoward or dogmatic reason. Therefore, stopping further investigations was plainly unjustified.

Third, the learned judge erroneously and solely relied on the respondents’ claims that all the documents were taken away. In the ruling, it was observed that, *“The Respondent in pursuance to its mandate sought and took away all documents relating to the award of the contract...”* The judge went on to conclude that in the request for documents and interviews in the impugned letter the appellant, *“... required the Exparte Applicants to submit the same documents...”* and that *“... it was unfair to demand the same from them, and when unable to produce, made a recommendation for prosecution by the 2<sup>nd</sup> Respondent...”*.

Essentially, though the learned judge was clearly aware that the documents taken away related to the *Lodwar- Napeikar- Moreuse road* contract, he failed to ascertain whether they were the same ones for which a request had been made, namely the Evaluation Committee Attendance register, letters of employment, letters of appointment to the Evaluation and Tender Committees amongst others. The judge nevertheless concluded, without any evidence whatsoever, that the documents required were the same as those taken away. Without having tested the veracity of the allegations, they remained unfounded, and could not be a basis on which to grant the blanket orders stopping all further investigations and prosecutions.

We hasten to observe that by quashing the impugned letter, the trial court did not only effectively stop further investigations into the other construction contracts, but went further to effectively, and without justification prohibit the prosecution of the respondents for the offences recommended in relation to the *Lodwar- Napeikar- Moreuse road* contract. The result of the judge’s decision was to provide immunity to the respondents from all and any investigations into the construction contracts and any ensuing prosecutions, which was tantamount to unjustifiably curtailing the appellant and the Director of Public Prosecutions from the conduct of their respective statutorily and constitutionally donated mandates.

We have said enough. It is quite clear that, the learned judge misdirected himself when he did not take into account matters that ought to have been taken into account and in so doing arrived at the wrong decision. As a consequence, we find it necessary to interfere with that decision.

Accordingly, the appeal is allowed. The ruling and order of the High Court of 29<sup>th</sup> March 2017 is hereby set aside with costs to the appellant.

***It is so ordered.***

*Dated and delivered at Nairobi this 29<sup>th</sup> day of January, 2021.*

**W. KARANJA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**



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