



**Chepkoi v Ethics and Anti-Corruption Commission & another (Petition E084 of 2022)
[2024] KEHC 10389 (KLR) (Constitutional and Human Rights) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E084 OF 2022
LN MUGAMBI, J
AUGUST 26, 2024**

BETWEEN

CHRIS CHEPKOIT PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

JUDGMENT

Introduction

1. The petition dated 28th February 2022 is supported by the petitioner's affidavit in support of similar date and a further affidavit dated 27th March 2023. The petitioner seeks the following relief against the respondents:
 - a. A declaration that the 1st respondent's unexplained delay of over six (6) years to conclude investigations and make a definitive determination whether to charge or not to charge the petitioner in regard to the allegations of irregular importation of 10,000 MT of sugar as the Finance Director at Mumias Sugar Company Limited, constitutes inordinate delay.
 - b. A declaration that the 1st respondent has violated the petitioner's rights as enshrined under Article 47(1), (2) and 50 of *the Constitution* and his legitimate expectation.
 - c. An order of judicial review in the nature of prohibition against the 1st and 2nd respondents prohibiting them, their officers, agents and anyone under their authority from instituting criminal proceedings under the Penal Code Cap. 63 and proceedings under Section 55 of the Anti-Corruption & Economic Crimes *Act No. 3 of 2003* as against the petitioner with regard to Mumias Sugar Company Limited.



- d. An order for compensation in the form of general, exemplary and aggravated damages under Article 23(3)(e) of *the Constitution* in the total sum of Kshs. 10 million, for the unconstitutional, unfair and callous conduct of the 1st respondent.
- e. Any other orders and directions as this Court may consider appropriate in these circumstances.
- f. Costs of this petition.
- g. Interest on (d) and (f) above.

Petitioner's Case

2. The petitioner, a former employee and Finance Director at Mumias Sugar Company Limited until 1st July 2013, avers that his name appeared in a 'list of shame' in 2015. This was because of allegedly based on alleged implication in the fraudulent importation of 10,000 MT of sugar while at Mumias Sugar working as the Finance Director of the Company. This list was published by the then President, His Excellency Uhuru Kenyatta in a report dated 20th March 2015 following the 1st respondent's submission.
3. The petitioner as a result stepped aside from his position as the Chief Finance Officer at National Bank of Kenya to pave way for the 1st respondent's investigations. The Central Bank of Kenya moreover vide a letter dated 16th June 2015, directed the National Bank's Managing Director, that the petitioner should not resume to work until the investigations are completed. Unfortunately, the petitioner's employment was soon after on 13th April 2016 terminated while the investigations were still on course.
4. The petitioner asserts that the 2nd respondent proceeded to charge him in Nairobi Chief Magistrate Criminal Anti-Corruption Case No.935 of 2017 for offences committed as the Chief Finance Officer at National Bank of Kenya.
5. On 1st February 2016, the petitioner through his advocates sought direction from the 1st respondent on the status of the investigation which the 1st respondent responded to on 12th February 2016. The 1st respondent informed that the investigations were ongoing and that he would be notified once they are concluded. His advocates made a further follow up on 18th January and 22nd February 2021. These correspondences were not responded to.
6. The petitioner is aggrieved that the investigation that commenced in 2015 is yet to be concluded. He contends that the inordinate delay has been without any explanation from the 1st respondent. According to him, this unfair, illegal and prejudicial to his right to fair hearing.
7. He as well takes issue with the perpetual state of abeyance which has caused his personal and professional ridicule and odium. He says this state of affairs is against constitutional principles and a violation to his constitutional right to a fair administrative action under Article 47(2), right to a fair hearing under Article 50 of *the Constitution* and legitimate expectation.

1st Respondent's Case

8. In response, the 1st respondent filed an undated replying affidavit by Abdulhamid Low, its Investigating Officer. He disclosed that the Mumias Sugar Company case involved an irregular award of a tender for importation of 30,000 MT of sugar to M/s Dantes Peak at Ksh.2.6 billion in 2013.
9. Opposing the petitioner's allegation of inordinate delay, he deponed that the investigations into this matter commenced on 6th March 2015. Following the resignation of the 1st respondent's Chairman



and its two Commissioners between 31st March 2015 and 12th May 2015, the Court in Michael Sistu Mwaura Kamau and 12 others vs Ethics and Anti – Corruption Commission and 4 others (2016)eKLR and later affirmed by the Court of Appeal, held that the 1st respondent was not properly constituted.

10. As a consequence, the 1st respondent's functions at that time could not be executed without a properly constituted Commission. This as a result nullified all the actions undertaken by the 1st respondent between 31st March 2015 and 18th January 2016. The 1st respondent's actions were however granted a new lease of life following the Court of Appeal's decision.
11. Furthermore, the 1st respondent had to consult the Attorney General on whether Mumias Sugar Company is a public body within the meaning of Sections 2(e) of the [Anti-Corruption and Economic Crimes Act](#). This issue was later on referred to the National Treasury for further consultation and guidance.
12. Equally, the investigation was also challenged by the fact that Dubai Bank Kenya Limited, which housed the bank account that received the impugned funds on behalf of Mumias Sugar Company, was faced with financial problems and its operations suspended. This in essence frustrated the 1st respondent's efforts to obtain information relating to the disputed transaction.
13. He as well asserts that due to the involvement of international persons in the impugned transaction, the 1st respondent also ran into challenges while procuring evidence from Kenana Sugar which is based in Khartoum, Sudan. He for these reasons asserts that the occasioned delay was beyond the 1st respondent's control.
14. He moreover contends that criminal investigations are not administrative functions within the meaning of Article 47 of [the Constitution](#). These investigations are said to be regulated under the dictates of Criminal Law and the [Anti-Corruption and Economic Crimes Act](#) not the Fair Administrative Actions Act, 2015.
15. In the same breath, he notes that grant of prohibition orders against the 1st respondent will hinder exercise of its constitutional mandate. Further that exercise of the 1st respondent's mandate cannot be deemed to be in violation of a person's fundamental rights. Accordingly, he urges the court to balance the petitioner's right and with the public interest in charging offenders on merit.

2nd Respondent's Case

16. The 2nd respondent's response dated 26th May 2022 is not in the Court file or CTS.

Petitioner's Submissions

17. In the submissions dated 29th March 2023, Tebino and Associates Advocates, highlighted the issues for discussion as whether there has been an inordinate delay and its effect; whether Article 47 of [the Constitution](#) applies to the respondents and whether entitled to the reliefs sought.
18. On the first issue, Counsel submitted that there has been inordinate delay of over 7 years in prosecution of the petitioner's case. This delay has not been explained or justified by the respondents. This is despite the petitioner's numerous follow ups to ascertain the status of the investigations and whether he was going to be charged. The 1st respondent despite the petitioner's consistent enquiry failed to respond to his correspondence. Counsel further stressed that the challenges highlighted by the 1st respondent in their affidavit was a clear indication that the petitioner's case would continue suffering more delay.



19. To buttress this point reliance was placed in *Jirongo vs Soy Developers Ltd & 9 others (Petition 38 of 2019)* (2021/ KESC 32 (KLR) (16 July 2021) where the Supreme Court held that:

“It is in the above regard trite that there is no limitation of time to institute and prosecute criminal offences but as stated in Githunguri, where the delay has the effect of denying a suspect the legal tools to mount a credible defence, then the High Court is properly mandated by *the Constitution* to step in and stop the intended prosecution.”

20. Further reliance was also placed on Stanley Munga Githunguri-vs-R (1986) eKLR, Republic-vs-Attorney General & Anor ex-parte Ngeny (2001) KLR 612and George Joshua Okungu & another v Chief Magistrate’s Court Anti-Corruption Court At Nairobi & another (2014) eKLR.

21. Counsel further argued that the investigations commenced by the 1st respondent were devoid of any factual foundation and mainly geared towards appeasing the members of the public of the government’s apparent mission to combat corruption at the time. Reliance was placed in Republic-vs-Attorney General & Anor ex-parte Ngeny (supra) where it was held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”

22. Similar reliance was also placed in Republic vs Director of Public Prosecution & another Ex Parte Chamanal Vrailal Kamani & 2 Others (2015) eKLR, Jared Benson Kangwana & 2 others v Director of Public Prosecutions & 3 others and Monarch Insurance Company Ltd & 2 others (Interested Parties) (2022)eKLR.

23. On the second issue, Counsel asserted that the continuing inordinate delay of 7 years and counting by the 1st respondent, will adversely affect the petitioner’s right to a fair trial. Reliance was placed in George Joshua Okungu another-vs-Chief Magistrate Anti-Corruption Court at Nairobi & Anor (2014) eKLR where it was held that:

“It is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted.”

24. Further dependence was placed in Erick Kibiwott Tar us & 2 others vs Director of Public Prosecutions & 7 others (2014) eKLR.

25. On the third issue, Counsel submitted that while the 1st respondent opposed the applicability of Article 47 of *the Constitution* in criminal investigations the Court of Appeal in Judicial Service Commission vs Mbalu Mutava Musyimi(2015) eKLR determined that:

“The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”



26. Similar dependence was also placed on Republic vs Retirement Benefits Appeals Tribunal & 5 others Ex-parte Kenya Airports Authority Staff Superannuation Scheme (2015) eKLR.
27. Counsel for this reason submitted that failure to uphold this provision violated the petitioner's legitimate expectation in how the matter was conducted and secondly violated his right to a fair hearing. Reliance was placed in Keroche Industries Limited v Kenya Revenue Authority & 5 Others, HCMA No. 743 of 2006, (2007) KLR 240 where it was observed that
- “Legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.”
28. More reliance was also placed on Royal Media Services Limited vs Attorney general & 8 Others, Nairobi CA No. 4 of 2014, (2014) eKLR, Republic vs Energy & Petroleum Regulatory Authority & 2 others Ex parte Talib Zein Salimin & another and Daniel Gichuhi & 3 others (Interested Parties) (2021) eKLR.
29. To this end, Counsel submitted that the respondents had violated and continue to violate the petitioner's constitutional rights and as such is as entitled to the reliefs sought. In support reliance was placed in [Miguna Miguna vs Fred Matiangi, Cabinet Secretary, Ministry of Interior & Coordination of National Government & 6 others, Const. Petition No. 51 of 2018](#) where it was held that:
- “One reason why courts' grant compensation in cases of breach or violation of rights and fundamental freedoms is not so much to restore a person 's already violated rights, but to act as a deterrent against similar violation in the future... The other reason is to send a message that there should be no right without a remedy and to remind the state and its agents that rights are for enjoyment and must be respected, enhanced and protected as demanded by [the constitution](#).”
30. The case of Republic vs. [Kenya National Examinations Council ex parte Gathenii & Others Civil Appeal No. 266 of 1996](#) was also cited in support of the Petitioner's submissions.

1st Respondent's Submissions

31. In support of its case, the 1st respondent filed submissions through its Counsel Jackie Kibogy dated 28th April 2023.
32. The 1st Respondent identified the issues for discussion as being whether there has been inordinate delay in the investigation against the petitioner; whether the Commission has infringed on the petitioner's rights under Articles 47(1), (2) and 50 of [the Constitution](#) and legitimate expectation; whether this Court can prohibit the respondents from ever instituting a criminal case against the petitioner in relation to Mumias Sugar Limited and; whether the petitioner is entitled to the reliefs sought.
33. On the first issue, the 1st Respondent stressed that there is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case as held in Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & another (2014) eKLR. According to the 1st Respondent the delay in this case is attributed to factors beyond the 1st respondent's control.



Nonetheless, it also noted that there is no law that sets a timeline or limit within which investigations are to be concluded.

34. The 1st Respondent submitted that investigations involving economic and corruption crimes are complex and, in this case, added international aspect involved where mutual legal understanding was also sought. The 1st Respondent thus submitted that it would be unreasonable to limit the 1st respondent to specific timelines in carrying this type of investigation. The case of *Thuita Mwangi & 2 others vs Ethics & AntiCorruption Commission & 3 others* (2013)eKLR was cited in support where the Court observed that:

“What constitutes ‘unreasonable delay’ is not a matter capable of mathematical definition but one dependent on the facts and circumstances of the particular case.”

35. Also relied on was the case of *Rose Owira & 23 others vs Attorney-General & another; Kenya National Commission on Human Rights & 4 others (Interested Parties)* (2020) eKLR.

36. On the second issue, the Respondent cited the Supreme Court in *Ethics and Anti-Corruption Commission & another vs Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 others Petition 30 & 31 of 2019* (Consolidated) [2022] KESC 59 (KLR) to illuminate on whether investigations by the 1st respondent constitute an administrative action. In that case it was held as follows:

“A close scrutiny of article 47 of *the Constitution* gives a glimpse of what an “administrative action” entails. Towards this end, the said Article provides that:

“ ... 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall- (b) promote efficient administration.... Does the 1st appellant’s investigative powers fall within the corners of this definition? Part IV of the A CECA specifically provides for the 1st appellant’s investigative powers. The powers granted therein include powers, privileges and immunities of a Police Officer under section 23(3) to search premises under section 29, to apply for surrender of travel documents under section 31, to arrest persons under section 32 amongst others. Strictly speaking, these powers when exercised cannot be described as “administrative action” within the meaning of article 47. For example, how can “conducting a house search” or “effecting an arrest” be considered as exercising administrative action? On the contrary, these are special powers conferred by a specific legal regime, to be exercised for a special purpose.”

37. Guided by this opine, Counsel stressed that the 1st respondent’s investigations in this matter cannot be deemed as administrative in nature as advanced by the petitioner but one that falls within the dictates of the criminal justice system. Further that due to the very nature of crime being secretive, collusive and a threat to peace and order in the general public, procedural fairness in a criminal investigation is bound to be different from procedural fairness in an administrative action.

38. Further on the claim of legitimate expectation, Counsel submitted that for legitimate expectation to arise, there must be a promise, representation or past practice that arouses the expectation and secondly, the representation must be competent and lawful for such a body to make. In this matter Counsel observed that the claim is not feasible as there was no promise made to the petitioner in order to create



a legitimate expectation. Reliance was placed in *Jane Kiongo & 15 others vs Laikipia University & 6 Others* Petition No. 596 of 2017 (2019)eKLR where it was held that:

“Legitimate expectation is based on legitimate representation made by an authority which has power to make such representation that certain actions will be done in a particular way without any qualification. Such representation gives rise to legitimate expectation and the authority or institution is thus bound by that representation.”

39. Speaking to the prohibition order sought by the petitioner, Counsel submitted that the 1st respondent is within its constitutional and statutory mandate to carry out investigations. Further that the petitioner has in no way shown that the 1st respondent is carrying out the investigations acted in excess of its mandate or that the Commission has no mandate to investigate the said complaint or that there is breach of the rules of natural justice or abuse of power.

40. In support Counsel for the 1st Respondent cited that case of *Republic vs Director of Public Prosecutions & another; John Ngugi Kabogo (Interested Party) Ex parte Harrison Wangoro Mwangi & another* (2020) eKLR where the Court observed that:

“As stated above, the power to quash police investigations is immense since it amounts to exonerating a suspect before conclusion of investigations, the decision to prosecute and even before trial. Such power must be exercised with extreme care and caution. It is a power which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution.”

41. Counsel submitted that damages are only awarded where it is found that there is an infringement of a fundamental right. Correspondingly that the damage suffered must first be established by the petitioner who bears the onus of proof. Reliance was placed in *Charles Muturi Macharia vs Standard Group & 4 others* (2017)eKLR where it was held that:

“The practice developed in constitutional matters is to award damages for violation of constitutional rights, but it cannot be overemphasized that this is after there is evidence of the damage.”

42. Equal dependence was placed in *Kenya Human Rights Commission vs Non-Governmental Organizations Co-Ordination Board* Petition No. 495 of 2015 (2016) eKLR and *Irene Wangari Gacheru & 6 others vs Attorney General* Constitutional Petition No. 376 of 2014 (2017) eKLR.

43. Counsel submitted that the 1st respondent in light of this arguments had not violated the petitioner’s rights and hence the petitioner was not entitled to the reliefs sought.

2nd Respondent’s Submissions

44. On 17th October 2023, Counsel Kinuthia Njenga on behalf of the 2nd respondent filed submissions in opposition to the petition. Counsel sought to deliberate on two issues, first whether the 2nd respondent has violated the petitioner’s rights and whether the 1st and 2nd respondent’s actions within the prescribed legal provisions and lastly whether this Court can issue an order of prohibition as sought by the petitioner.

45. On the first issue, Counsel relying in *Anarita Karimi Njeru vs. the republic* (1976-1980) KLR 1272 submitted that the petitioner had not specifically demonstrated how his rights under Article 47 and 50 had been violated by the respondents.



46. Counsel further submitted that, Article 24(1) of *the Constitution* is clear that a fundamental right can be limited through law and to the extent that the limitation is reasonable and justifiable in an open and democratic society. In this regard, he made known that *the Constitution* under Article 157(6) empowers the 2nd respondent to institute, undertake and takeover prosecutions for all criminal suits. This is mandate does not require the consent of any person. These powers can only be subjected to review where, as held in *Matalulu versus DPP (2003) 4 LRC 712*:
- i. In excess of the DPP's Constitutional or statutory powers.
 - ii. Contrary to the provisions of Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and failed to exercise his or her own independent discretion.
 - iii. In bad faith
 - iv. In abuse of the process of the court in which it was instituted
 - v. Where the DPP has fettered his discretion by a rigid policy.
47. According to Counsel the petitioner has not established any of these elements. In fact, he makes known that the investigations and prosecution were commenced following the lodged complaint and evidence gathered.
48. On the third issue, Counsel submitted that an order of prohibition is only tenable where a public body or official has acted in excess of their power and discretionary on the part of the Court. Counsel noted that abuse of process was defined in High Court Petition No. 537 of 2017 *Stephen Oyugi Okeru - vs - Milimani Chief Magistrate's Court & DCI* as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly unsupportable case.
49. In Counsel's view, the petitioner has not adduced any evidence of misuse of power or contravention of the rules of natural justice on the part of the respondents to entitle grant of the sought orders. In fact the 2nd respondent reviewed and analyzed the evidence contained in the 1st respondent's investigations file before making the decision to charge the petitioner thus acted upon the sufficiency of the evidence on record and in public interest.

Analysis and Determination

50. It is my considered view that the issues that arise for determination in this matter are:
- i. Whether there has been inordinate delay on the part of the respondents in investigating the petitioner's case and if so, the implication thereof.
 - ii. Whether the respondents in carrying out their mandate breached the petitioner's rights under Article 47 and 50 of *the Constitution* and his legitimate expectation.
 - iii. Whether the petitioner is entitled to the reliefs sought.
- Whether there has been inordinate delay on the part of the respondents in investigating the petitioner's case and if so, the implication thereof.
51. The phrase 'inordinate delay' is also alternately referred to as 'unreasonable or undue delay'. The phrase describes the unacceptableness of the period of time spent waiting without completing a particular task or chore. It is a relative term which applies depending on context where many factors have to be taken into consideration.



52. The Court of Appeal in Cecilia Wanja Waweru (*supra*) explained the meaning of ‘inordinate delay’ as follows:

“7. ...There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned Judge in considering the application should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed.”

53. In the instant case, the petitioner is alleging that there is inordinate delay by the 1st Respondent to conclude the investigation into an economic crime. He claims that the investigation commenced in 2015 following the publication of his name in the infamous ‘list of shame’ that the 1st Respondent had submitted to the President. He has been writing letters seeking to know the progress of that investigation. He wrote on 1st Feb. 2016. On 12/2/2016 the 1st Respondent informed him that he would be notified once the investigations are completed. He further wrote on 18/1/2021 and 22/2/2021 but these letters did not elicit any other response from the 1st Respondent. He contends that it has been six years since his name was published in the list of shame that was submitted to the President by the 1st Respondent showing the names of people that were under investigation for economic crimes. He stated that he had to step aside from his job to pave way for these investigations. He was subsequently terminated from his employment. That he has undergone isolation from people and has experienced agony which still persists as the investigations are yet to be completed to date.

54. The 1st Respondent in explaining the reasons for the delay referred to various setbacks it has faced since commencing this investigation. One was a legal challenge on its constitutionality arising from a vacancy in the composition of the Commission that caused all the work it had done in connection with the instant and other investigations to be declared a nullity and had to start afresh. Secondly, it stated that this particular investigation has an international dimension since the alleged criminality involved external contacts beyond Kenya and thus required mutual legal assistance. Further, time was taken in establishing if the organization against which the offence was perpetrated was a public entity. The 1st Respondent stated that all these factors took time and were beyond its control.

55. As a starting point, there is no constitutional or statutory limit that defines the time a criminal investigation should take. The common law doctrine of *nullum tempus occurit regi* (no time runs against the King) may thus be said to apply in regard to investigative powers for criminal offences.

56. Judicial precedents that have considered the effect of delay mainly focus from the time the formal charge is laid before the Court and consider it on the basis of a fair trial under Article 50. A case in point is *Jirongo vs Soy Developers Ltd & 9 others* (*supra*) where the Supreme Court stated:

“The question of delay with respect to the lodging of criminal prosecutions has been addressed by our courts in several matters. The leading persuasive decisions on the subject are the High Court cases of *Githunguri v Republic* (1986) KLR 1 and *Republic v Attorney General & another ex parte Ng’eny* (2001) KLR 612 which both Superior Courts relied on.

57. In *Githunguri v Republic* (*supra*), the court stated as follows: “In this instance the delay is said to have been nine years, six years and four years. The court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil! It is too long, too much of delay. The Attorney-General is not bound to tell the court the reason but it would have made us knowledgeable if told. We are of the opinion that to charge



the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the court will be within a reasonable time as required by section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General...”

57. The Supreme Court went on to hold thus:

“It is in the above regard trite that there is no limitation of time to institute and prosecute criminal offences but as stated in *Githunguri*, where the delay has the effect of denying a suspect the legal tools to mount a credible defence, then the High Court is properly mandated by *the Constitution* to step in and stop the intended prosecution.”

58. The Court assesses the effect of unreasonable delay from the point of securing a fair trial of the accused and this can only come after the charge is formally laid. It would be speculative in my view to stop an investigation because not every investigation will yield a charge before the Court. The Court cannot purport to monitor the timelines of an investigation such as this with multi-dimensional aspects.

59. This Court also notes that this investigation involves a serious economic crime which is attracting a colossal amount of money and the facts are complex extending to other jurisdictions. The Court opines that it would not be in public interest to terminate this kind of investigation prematurely and should thus be allowed to proceed to its ultimate end.

60. The Petitioner stated that as a result of this investigation he lost his job. There was no proof provided that the reason for termination was because of this particular investigation. In any case, Section 62 of the *Anti-Corruption and Economic Crimes Act* only requires a public or state officer to be suspended with effect from the date he is charged for an offence under the Act, not from the date of the commencement of an investigation.

61. I do not find any merit in the Petitioner’s claim that the investigation against him should thus be terminated on the basis of delay in concluding the same.

Whether in carrying out their mandate, the respondents breached the petitioner’s rights under Article 47 and 50 of *the Constitution* and his legitimate expectation.

62. The 1st Respondent, Ethics and Anti- Corruption Commission (EACC) derives its mandate from Article 79 and 252 of *the Constitution*. Furthermore, its functions and powers are provided for under the *Ethics and Anti-Corruption Commission Act*. Being an Independent Commission, EACC may under Article 252 (1) (a) conduct investigations on its own initiative or on a complaint made by a member of the public.

63. Under Section 11 (d) of the *Ethics and Anti-Corruption Commission Act*, part of the functions of the Commission is to investigate and recommend to the Director of public Prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of *the Constitution*.

64. The Court of Appeal in *Alfred N. Mutua vs Ethics & Anti-Corruption Commission (EACC) & 4 others (2016) eKLR* as cited in *Philomena Mbete Mwilu vs Director of Public Prosecutions & 3 others*;



Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) (2019) eKLR acknowledged the 1st respondent's mandate as follows:

“It is also not contested that the EACC is mandated under Section 11(1)(d) of the Ethics and Anti-Corruption Commission Act to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to Chapter Six of *the Constitution*. Further, under the provisions of Section 35 of ACECA as read with the provisions of Section 11(1) (d) of *Ethics and Anti-Corruption Commission Act*, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not ...”

(Other cases where the mandate of EACC has been dealt with include Okiya Omtatah Okoiti & 2 others vs Attorney General & 4 others (2018) eKLR; Republic vs Ethics and Anti-Corruption Commission Ex parte Nairobi City County Assembly & 13 others (2019) eKLR and Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others (2017) eKLR)

65. As for the Director of Public Prosecutions his powers are derived from Article 157 of *the Constitution*. Article 157 (6), (10) and (11) of *the Constitution* provides as follows:

- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may;
- a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
- (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

66. This Article is operationalized by The Office of the Director of Public Prosecutions, 2013. Act. Section 5 (1) of the Act states as follows:

Pursuant to Article 157 of *the Constitution* the Director shall;

- a. have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction; and
- b. exercise State powers of prosecution.

67. For the Office of the Director of Public Prosecutions to perform his functions, he enjoys independence where in Section 6 of the Act provides as follows:



Pursuant to Article 157(10) of *the Constitution*, the Director shall:

- a. not require the consent of any person or authority for the commencement of criminal proceedings;
 - b. not be under the direction or control of any person or authority in the exercise of his or her powers or functions under *the Constitution*, this Act or any other written law; and
 - c. be subject only to *the Constitution* and the law.
68. Nevertheless, the Petitioner must not only plead the provisions of *the Constitution* he claims were violated but must further demonstrate of how these provisions were violated by the respondents by way of evidence to support his claim. In this matter, the petitioner alleged that rights have been violated under Article 47 and 50 were violated in the manner the 1st and 2nd Respondents exercised their mandate.
69. Article 47 of *the Constitution* deals with the right to a fair administrative action. It provides as follows:
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
70. In addition to this Constitutional safeguard, Parliament also enacted the Fair Administrative Actions Act which expounds the provisions of Article 47 of *the Constitution*.
71. The prominence of fair administrative action as a constitutional right was appreciated in the South African case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1 where it was held as follows:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

- b) The right to fair hearing under Article 50(1) of *the Constitution* provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.



72. This right essentially entrenches the principle of natural justice. The Halsbury's Laws of England, 5th Edition Vol. 61 at page 539 Paragraph 639 espouses on the rule of natural justice as follows:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adopted to govern proceedings of bodies other than Judicial tribunals, and duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in light of the right under the convention for the protections of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination and civil rights or obligations on any criminal charge.”

73. Did the Respondents thus violate the rights of the Petitioner under Article 47 and Article 50 of *the Constitution* as alleged?

74. Starting with the 2nd Respondent-the DPP has not yet made any decision yet as the 1st Respondent has not forwarded any report of investigations to the DPP as per section 35 of the *Anti-Corruption and Economic Crimes Act*. On what basis then does the Petitioner fault the 2nd Respondent for violating his rights? The claim against the DPP (2nd Respondent) is absolutely groundless. The Petitioner did not demonstrate how the 2nd Respondent has violated his rights under Article 47 and 50 of *the Constitution*.

75. In regard to the 1st Respondent, the Petitioner claims that his rights under Article 47 and 50 of *the Constitution* have been infringed by reason of the investigation; I am guided by the Supreme Court decision in *Ethics and Anti-Corruption Commission & Anor v Tom Ojienda, Sc T/A Prof. Tom Ojienda and Associates Advocates and 2 Others Petition 30 & 31 of 2019* (Consolidated) [2022] KESC 59 (KLR) which held that criminal investigation do not fall within the realm of ‘administrative actions’ and are thus not covered by Article 47 of *the Constitution* or the *Fair Administrative Action Act*. They fall under special legal regime designed for that particular purpose.

“57. By stipulating that the legislation so contemplated has to among other things, promote efficient administration, *the Constitution* leaves no doubt that an ‘administrative action’ is not just any action or omission, or any exercise of power or authority, but one that relates to the management of affairs of an institution, organization, or agency. This explains why such action is described as ‘administrative’ as opposed to any other action. The Concise Oxford Dictionary (9th Ed) defines the word ‘administrative’ as concerning or relating to the management of affairs “Black’s Law Dictionary” (11 Ed) defines “administrative action” to mean “a decision or an implementation relating to the government’s executive function or business management.” Burton’s Legal Thesaurus (4th Ed) defines the adjective “administrative” to mean among others, “directional, guiding, managerial, regulative, supervisory.

58. Does the 1st Appellant investigative powers fall within the corners of this definition? Part IV of the ACECA specifically provides for the 1st appellant’s investigative powers. The powers granted therein include powers, privileges



and immunities of a police officer under Section 23 (3) to search premises under Section 29, to apply for surrender of travel documents under section 31, to arrest persons under Section 32 among others. Strictly speaking, these powers when exercised cannot be described as “administrative action” within the meaning of Article 47. For example, how can “conducting a house search” or “effecting an arrest” be considered as exercising administrative action? On the contrary, these are special powers conferred by specific legal regime, to be exercised for a special purpose...”

76. As guided by the Supreme Court in the above decision, the claim that the conduct of investigations is in violation Article 47 of *the Constitution* is legally unsustainable. The procedures governing investigations are those contained in Statutes that specifically apply to and regulate criminal law. I concur with the 1st Respondent contention due to the nature of crime itself that is normally characterized by concealment, collusion and threat to peace generally, there are distinct procedural safeguards for criminal investigations as opposed to other administrative actions. That is why we have Acts such as Rights of the Persons Arrested and Detained Act, the Criminal Procedure Act that regulates searches arrests and so on.

77. I find no merit in this Petition which is hereby dismissed. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF AUGUST, 2024.

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L N MUGAMBI

JUDGE

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