



**Omondi v Ethics and Anti-Corruption Commission & 4 others (Anti-Corruption and Economic Crime Constitutional Petition E001 of 2024)
[2024] KEHC 10041 (KLR) (Anti-Corruption and Economic Crimes) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIME
CONSTITUTIONAL PETITION E001 OF 2024**

**F GIKONYO, J
JULY 26, 2024**

BETWEEN

JAMES AMBUSO OMONDI PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

BISHOP DR DAVID AGANG OGINDE 2ND RESPONDENT

TWALIB MBARAK 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

CHIEF LAND REGISTRAR 5TH RESPONDENT

JUDGMENT

Violation of rights

1. The petition dated 8th march 20204 seeks for orders/declarations: -
 - a. That the respondents have violated the petitioner’s rights in article 23,27,28,29,31,41,47 & 48 of the Constitution;
 - b. General damages for violations of rights;
 - c. Immediate return of seized documents;
 - d. If titles thereto not returned in time, the 5th respondent be ordered to issue new titles properties, and where;



- e. Lifting of restrictions placed on the seized properties;
 - f. An injunction restraining the 1st, 2nd and 3rd respondents from harassing him on similar facts; and
 - g. Upon success of the petition, the 1st, 2nd and 3rd respondents to issue him with necessary clearances;
 - h. Any other relief the court may deem appropriate
2. The petition is supported by grounds set out in the petition, the supporting affidavit and as elucidated upon in the submissions by the petitioner.
 3. The main grounds are that, contrary to the submissions by EACC, its action is governed by fair administrative action and therefore, bound to act expeditiously, efficiently and procedurally fair. According to him, expediency and efficiency are matters of national values and good governance and should be adhered to by all state officers and organs. They cited the Court of Appeal in *JSC vs. Mbalu Mutava* [2015] eKLR, *CCK vs. Royal Media Services* [2015] eKLR, *Gregory Magare vs. UON* [2017] eKLR, *Zhang Jing* case
 4. Based on the requirements of fair administrative action the petitioner accused EACC of; retaining his documents which included 22 title deeds – of which, some belong to his wife; and registering and maintaining restrictions on the said title deeds for over six years. They only returned one title deed and removed the restriction on *Kajiado Kaputei North/16545*.
 5. He stated that EACC has revealed that it commenced investigations in 2015 which is over 9 years as at now.
 6. To the petitioner, a delay of six years is unacceptable and unjustified, infringement of right to fair administrative action as well as access to justice. And, holding his documents for a long period in the pretext of investigation or indefinitely is unjust-something that cannot be justified by a claim of EACC's sweeping powers.
 7. He dismissed as mere excuses claims that delay has been caused by changes in investigations teams on this matter, for such are internal matter and they are expected to be efficient.
 8. He continued to thrash EACC's claims on the nature of forensic investigations, voluminous documents and attendant complexities which he says should be weighed against the circumstances of the case and the conduct of the parties; and where there are incidents of inaction or indolence by the investigator, like in this case, EACC did not explain what it has done since his last response in 2022; which should be held against EACC. They cited *Marpa Zeeland B.V. nad Metal Welding B.V. vs. Netherlands* (Application No. 46300/99).
 9. The petitioner also submitted that, it is unreasonable for EACC to ask details of M-Pesa transactions as far back as 2011; and poses a question; Who can remember and explain all their M-Pesa transactions from thirteen years ago?
 10. He was of the view that delay denies a suspect the legal tools to mount a credible defence. He cited *Jirongo vs. Soy Developers Ltd & 9 others* [2021] KESC 32 (KLR). He cited many other cases in support of this point which are in the submissions.
 11. He equated the action by EACC to retain his titles and restrict his titles to deprivation of property contrary to article 40 and 260 of the Constitution. Thus, an infringement of his right to exclusive



enjoyment, alienation or disposition of his property guaranteed under article 40 of the Constitution. He cited *Mohd Noor vs. Mohd Ibrahim* [1955] AIR 398.

12. He claimed that by these actions by EACC, his right to dignity has been infringed upon. He emphasized that; ‘right to human dignity is the foundation of all rights’ (*Ahmed Issack Hassan vs. Auditor General* [2015] eKLR & *Mutuku Ndambuki vs. Rafiki Microfinance Ltd* [2021] eKLR). Proof of violation of this right is in the manner EACC executed the warrants of search; they stormed his house, persistently demanded to enter the bedroom where he and his spouse were dressing; and searched his house when his children were watching. EACC caused a commotion and drew neighbour’s attention, bringing him to disrepute; an experience he says was quite in-dignifying and humiliating.
13. According to the petitioner, EACC dealt the final blow upon his dignity when it set out to deny him every opportunity of livelihood by writing to his employer and prospective employers that he could not be engaged in any public appointment before finalization of this matter. And, on the basis of information by EACC, he was dismissed by Kenya University and Colleges Central Placement Services (KUCCPS). He claimed that these actions by EACC has rendered him a pauper.
14. He stated that, following the setting aside on appeal of his conviction on two counts on ‘corruptly soliciting’, he believes that, the other two counts upheld by the High court on ‘corruptly receiving a benefit’ cannot stand.
15. He sought relief appropriate to protect his rights and enforce the Constitution as was held in *Gitobu Imanyara vs. AG* [2022] eKLR.

The respondents case

16. The 1st, 2nd and 3rd respondents averred that, the right to privacy may be limited by law. They lawfully obtained warrants to investigate the petitioner’s accounts as well as of search of his premises and seizure of items necessary to the investigation in accordance with sections 118, 118A, 119, 121 and 122 of the CPC and section 23 and 29 of CECA and section 180 of the Evidence Act, which they lawfully executed in accordance with the law.
17. The warrants and execution thereof have never been revised or appealed against by the petitioner which is the proper remedy for any aggrieved party and appropriate course the petitioner ought to have followed as was held (*Manfred Walter Schmitt & Another vs. R* [2013] eKLR). Therefore, they posit that, they did not infringe upon his right to privacy and dignity.
18. The 1st, 2nd and 3rd respondents argued that, contrary to claims by the petitioner, Anti-corruption Criminal Case No. 5 of 2019 are not unrelated to investigations for forfeiture of unexplained assets against him; they draw upon same facts.
19. The respondents stated that there has been no inordinate delay in these investigations and the investigator has explained in the replying affidavit the steps taken in the investigation.
20. In addition, EACC stated that, the petitioner and his wife were afforded opportunity to explain their side of the story and they made responses at different times, the last one being in November 2022. They have had to evaluate and analyse the responses and documents provided which are quite voluminous.
21. According to them, an investigation is part of the trial and in gauging whether there has been delay, it must be decided in the circumstances of the case. Seeking documents and searches from lands office as well as physical visits to the properties took considerable time. Some documents are still to be provided



- by the land offices; one registry had been gutted down by fire. They cited Abdul Rehman Antulay & Others vs. R.S. Nayak & Another, AIR 1992 Supreme Court 1701.
22. According to them, it is difficult to determine the course or time an investigation may take because it is unpredictable what the investigation may reveal. Relying on article 245(4) of the Constitution, they opined that, it is against public interest to direct the manner and depth an investigation should be conducted (Mape Building case [2016] e KLR).
 23. They denied any discrimination against the petitioner as EACC is mandated to give clearance reports under Chapter Six of the Constitution and Leadership and Integrity Act about any individual seeking public office. They cited Petition number E084 OF 2021 James Ambuto vs. Dr. Agnes Wahome & 3 Others in which the court at page 169 held that EACC did not violate any laws in cautioning the petitioner's would be employer.
 24. They also responded his claim that he has been rendered a pauper by stating that he has offered no evidence to support the assertion; and in any case in his letter dated 14th July, 2021, he stated that he is receiving rental income and that he is involved in buying and selling of motor vehicles which negate his claim that he has been rendered a pauper.
 25. In addition, they asserted that despite taking away tile documents and registering restrictions on the property, they did not interfere or interrupt actual occupation or rental income activities on any of these properties. Therefore, an infringement of right in the manner claimed by the petitioner cannot arise.
 26. The respondents stated that, criminal investigation and special investigative tools provided in law do not fall within the definition of administrative action envisaged under article 47 of the Constitution, lest criminal investigation should be rendered impossible. They cited the case of EACC vs. Tom Ojienda [2022] KESC 59.
 27. Nevertheless, they submitted that, an investigation should be conducted within the law.
 28. Thus, it was their view that the prayer for EACC to be barred from harassing him by investigation based on similar facts are misconceived. They stated that the petitioner is asking the court to make definitive orders on investigations and evidence not before the court. They cited Francis Mbugua vs. The Commissioner of Police [2013] eKLR.
 29. The respondent urged the court not to entertain the prayer for damages, as that would be punishing an investigative agency for carrying out an investigation in good faith to establish commission of an offence or for forfeiture of proceeds of crime or unexplained assets.
 30. They beseeched the court to dismiss the petition with costs.

4th and 5th respondents' case

31. The 4th and 5th respondents filed grounds of opposition dated 18th April, 2024. They withdrew grounds of opposition dated 17th April, 2024.
32. The gist of the opposition is that the role of the AG in respect of matters forming the petition has not been stated; AG has no role in the investigation and charging of the petitioner; that the petition does not set out the manner and particulars on how the AG has infringed his rights; matters of use and occupation of, and title to land belongs to the jurisdiction of ELC.



33. In any case, replacement of title is provided for in section 33 of the Land Registration Act, thus, the 4th and 5th respondents are non-suited and are not necessary parties in these proceedings. They asked the court to dismiss the petition against them.

Analysis And Determination

Issues

34. From the petition, affidavits filed as well as the rival arguments by the parties, the court should determine: -
- a. Whether the 4th and 5th respondents are non-suited in these proceedings;
 - b. Whether the petitioner has proved infringements of the Bill of Rights; more specifically, right to privacy, dignity, fair administrative action, access to justice, and fair trial;
 - c. Whether the remedies sought are merited
 - d. Who pays the costs of the petition?

Whether 4th and 5th respondents are non-suited

35. The 4th and 5th respondents stated that they are non-suited and are not necessary parties in these proceedings. These are issues to do with competence of the suit and are of preliminary significance. They should be determined in limine.
36. Doubtless, the AG does not have any power or mandate in respect of criminal investigations by EACC or prosecution of the petitioner; the latter is a preserve of the DPP under article 157 of the Constitution.
37. The court has also perused the petition and it fails the competence test laid down in the Anarita Karimi case in relation to the AG.
38. Therefore, it has not been established why the AG was sued in these proceedings. The court agrees with the AG that it is not a necessary party herein.
39. The petition seems to have joined the 5th respondent on the basis that if successful, and the respondents do not return his title deed in time, then the 5th respondent should be directed to issue other titles. This prayer is speculative and unnecessary because replacement of title deed is governed by section 33 of the Land Registration Act; ‘the proprietor may apply to the Registrar for the issue of a replacement certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease’.
40. The petition has not set out particulars on how the 4th and 5th respondents have infringed the petitioner’s right. Appropriate order shall be made on the basis of these findings.

Whether the 1st, 2nd and 3rd Respondents Infringed His Rights

Whether investigation is Administrative action

41. The petitioner argued that, EACC is bound by the right to fair administrative action; and have infringed this right by not being efficient in their investigation upon him and arbitrarily engaging intrusive methods such as warrants of search without notice to the petitioner.



42. The respondents stated that, criminal investigation and special investigative tools provided in law do not fall within the definition of administrative action envisaged under article 47 of the Constitution, lest criminal investigation should be rendered impossible.
43. From the onset, the question whether an investigation was an administrative action in the sense of the definition provided for purposes of article 47 of the Constitution, was discussed and settled in the case of EACC vs. Tom Ojienda [2022] KESC 59, that, EACC investigative powers, ‘Strictly speaking, these powers when exercised cannot be described as “administrative action” within the meaning of article 47.’
44. Nevertheless, it bears repeating, that every investigation must be done in accordance with the law.

Deprivation of property: of seized documents

45. The petitioner claimed that his documents and title deed- some of which are in the name of his wife- were carted away by the 1st, 2nd and 3rd respondents over six years ago in the pretence of investigation. According to him, there has been an inordinate delay in completing the investigations, which has now become a deprivation of property without just cause. They are not able to exercise exclusive enjoyment, use, alienation or disposition of their landed properties because they do not have their titles and restrictions have been registered on the properties by the 1st, 2nd and 3rd respondents.
46. Every investigation must be conducted in accordance with the law. EACC obtained warrants to investigate account as well as of search and seizure. These warrants were executed in accordance with the law. See for instance section 119 of the CPC. The warrants have not been quashed or revised through an appeal or revision (Manfred Walter Schimit & Another vs. R & Ano [2013] eKLR).
47. These are judicial tools which aid investigation and are permitted and regulated by law with a complete accountability scheme and requirements which act as safeguards against abuse of rights by these intrusive investigative tools. See section 118, 118A, 119 of CPC, 180 of the Evidence Act, 29 of ACECA.
48. Anything seized under a warrant, may be detained until the conclusion of the case or appeal, or the investigation, except, reasonable care being taken for its preservation (s. 121 of CPC). Except, the items should be accounted for and stated in an inventory.
49. The court retains the general the power and authority to direct the manner the item seized should be disposed of. It may order anything seized through a warrant to be restored to the person from whom it was taken. Common situations include, where the case concludes in favour of the respondent and there is no appeal, or if no person is committed for trial, or no forfeiture proceedings are instituted.
50. Although the petitioner complained about execution of the warrants, he did not establish anything particularly untoward which offended article 24 threshold in the obtaining or execution of the warrants in question. In the circumstances, documents so obtained cannot, ipso facto, be said to be an infringement of right to privacy or property.

Of anti-corruption criminal case

51. The petitioner also argued that criminal case number 5 of 2019 is unrelated to the investigation undertaken by EACC and which is still on for purposes of forfeiture of the properties herein which are reasonably suspected to be proceeds of crime. EACC stated that the anti-corruption case is directly related to and draws upon the findings in the investigation in question.



52. The petitioner appears to be saying that, because two counts on soliciting for a bribe were set aside on appeal, the two counts on receiving a benefit which the appellate court upheld, cannot stand. This argument is fit for an appeal against the judgment of this court (Maina J). It is inappropriate as it is misplaced for purposes of this petition.
53. Of significance, is that, EACC has drawn a direct nexus between the anti-corruption criminal case and the investigation in question. The criminal case drew upon the result of the investigation which now continues for purposes of forfeiture of proceeds of crime. It may be profitable to restate here that, asset tracing investigation as well as civil forfeiture proceedings are not tied to a criminal trial arising from the same facts and transactions. Civil forfeiture which has been discussed elsewhere in this judgment are quite separate proceedings which are attended to by rules of evidence applicable to civil proceedings; the burden and standard of proof; which are different from those applicable to criminal culpability in a criminal trial.

Of inordinate delay in investigation

54. The more serious argument is on the delay in completing investigation which in a sense also speaks to prolonged detention of the documents. Delay in investigation is to be determined upon the circumstances of each case. Investigations on cognizable offences may take a short time. Of others such as corruption, economic crimes, money laundering or those with international component or of transboundary nature, may take a considerable period of time. Reasons for this include; the complexity of the investigations, the webs or designs attending to or created by the criminals, extremely voluminous documentation or financial records and reports, copious money trails, challenges associated with mutual legal assistance, to mention a few.
55. Prolonged investigations may cause real drowsiness in a person's life, take a toll on a person's health, relations and livelihoods, create a feeling of gauntness and dreariness in the person under investigations, and worst of all, may, in appropriate cases, become an infringement of fundamental rights to dignity, privacy, property amongst others.
56. The court does not therefore, take as a trifle, the petitioner's plea that he is aggrieved by and continues to suffer the existence and pendency of investigations which is being used to justify retention of his title deeds and to deny him a livelihood.
57. Thus, the absolute need for proportioned balance between the constitutional rights of the respondent, on the one hand, and public interest in the recovery or forfeiture of illicit assets or proceeds of crime as a way of combating crime, in this case, corruption, economic crime, on the other. These are serious organized, and transboundary crimes which have caused the world and nations, severe migraine, and huge economic leakages and social squeeze, prompting, international, regional and national concerted focus and efforts through tools such as United Nations Convention against Corruption, United Nations Convention against Transnational Organized Crime, African Union Convention on Preventing and Combating Corruption, to mention but a few.
58. Accordingly, investigations should not be indefinite. EACC is expected to be efficient in investigations and well equipped with necessary competencies and abilities to unravel impediments coming the way of investigations. It is indeed world class institution of professionalism and expedition. EACC should have given an indication as to the amount of time required to complete the investigation as a sign of good faith and also to assist the court determine what is reasonable time, if any, to allow them.
59. Time has passed by in these investigations. But, in determining whether the delay is inordinate, the court is guided by the circumstances of each case. The explanations provided by EACC are reasonable.



60. EACC has explained in the replying affidavit the steps it has taken in the investigations and the hurdles it has encountered which are plausible explanations.
61. Therefore, by holding the title deed for the period complained of is not an infringement of the right to property. And, the restrictions placed on the land are legally permitted.

Forfeiture of properties in the name of third parties

62. The petitioner also claimed that some of the properties belong to his wife and should not be part of the investigation. Under the law, a property which is reasonably suspected to be proceeds of crime may be pursued even if it is in the hands of a third party or in forms other than the original illicit property, which explains why the law defines proceeds of crime in very broad terms to include the actual illicit asset, and related property. See for instance, section 2 of POCAMLA.
63. Related property or traceable products refers to assets into which the illicit property is converted- including investment, profit, income, gain derived thereto- or for which it is exchanged. This remedy became more accessible through tracing of property; an evidential process whose doctrinal foundation and function draw upon the law on restitution whereby one asset is permitted to stand in the place of another asset for the purposes of forfeiture.
64. The law, nonetheless, provides for protection of interest of third parties by requiring notice of forfeiture proceedings to be given to any person who may have an interest in the property, and providing that such party may join the proceedings and defend their interest thereto.
65. Therefore, investigation or restriction upon properties of his wife is permitted under forfeiture law as long as those properties are reasonably suspected to be proceeds of crime.

Impoverishment and EACC mandate to enforce integrity provisions

66. The other significant claim by the petitioner is that, he has been made a pauper especially by two particular actions by EACC; i) restriction of his lands; and ii) giving information to his would-be employers.
67. On the former, EACC explained that it did not interfere with physical use and occupation of any of the properties; and that the petitioner still earn rental income from the properties in question. These facts were not controverted. Therefore, it may be an overstatement that the petitioner has been made a pauper
68. On the latter; It cannot be gainsaid that EACC is mandated to enforce chapter six of the Constitution and is bound to provide information of any person under investigation. The public organ concerned then makes the decision on the basis of the information provided.

Conclusion and orders

69. The petitioner has not established infringement of his right under article 23, 27, 28, 29, 31, 41, 47 & 48 of the Constitution by EACC.
70. Consequently, the court does not find infringement of petitioner's rights.
71. However, EACC should complete investigations within 8 months.
72. In the upshot, all relief are declined and the petition is dismissed.
73. Given the nature of these proceedings, each party shall bear own costs of the petition.



**DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 26TH DAY OF JULY 2024**

F. GIKONYO M

JUDGE

In the presence of: -

1. Wairimu Kamau for EACC
2. Ochiel Dudley for petitioner
3. Petitioner
4. Adan C/A

