



REPUBLIC OF KENYA



KENYA LAW
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**Agoro & 2 others v Ethics & Anti-Corruption Commission & 4 others
(Petition E003 of 2023) [2024] KEHC 7955 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7955 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
PETITION E003 OF 2023
F GIKONYO, J
JUNE 24, 2024
IN THE MATTER OF:
THE KENYA NATIONAL AUDIT REPORT 2021/2022
AND
UNAUDITED MULTIPLE UNACCOUNTED EARNINGS
AND
PAYMENTS TOTTALLING HUNDREDS OF MILLIONS
AND
CONCEALING INVESTMENTS REVENUE AMOUNTING TO MILLIONS.
AND
OUKO TASKFORCE REPORT, JANUARY 2023 AND
ANOMALIES IN THE BANK RECONCILIATION
STATEMENT
AND
INACCURATE & INCOMPLETE CASH BALANCES
AND
THE FINANCIAL MANAGEMENT AUDIT REPORT 2020/2021
AND
IMPREST OF SUPPLEMENTARY BUDGET 1 2022/2023
AND
THE OFFICE OF THE CONTROLLER OF BUDGET MONITORING REPORT
AND
LEADERSHIP AND INTEGRITY CODE**



AND
THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT
AND
ANTI CORRUPTION AND ECONOMIC CRIMES ACT
AND
THE ENFORCEMENT OF THE CONSTITUTION OF KENYA 2010
AND
ARTICLE 10 OF THE CONSTITUTION OF KENYA 2010 ON
THE NATIONAL VALUES & PRINCIPLES OF PUBLIC SERVICE
AND
CHAPTER 6 OF THE CONSTITUTION OF
KENYA 2010 ON LEADERSHIP AND INTEGRITY
AND
THE DOCTRINE OF LEGITIMATE EXPECTATIONS
AND
THE PUBLIC FINANCE MANAGEMENT ACT, THE PUBLIC PROCUREMENT AND
DISPOSAL ACT, THE ETHICS AND ANTI CORRUPTION COMMISSION ACT,
AND
THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT

BETWEEN

PETER ODHIAMBO AGORO 1ST PETITIONER
ERICK ONYANGO OMENY 2ND PETITIONER
ELIZABETH AKINYI OMOLLO 3RD PETITIONER

AND

ETHICS & ANTI-CORRUPTION COMMISSION 1ST RESPONDENT
JACK ODINGA 2ND RESPONDENT
GEOFFREY OCHIENG 3RD RESPONDENT
JOB KINGSLEY AMOTH OTIENO 4TH RESPONDENT
HEZRON JUNIOR OPIYO 5TH RESPONDENT



JUDGMENT

Quest to compel EACC to investigate

1. Before this court for determination is the petition, and application dated 29/05/2023. The affidavits in support were sworn by the 1st petitioner, Peter Odhiambo Agoro on 29/05/2023.
2. The application is brought under Articles 10,22,23, and 159 of *the Constitution*, Order 51 Rule 1 of the Civil Procedure Rules, Rules 3 and 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
3. The petitioners have sought the following orders;
 - i. That a declaration be and is hereby issued that the respondent committed corruption and economic crimes, preceding over the unaccountability in the Siaya county government hence violating articles 10,22,23,258 and chapter 6 of *the Constitution* of Kenya, the *Anti-Corruption and Economic Crimes Act* and The *Ethics and Anti-Corruption Commission Act*.
 - ii. That a declaration be and is hereby issued against the respondents that they have engaged in corrupt practices amounting to gross violation of *the Constitution* and have been rendered incapable of discharging their mandates as required by *the Constitution* and various statutes.
 - iii. That this court be pleased to issue a conservatory order to restrain the respondent by himself, officers, servants, agents, or anyone acting on his behalf from undertaking any further fiduciary activities until the funds misappropriated and unaccounted for are accounted for and ascertained by the 2nd interested party pending the hearing and final determination of this case.
 - iv. That a declaration be and hereby issued aiding and abetting corruption is criminal and should not go unpunished.
 - v. That a declaration be issued that the respondents violated, infringed threatened *the constitution*, the Public Officer's Ethics Act, the *Anti-Corruption and Economic Crimes Act*, The County Government Act, the EACC Act, the NSSF code of conduct, MWONGOZO (code of governance for state corporations) the national values and principles of governance, the principles of public service and all other applicable provisions of the law therefore unfit to hold public office.
 - vi. That an order be issued compelling the 1st respondent to commence investigations into the activities of the respondent and officers serving under them and institute criminal and civil proceedings against them.
 - vii. That the 3rd interested party be directed to furnish the petitioners with certified bank statements for the imprest account for the period July to date.
 - viii. That the honourable court do make any such other or further orders as it may deem just and expedient in the circumstances to remedy the violations aforesaid.
 - ix. Costs of this petition to be granted to the petitioners

Facts relied upon

4. The facts relied upon by the petitioners are that the 2nd interested party audit revealed multiple unaccounted earnings and payments totaling hundreds of millions.



5. The 2nd respondent served as the director of finance from January 2022 to July 2022, the period within which most of the cases of cash withdrawals were done and he authorized them. He authorized the withdrawal of cash from the Imprest account for non-existing training of staff and Imprest sent the cash to individual officers' bank accounts facts which are captured in the Ouko taskforce report and the auditor general's report and the internal audit report.
6. The 3rd respondent served as the director of finance during the Kshs. 600 million heist period. He was a signatory to the imprest account.
7. The 4th and 5th respondents were a departmental accountant-finance and imprest respectively Siaya county government during the Kshs. 600 million heist and personal accounts were used to transact funds from IFMIS.
8. The audit raised several queries as enumerated by the petitioners in their petition.
9. The petitioners placed on the spot the 1st respondent for carrying out investigations for far too long without prosecution. And alleged that they seemed to have been pocketed by the thieves in the county.
10. The 1st petitioner also swore a supplementary affidavit on 24/07/2023.

The Responses

11. The 1st respondent opposed the petition and application vide grounds of opposition dated 18/07/2023.on the grounds;
 1. That the mandate of EACC as per *the Constitution* of Kenya 2010, Ethics and Anti-Corruption Act (EACC Act) Leadership & Integrity Act (LIA) is to investigate allegations in respect to corruption, economic crimes, chapter six matters and recommend to the director of public prosecutions.
 2. That the order sought in the application and petition herein compelling the EACC to investigate the activities of the 2nd, 3rd, 4th, and 5th respondents and officers serving under them and to institute criminal and civil proceedings against them threatens to encroach upon the independence of EACC contrary to the provisions of Article 79 of *the Constitution* of Kenya 2010.
 3. That EACC is an independent constitutional commission which is not subject to any control or direction by any person or authority as enshrined in the provisions of Article 249(2)(b),79 of *the Constitution* of Kenya 2010.
 4. That the order as sought is frivolous, vexatious, without merit, and an abuse of the court process and therefore should be dismissed with costs to EACC.
12. The 3rd respondent opposed the petition and application vide notice of preliminary objection dated 13/06/2023. On the grounds that;
 1. This Honourable court lacks jurisdiction to hear and determine this Petition, for the following reasons:
 - i. The Petition offends section 29 of the Ethics and Anti-Corruption Act, No.22 of 2011 as well as sections 6 and 9 (1) of the *Access to Information Act*, No.31 of 2016;



- ii. The Petition as filed is caught up with the bar of non-justiciability since it offends the Political Question Doctrine, the Constitutional - Avoidance Doctrine, and the Ripeness Doctrine;
 - iii. The Petition does not set out with a degree of precision the Petitioners' complaint, the provisions infringed, and the manner in which they are alleged to be infringed as was held in *Anarita Karimi Njeru vs. The Republic* [1979] eKLR;
 - iv. The notice of motion and the petition are not founded on the mandatory provisions of *the Constitution* of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules;
 - v. The Notice of Motion and the Petition are wanting in both form and substance and the prayers sought therein cannot be practically granted;
 - vi. The affidavits in support thereto offend Rule 9 of the Oaths and Statutory Declarations Rules. 2
2. Both the Petition and Notice of Motion are therefore ex-facie incompetent, fatally defective, and inadmissible hence the same should be struck out and/or dismissed with costs.
 3. On the whole, they argued, that, the Petition and the Notice of Motion are frivolous, vexatious, and a gross abuse of the court process.
13. The 1st respondent filed a replying affidavit sworn by Charles Kiptanui, a forensic investigator with the 1st respondent filed in court on 24/08/2023
 14. The 2nd, 3rd, 4th, and 5th respondents and the 1st interested party filed a replying affidavit sworn by Geoffrey Ochieng on 10/07/2023.
 15. The 3rd respondent filed a replying affidavit sworn on 10/07/2023.

Directions of the court

16. The application was canvassed by way of written submissions. The petitioners, the 1st respondent, 2nd, 4th, 4th and 5th respondents, and 1st interested party have filed their respective submissions. The petitioners filed their submissions dated 29/08/2023. The 2nd, 3rd, 4th, and 5th respondents and the 1st interested party filed their submissions dated 18/09/2023. The 3rd respondent filed submissions dated 14/06/2023. In opposition to the Petition and Notice of Motion, both dated 29.5.2023; and in support of the 3rd Respondent's Notice of Preliminary Objection dated 13.6.2023

Analysis And Determination

17. The court has carefully considered the petition, the petitioners' application, supporting affidavit, supplementary affidavit, replying affidavits, grounds of opposition, and the respective parties' submissions.
18. The petitioners seek declarations in respect of investigations that the 1st Respondent was 'expected' to carry out following a report to it concerning various audit queries at Siaya County.

Issues for determination

19. Arising thereto, are issues to do with: -
 - i. The Petitioners' locus standi (standing)



- ii. Competence of the petition and setting out of particulars with a degree of precision.
- iii. Compliance with the provisions of the *Oaths and Statutory Declarations Act*
- iv. Failure by the 1st respondent to undertake its mandate
- v. Non-justiciability of the matters forming the petition
- vi. Non-availability of the reliefs sought.
- vii. Who shall bear the costs of this suit

I. Whether the Petitioners have locus standi

- 20. The petitioners submitted that they have locus standi. They stated that, they are responsible citizens of Kenya and therefore, perfectly entitled to move this court to ensure the rule of law and Constitution is upheld.
- 21. In particular, the petitioners averred that, being concerned citizens and residents of Siaya County, have a particular stake in the general state of affairs for the county and therefore brought the petition in the public interest. The petitioners relied on Article 258 of *the Constitution* of Kenya.
- 22. Under article 258(1) of *the Constitution*; ‘Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention’. And, under article 258(2)(c) thereof; ‘...court proceedings under clause (1) may be instituted by—...a person acting in the public interest’.
- 23. Accordingly, standing of parties in filing court proceedings claiming that the ‘Constitution has been contravened, or is threatened with contravention’, has been enlarged. These proceedings claim are claiming that the ‘Constitution has been contravened, or is threatened with contravention’.
- 24. And therefore, by dint of Articles 22 and 258 of *the Constitution* and the decision in the Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, it is this court’s finding that the petitioners have the locus standi to institute this suit.

Of competence of the petition: setting out particulars with a degree of precision.

- 25. The petitioners submitted that this petition raises a cause of action and the facts thereto are well pleaded.
- 26. The 1st respondent submitted that the petitioners have not demonstrated that the 1st respondent has acted in contravention of *the constitution* or any other written law or set out with reasonable precision the particular provisions of *the Constitution* which were allegedly contravened by the 1st respondent. The 1st respondent relied on Paul Ng’ang’a Nyaga & 2 Others V Attorney General & 3 Others [2013] eKLR, and Anarita Karimi Njeru Vs the Republic (No. 1) [1976-80] 1KLR.
- 27. It was the 3rd Respondent’s position that the Petition fails the competency test by not setting out with a reasonable degree of precision their complaints against the Respondents, the relevant provisions of *the Constitution* alleged to have been infringed, and how they are alleged to have been infringed by the specific Respondent. The 3rd respondent relied on Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, and Japheth Ododa Origa vs. Vice Chancellor University of Nairobi & 2 others [2018] eKLR.
- 28. The 1st respondent submitted that the petitioners have not demonstrated that the alleged refusal or failure by the 1st respondent to perform the duty is detrimental to them and that it has the legal right to



- expect the duty to be performed. The 1st respondent relied on Ferdinand Ndungu Waititu V Benson Riitho Mureithi (suing on his behalf and on behalf of the general public) & 2 others [2018] eKLR.
29. Upon consideration of the arguments presented, a party should set out the claim and particulars of the claim-alleged breach, manner of infringement, the law breached- with a reasonable degree of precision. The requirement is not mere technicality, but a matter of fair hearing, and serves important roles; it enables the court and the parties to discern the cause of action; bring to the notice of the respondent the kind of case faced with; and enable the respondent to prepare appropriate defense to the case. These are elements of fair hearing and are substantial. See Anarita Karimi Njeru vs. Republic [1979] eKLR, Mumo Matemu case (supra).
 30. Specific rules reinforce this important requirement. Rule 10 (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules provides the ingredients of a constitutional petition. Rule 10 (2) (c) provides that a Petitioner must disclose the constitutional provision violated whereas rule 10 (2) (d) provides that the nature of injury caused or likely to be caused to the Petitioner or the person in whose name the Petitioner has instituted the suit must be evident.
 31. In the present case the Petitioners have in their Petition stated, albeit inelegantly, that, the 2nd – 3rd respondents have been linked to misappropriation of public funds which have raised audit queries, thus, making their actions abuse of office.
 32. The petition has also cited the 1st respondent for failing to carry out investigations on the alleged misappropriation of public funds noted in the audit queries in accordance with their constitutional and statutory mandate.
 33. To the extent that the petition has articulated the acts allegedly constituting a violation of the rights of the residents and employees of Siaya County as well as the Constitutional provisions that have been infringed, the petition meets the threshold requirements of a constitutional petition. The objection on that ground fails.
 34. The hurdle which must, however, surmount, is of proof of the allegations made in the petition.

Compliance with the *Oaths and Statutory Declarations Act*.

35. The 3rd respondent submitted that all the Petitioners' annexures in their pleadings ("POA - 01 to "POA - 09") do not have the signature and seal of the Commissioner of Oaths and hence are incurably defective and offends Rule 9 of the Oaths and Statutory Declarations Rules. The exhibits have not been properly annexed, marked, and sealed. Therefore, there is nothing presented by the Petitioners to be considered by the Honourable Court. The 3rd respondent relied on the Court of Appeal in Pharmacy and Poisons Board & another vs. Mwititi & 21 others [2021] eKLR
36. According to the 3rd respondent; the Petitioners cannot seek solace in article 159 (2) (d) of *the Constitution* as the Supreme Court has consistently held that the Article cannot be used to circumvent mandatory rules of procedure laid down in statute law. The 3rd respondent relied on the Supreme Court decision in Raila Odinga vs. the Independent Electoral and Boundaries Commission and 3 others [2013] eKLR and the Court of Appeal's decision in Nicholas Kiptoo Arap Korir Salat Vs. The Independent Electoral and Boundaries Commission and 6 Others [2013] eKLR



37. The objection to annexures herein is around Rule 9 of the Oaths and Statutory Declarations Rules which provides as follows:

“9. All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”

38. The court is content to cite the Court of Appeal in *Pharmacy and Poisons Board & Another Vs. Mwiti & 21 Others* [2021] eKLR at paragraph 7, page 3 of the decision that, unmarked and unsealed annexures are of no value to the application to which they relate in view of the fact that an affidavit and the annexures attached thereto constitute evidence. The Court of Appeal did not end there; it made it clear that, to qualify as evidence, such annexures must be marked and sealed by a Commissioner for oaths as required by Rule 9 of the Oaths and Statutory Declarations Rules.

39. Accordingly, the annexures which are not sealed by a Commissioner for Oaths are of no evidentiary values.

Whether the 1st respondent failed in its mandate

40. The petitioners urged that, this court has sufficient jurisdiction and authority to direct the EACC or any other body to carry out its mandate as provided by *the Constitution* of Kenya where such an institution has failed to carry out its mandate as per the law. According to them, however, the directive by this court does not interfere with the independence of EACC. And, the court will not be interested in the outcome or be in control of EACC's investigations. The petitioners contend that the 1st respondent got access to the 2nd interested party's report, which provides evidence but failed in their constitutional mandate.

41. The petitioners invited this court to compel the 1st respondent to act on the 2nd interested party's report and investigate the theft committed or lining the 2nd, 3rd, 4th, and 5th respondents.

42. The 1st respondent asserted its mandate and confirmed that they captured a complaint on its register on alleged embezzlement of public funds amounting to Kshs. 400 million which was irregularly paid through claims of Imprest to junior employees of Siaya County government for activities which were not performed, and the cash was immediately withdrawn from their respective bank accounts between 2017 and 2022. The 1st respondent commenced investigations on the complaint which is now at an advanced stage. Upon finalization of the investigations, the 1st respondent will forward its findings and recommendations to the DPP. The 1st respondent is not in a position to divulge details of investigations. However, the petitioners will be apprised of the outcome of investigations once the DPP has conclusively considered the matter.

43. The 1st respondent has relied on sections 11(1)(d) 13(2) (c), 28 of the EACC Act 2011, article 79, 80 249(2) of *the Constitution*, section 4(2) of the *Leadership and Integrity Act*, 2012, Boundary Commission [1983] 2WLR458, 475.

44. The foregoing notwithstanding, the 1st respondent submitted that the petitioners have not produced any formal report to the 1st respondent on the issues raised in the petition and as such the mandate of the 1st respondent has not been invoked. The 1st respondent relied on Article 75, and 80 of *the Constitution*, sections 4(2) and 13(2) (c) of the *Leadership and Integrity Act*, and *Francis Curukia V Peter Gatirau Munya & 2 Others* [2017] eKLR.

45. The 3rd respondent submitted that, the Petitioners have also failed to demonstrate how the 1st Respondent Commission has abdicated its mandate and /or acted unconstitutionally. Therefore, the



issues presented in the Petition are merely speculative and devoid of evidence, out of apprehension and premature. The 3rd respondent relied on Bloggers Association of Kenya (BAKE) Vs. Attorney General & 3 others; Article 19 East Africa & another (Interested Parties) [2020] eKLR.

46. The 3rd respondent submitted that investigations by their own nature are covert hence the route taken by the Petitioners is impeding the due process of the law and significantly undermining the 1st Respondent Commission's ability to exercise its mandate and give adequate and judicious consideration to the matter which is the subject of an active consideration before it. Therefore, the orders sought by the petitioners to compel the 1st respondent to commence investigations cannot be issued. The 3rd respondent relied on Mohamed Okashi Mohamed vs. Ethics and Anti-Corruption Commission & 2 others, Michael Sistu Mwaura Kamau vs. Ethics & Anti-Corruption Commission & 4 others [2017] eKLR, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR
47. This court notes that, arguments by the parties are on quite an important matter on the fight against corruption and economic crimes; the role of citizens, the court and the mandate of the 1st Respondent which is the dedicated institution in the fight against corruption, economic crimes, recovery of proceeds of crime including laundering of proceeds of corruption, unexplained assets.
48. EACC is an independent Commission established by law pursuant to Article 79, and Chapter 15 of *the Constitution*. Establishment of EACC and its mandate should also be seen within the provisions of the United Nations Convention against Corruption (UNCAC) which is a '...treaty or convention ratified by Kenya', and thus, '...form part of the law of Kenya' (art. 2(6) of *the Constitution*).
49. According to article 249(2) of *the Constitution*:
- The commissions and the holders of independent offices—
- (a) are subject only to this Constitution and the law; and
 - (b) are independent and not subject to direction or control by any person or authority.
50. However, it must be noted that, the idea of accountability is not a derogation from the independence of the Commission; it is a constitutional obligation under, inter alia, article 10 (National Values and Principles of Governance), and 254 of *the Constitution*, and also a statutory obligation under section 25, 25A, 35, 36 and 37 of *Anti-corruption and Economic Crimes Act* (ACECA), to mention but a few.
51. ACECA, although it was enacted before Kenya ratified the UNCAC, and before the promulgation of *the Constitution* of Kenya, 2010, was quite progressive on accountability in the exercise of mandate by the Commission. In section 25 thereof, it required the Commission, where it declines to investigate a complaint concerning corrupt conduct, to inform the complainant in writing of its decision and of the reasons for its decision. See section 25 of ACECA, which provides that: -
- If the Commission receives a complaint concerning corrupt conduct on the part of any person and the Commission declines to investigate or discontinues its investigation before the investigation is concluded, the Commission shall inform the complainant in writing of its decision and of the reasons for its decision
52. The other relevant matter is that, the Commission bears a constitutional and statutory public duty to, inter alia, investigate corruption and economic crimes and to recover proceeds of crime thereto. And, in case of violation of *the Constitution* or failure to perform the constitutional mandate or public duty,



EACC is subject to judicial review remedy. Doubtless, therefore, exercise of judicial review power of the court, is not an interference with the independence of the Commission.

53. The Petitioners are seeking the Honourable Court to compel the Commission to commence investigations on a raft of matters flagged out as audit queries which, according to them, constitute misappropriation of public funds.
54. Is there proof of failure by the Commission to investigate the allegations in the petition?
55. The Petitioners have put the 1st respondent Commission on the spot; that, the 1st respondent has carried out investigations for far too long without prosecution and cited them for being pocketed by thieves of the county funds.
56. The 2nd, 3rd, 4th, and 5th respondents and the 1st interested party submitted that this petition seeks to undermine the constitutional and statutory mandate and authority of independent bodies and institutions that have been established under various laws in the republic of Kenya, therefore, this court should not intervene. They were of the view that, no evidence of failure to act by the agencies has been brought before the court. They relied on sections 23, 35, of the *Anti-Corruption and Economic Crimes Act*, Article 79, 249(2) of *the Constitution*, the Supreme Court case of In the Matter of Interim Independent Electoral Commission [2011] eKLR, Mumo Matemu Vs Trusted Society of Human Rights Alliance, and Pravin Bowry V Ethics & Anti-Corruption Commission [2015] eKLR.
57. The 1st respondent has stated that, it commenced investigations on a complaint on matters forming the petition, which is now in advanced stage; and upon completion thereof, it shall do a report to DPP pursuant to section 35 of the ACECA. They claimed that they cannot disclose material details of the investigations which is pending completion. The 1st respondent Commission has also stated that the petitioner have not provided evidence of any formal report to them on the matters complained of.
58. There is one little thing, yet important; that the Commission may not disclose details of an on-going investigation. The law prohibits disclosure of details of an on-going investigation including the identity of the persons under investigations except with the leave of the ‘Director’. Investigative bodies apply ‘need to know’ principle, due to several reasons, including, to prevent; prejudice to the investigation, due process as well as rights of the persons under investigations. Section 33 of ACECA specifically provides that: -

No person shall, except with leave of the Director or with other lawful excuse, disclose the details of an investigation under this Act, including the identity of anyone being investigated.
59. Be that as it may, the Petitioners have not indicated when the 1st Respondent Commission commenced investigations to infer delay. In the letter dated 11.5.2023, the Petitioners demanded that the 1st Respondent Commission do commence investigations “within the shortest time possible’.
60. It is expected that, the Commission will carry out and complete investigations within reasonable time. Reasonable time will, however, depend on the circumstances and nature of the investigations; some investigations are complex involving complex channels, cyber and technology-based platforms, or involve or has a component of international investigations which takes considerable period of time to conclude, especially, given that such investigations must be carried out through seeking informal assistance or mutual legal assistance from foreign nations, with complex and strict procedures, processes and requirements; these are real hurdles an investigator must surmount.



61. In *Mohamed Okashi Mohamed vs. Ethics and Anti-Corruption Commission & 2 others* [2022] eKLR it was held at paragraph 58, page 16 thereof, two (2) years taken by the 1st Respondent Commission to conduct investigations was found not to amount to unreasonable delay.
62. There is no evidence of inertia on the part of the Commission.
63. There is also nothing to show that the Commission has been ‘bought’ or ‘pocketed’ by the corrupt officials as has been alleged by the petitioners.
64. It bears repeating that, the 1st Respondent Commission being an independent commission is not under the control of any person and or organ in the exercise or performance of its mandate. The court will also not compel the Commission to act except where it is demonstrated that, actions or omissions by the Commission amount to violation of *the Constitution* or law. The petitioners have not proved the Commission has violated *the Constitution* or the law.

Non-justiciability of the petition

65. The 3rd respondent claimed that the petition is non-justiciable, for it offends the three doctrines of non-justiciability to wit, the Political Question Doctrine, the Constitutional Avoidance Doctrine, and the Ripeness Doctrine. The 3rd respondent relied on *Kiriwa Wa Ngugi & 19 Others Vs. Attorney General & 2 Others* [2020] eKLR.

Ripeness doctrine

66. The doctrine of ripeness is concerned about the state attained by a dispute; that it has not developed sufficiently to warrant an intelligent and useful decision. In other words, the dispute is premature. Courts frown upon such dispute as it is an invitation to speculation and pious hope. See *Kiriwa Wa Ngugi & 19 Others Vs. Attorney General & 2 Others* [2020] eKLR.
67. In the case of *Wanjiru Gikonyo & 2 Others V National Assembly of Kenya & 4 others Nairobi Constitutional Petition No. 453 of 2015* [2016] eKLR, Onguto J stated:
 - (27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.”
68. The respondents have urged the court to dismiss the petition as it is not justiciable but prematurely filed on the basis of apprehensions and speculation, hence, falling within the doctrine of ripeness.
69. The record shows that, the Petitioners wrote to the 1st Respondent Commission on 12.5.2023 and filed the matter barely 17 days from the date of receipt of their letter.
70. The respondents argued that, twenty (21) days had not lapsed upon the inquiry by the Petitioners before filing this matter. The 1st Respondent Commission had neither responded to the letter nor made any decision on it, hence, they submitted that, these proceedings are prematurely brought.
71. The court has already made a finding that, the Petitioners did not provide evidence when investigations commenced as to infer delay in completing the investigations.
72. By their own admission, the Petitioners have acknowledged that investigations are still ongoing. Section 35 (1) of the *Anti-Corruption and Economic Crimes Act*, No.3 of 2003 mandates the 1st Respondent Commission to report to the Director of Public Prosecutions on the results of the investigation which



report shall include any recommendation that a person be prosecuted for corruption or economic crime.

73. The 1st Respondent Commission is yet to complete investigations and to make a report to the DPP pursuant to section 35 of ACECA. This state of things makes these proceedings not ripe for any adjudication by the court.
74. Also relevant is the fact that, there is no evidence that the Task Force Report (“POA - 04”) which by its very nature should be, was tabled before the County Assembly for debate and approval to make it a valid report on which any reliance may be placed. As long as the said report has not been duly tabled, the Petitioners have prematurely come to court on matters forming the report.

Constitutional avoidance doctrine

75. The doctrine of constitutional avoidance posits that; ‘...a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion’ (Black’s Law Dictionary, 10th Ed. Page 377). Or, as per the Supreme Court; ‘...when a matter may properly be decided on another basis’ (CCK & 5 Others vs. Royal Medial Services & 5 Others [2014] eKLR)
76. The doctrine of constitutional avoidance is related to the doctrine of exhaustion of remedies.
77. According to the respondents and third parties herein, the petitioners had not exhausted the remedies available to them or given the institutions involved the opportunity to carry out their mandate. The petitioners had also not lodged any formal complaint with the state agencies vested with the investigation of crime in regard to the issues they are raising in the petition, they cannot rush to this court to report to it such a matter and ask the court to make adverse findings. They relied on the court of appeal In Speaker of National Assembly V Njenga Karume [2008] 1KLR 425.
78. This court’s view is that, majority of the matters forming the petition, fall within the mandate of, and ought to be unraveled through investigations by EACC. EACC stated that, investigations on the matters forming the petition are on-going and at an advanced stage, and will submit its report to the DPP pursuant to section 35 of the ACECA. The issues raised should, therefore, be resolved through investigations, and the office of the DPP. They are not apt for adjudication by the court. This brings the court to discuss some of the reliefs sought which lie elsewhere.
79. The petition seeks inter alia;
 - a) That a declaration be and is hereby issued that the respondent committed corruption and economic crimes, preceding over the unaccountability in the Siaya county government hence violating articles 10,22,232,258 and chapter 6 of *the Constitution* of Kenya, the *Anti-Corruption and Economic Crimes Act* and The *Ethics and Anti-Corruption Commission Act*.
 - b) That a declaration be and is hereby issued against the respondents that they have engaged in corrupt practices amounting to gross violation of *the Constitution* and have been rendered incapable of discharging their mandates as required by *the Constitution* and various statutes.
 - c) That this court be pleased to issue a conservatory order to restrain the respondent by himself, officers, servants, agents, or anyone acting on his behalf from undertaking any further fiduciary activities until the funds misappropriated and unaccounted for are accounted for and ascertained by the 2nd interested party pending the hearing and final determination of this case.
 - d) That a declaration be and hereby issued aiding and abetting corruption is criminal and should not go unpunished.



- e) That an order be issued compelling the 1st respondent to commence investigations into the activities of the respondent and officers serving under them and institute criminal and civil proceedings against them.
 - f) That the 3rd interested party be directed to furnish the petitioners with certified bank statements for the imprest account for the period July to date.
80. The declarations sought in (a), (b), & (d) above are akin to a finding of guilt or criminal conviction for corruption and economic crimes. This is a constitutional court presiding over a constitutional petition. It has no jurisdiction to convict the respondents for corruption and economic crimes. Only a trial court properly so constituted and moved through a charge, can find a person guilty of a criminal offence.
 81. The request in (c) above may be dealt with in two ways. Through applicable disciplinary procedures or under section 62 of ACECA. The latter kicks in only upon being charged with an offence of corruption or economic crime. The relief is dealt with or provided elsewhere other than in a constitutional petition.
 82. The last part of (e) above; ‘and institute criminal... proceedings against them’ is misconceived because EACC does not have state power to prosecute.
 83. The 3rd respondent submitted that; the route taken by the Petitioners impedes the due process and offends section 6 (1) (b)(g) of the [Access to Information Act](#), No. 31 of 2016 and Section 29 (3) (b) of the Ethics and Anti-Corruption Act. According to them, the applicant makes a formal request for access to information under the Act, with right to appeal to the Commission for Administrative Justice to challenge any the decision not to make the information available to the applicant.
 84. The request in (f) above is a matter falling under Access to Information law, and should be pursued in accordance with article 35 of [the Constitution](#), [Access to Information Act](#), and the procedures set out in the implementing law, and from the relevant institutions.
 85. These issues are to be dealt with elsewhere and not through adjudication by the court. Hence, treatment under constitutional avoidance doctrine.

Political question doctrine

86. The Political Question Doctrine is concerned with limitations upon court’s adjudication of matters which are generally in the realm of the other arms of government. The doctrine is related to exhaustion of remedies doctrine.
87. But, there could be no clear-cut delineation of what really is a political question. Nevertheless, certain issues which relate to foreign relations, national security, formulation and implementation of policy etc. are considered to be within the political realm.
88. A new and trending discussion, Judicialization of Politics, has implications on the political question doctrine.
89. ‘The judicialization of politics—the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies—is arguably one of the most significant phenomena of late twentieth- and early twenty-first-century government’ (Ran Hirschl, 2019).
90. Courts in Kenya have been armed by [the Constitution](#) with wide judicial review power to check adherence with [the Constitution](#), and more specifically, article 10 on National Values and Principles of Governance, in public decision-making process-the most notorious being public participation.



91. Similarly, courts adjudicate upon major political controversies such as county and national elections, including, presidential elections, with power of invalidating the election. In 2017, the Supreme Court invalidated the presidential election. These are major political controversies but are adjudicated upon by the courts, which in a way, greatly impinges on the political question doctrine.
92. Making socio-economic rights under article 43 of *the Constitution* justiciable, is yet another example of matters which were traditionally reserved for the executive, becoming justiciable before courts of law.
93. These are some of the incidents of judicialization of politics, as well as contributors to jurisprudence of courts on court's judicial review and constitutional remedies' power.
94. According to the 3rd respondent, the right forum for such issues as budgetary allocations is the County Assembly, which plays an oversight role, which body the Petitioners have conveniently not sued. They accused the Petitioners of not following the right procedure under section 15 of the *County Governments Act*, No.17 of 2012 by firstly petitioning the County Assembly before instituting these proceedings. They cited National Assembly of Kenya & another vs. Institute for Social Accountability & 6 others [2017] eKLR
95. The 3rd Respondent contended that both the Petition and Notice of Motion are not justiciable, are ex-facie incompetent, fatally defective, and inadmissible, hence, should be struck out and/or dismissed with costs.
96. The court has already found that there is nothing to show the report by the task force has been duly tabled before the county assembly or formally adopted which makes the issues in controversy not ripe for adjudication by the court.
97. Similarly, the court has made a finding that the 1st respondent Commission is yet to complete investigations on matters forming the petition, thus, making this petition not ripe for adjudication by the court.
98. Therefore, the matters ought to be decided elsewhere and on another basis rather than in a constitutional petition. There is nothing to show that the Commission is not competent to deal with the matters in question in the on-going investigations. In fact, the matters complained of fall within the mandate of the Commission-something the petitioners acknowledge in this petition by asking the court to compel the Commission to investigate the matters complained of in the petition.
99. In sum, this court finds that the petitioners had not exhausted the remedies available to them or given the institutions involved the opportunity to carry out their mandate.

Whether reliefs sought merited.

100. The petitioner submitted that the respondents have failed to uphold the rule of law and *the constitution*. The petitioners relied on articles 1(1), 2(1)(2)(4), 3(1),4(2), 10(2)(c), 19(3) (c), 21(1), 22(1), 24, 47(1),48,50(1), 259(1)(d), and 73 of *the Constitution*.
101. The 1st respondent submitted that the 1st respondent did not violate any of the petitioners' rights as alleged and therefore there is no justification to grant the orders sought.
102. They also argued that, damages are only awarded if a court finds an infringement of the fundamental right. The 1st respondent relied on *Gitobu Imanyara & 2 Others V Attorney General Civil Appeal No. 98 of 2014*[2016] eKLR, Dendy V University Of Witwatersrand, Johannesburg & Others –[2016] 1LRC 291, section 4(2) of the *Leadership and Integrity Act*, section 11(1)(d) of the EACC Act, Irene Wangari Gacheru & 6 Others V Attorney General Constitutional Petition No. 376 of 2014 [2017]



eKLR, Charles Muturi Macharia V Standard Group & 4 Others [2017] eKLR, and Kenya Human Rights Commission V Non-Governmental Organizations Co-Ordination Board Petition No. 495 of 2015 [2016] eKLR.

103. The court has found no infringement of *the Constitution* or statute. It has also found that, the Petition is not ripe for adjudication by the court.
104. Furthermore, removal of public officers is in accordance with the applicable disciplinary procedures which are imbued with due process tenets and safeguards, and is undertaken by the relevant institutions rather than the court.

Conclusions and orders

105. It is clear the direction the analysis is taking the court. It is not in dispute that the investigation by the Commission is still pending, making the intervention through court proceedings premature. No controversy that has crystalized yet for adjudication by the court.
106. The allegations by the petitioners that the 1st respondent has taken far too long to complete investigations, are unsubstantiated. Any intervention by the court, at this stage, and especially when no evidence of violation of *the Constitution* has been adduced, is an interference with the independence of the Commission.
107. It bears repeating: -

‘...that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under *the Constitution*, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government’ (SC, in Re The matter of Interim Independent Electoral Commission [2011] eKLR)
108. The independence proclaimed of Commissions, is a shield from influence or interference with the Commission in any form or shape not authorized by law.
109. Securing the independence in real practical terms, may require courts to rebuff any invitation to or attempted interference with the independence of the commissions and independent offices. Denial of this petition and application perfectly secures the independence of EACC. See the case of Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 others [2014] eKLR the Supreme Court.
110. This is not a case which, endears itself for exercise of court’s jurisdiction under Article 165 (3) of *the Constitution*. No violations of *the Constitution* that has been proved. Matters complained of are under investigations in the right forum; EACC, pursuant to its mandate under Section 13 (2) (c) of the Ethics & Anti-Corruption Commission Act. It cannot, therefore, be said that a great injustice would be occasioned upon the petitioner as they would have no other recourse in the sense stated in Okiya Omtatah Okoiti & 2 Others v Attorney General & 3 Others. See also Okiya Omtatah Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) [2021] eKLR
111. It is expected that, the Commission should complete investigations within a reasonable time and submit its report under section 35 of ACECA to the DPP. There is nothing to show that, the Commission will not complete investigations within reasonable time and submit its report to the DPP under section 35 of the ACECA.



112. Matters complained of are best unraveled in an investigation, rather than in a petition which lacks the necessary procedural ability and staple criminal law protections to safeguard the rights of persons concerned. This court, in exercise of its jurisdiction for redress of violation of the Constitution or sui generis jurisdiction, has no jurisdiction to enter a verdict of criminal culpability of the persons against whom allegations have been made in this petition.
113. In the upshot, this court finds that the declarations sought by the Petitioner are untenable. Accordingly, the petition is dismissed.
114. However, this is a public interest litigation, a venture to champion a public cause, albeit it was not ripe for adjudication by the court. Accordingly, each party shall bear own costs of the petition.
115. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 24TH DAY OF JUNE, 2024**

F. GIKONYO M

JUDGE

In the presence of:

Midega for 3rd respondent

Ms. Leah for Willis for 2nd and 4th respondents

EACC absent

Petitioners absent- petitioners were duly served with notice.

