



**Ria v The Ethics and Anti-Corruption Commission (Constitutional Petition
E013 of 2020) [2022] KEHC 11605 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E013 OF 2020
JM MATIVO & OA SEWE, JJ
JULY 27, 2022**

BETWEEN

JOEL JOHN RIA PETITIONER

AND

THE ETHICS AND ANTI-CORRUPTION COMMISSION RESPONDENT

JUDGMENT

1. The Petitioner's grievance as I glean it from the Petition is that on 28th July 2010, the Respondent searched his house at Nyali, Mombasa without a search warrant and seized his personal documents/ properties enumerated in paragraph 5 (a) – (d) of the Petition. He states that the Respondent obtained orders restraining him from in any manner dealing with any of his properties relating to the seized titles. He avers that the conservatory orders were to last for a period of 6 months, so, they were to lapse by 1st February 2011 and vide a ruling dated 17th July 2017 the court ruled that the said conservatory orders had lapsed but the Respondent declined to release the seized documents.
2. The Petitioner states that he was told that the seized documents could only be traced in Nairobi, but his visit to Nairobi was in vain. He contends that he has suffered mental anguish, that he has been rendered destitute and that the Respondent registered caveats against the said titles so he cannot use the properties. He avers that his bank accounts have been frozen for the last 10 years. Arising from the foregoing, he contends that his fundamental rights have been violated by inter alia depriving him the right to earn, or access to his land and money, and by subjecting him to cruelty by withholding his documents. He avers that the acts complained of violate his rights under articles 27, 28, 29, 30, 33, 35, 38, 39, 40, 43, 46, 47, 60, 61, 64 of *the Constitution*. Consequently, he prays for: -
 - a. A declaration that his rights and freedoms under *the Constitution* have been violated by the unlawful and or illegal seizure/ withholding them and an order for their immediate return.



- b. An order for compensation in form of punitive and or exemplary and or general damages for the mental torture and or anguish and or psychological injury and or health and sexual issues or conditions suffered as result of the aforesaid actions.
 - c. Costs of the Petition.
 - d. Any other relief and or remedy this court may deem fit and just to grant.
3. The Petition is opposed. The Respondent filed the Replying affidavit of a one Ignatius Wekesa, dated 18th October 2029, a member of the Respondent’s Investigative Team which was investigating allegations of corruption and economic crimes relating to procurement of two ferries by the Kenya Ferry Services in respect of Tender No. KFS/FV/068/2004. The salient features in the affidavit are that that the investigations are lawful; that following the search, the documents obtained were recorded in an inventory and are all in the Respondent’s custody and are subject to ongoing investigations; and that the investigations have so far established that: -
- a. The tender was advertised as an international tender in both local and international media on the 18/02/2004 and 19/02/2004. The initial closing date was on 01/04/2004 but it was extended to 05/05/2004 and six bidders submitted bid documents: -
 - i. Sciffbau-Un Entwicklungsgesellschaft, Tangemunde Mbh-SET-Germany;
 - ii. Damen Shipyards of Gorichem-Netherlands;
 - iii. Sinnautic International of Dokkum-Netherlands;
 - iv. Intercontinental Trade Limited, Mayfair London and VT Halter Marine Inc Gulf-Missipi USA;
 - v. African Marine and General Engineering Company Limited-Mombasa Kenya; and
 - vi. Johns Gram-Hansen A/s-Copenhagen Denmark.
 - b. The procurement of the two new ferries was to be financed by the Government of Kenya through the then Ministry of Transport at a cost of Kshs. 644,000,000.00/= (Euros 5,904,964) each; That the Tender was awarded at a sum of Euros 9,458,672 (Then Kshs. 898,600,00.00/=) to a company known as M/s Sciffbau-Und Entwicklungsgesellschaft Tangernude of Tangernude, the Republic of Germany. Kenya Ferry Services and M/s Sciffbau-Und Entwicklungsgesellschaft Tangernude entered into a contract in February, 2007;
 - c. M/s Sciffbau-Und Entwicklungsgesellschaft Tangernude were required by the Tender Contract to build and deliver the two new ferries within 13 months from the date of signing the Contract; M/s Sciffbau-Und Entwicklungsgesellschaft Tangernude subsequently subcontracted M/s Schiffs-und Yachtwerft DD GmbH of Dresden in the Republic of Germany to deliver the two ferries;



- d. M/s Sciffbau-Und Entwincklungs Gesellschaft Tangernude irregularly subcontracted M/s Schiffs-und Yachtwerft DD GmbH without the approval of the relevant Kenyan Government entities;
 - e. Without the approval of the Kenya Ferry Services Tender Committee, the Board of Directors and the then Ministry of Transport; The dimensions of one of the ferries were unilaterally changed from length of 48m to 60m and the width of 13m to 16.25m leading to an increase in cost;
 - f. Between 2003 to 2010 the then Ministry of Transport remitted to Kenya Ferry Services a sum of Kshs. 1,805,120,000.00/= in respect to the procurement of two new ferries; As at 27/10/2010 Kenya Ferries Services had made payments of Kshs. 1,288,000,000.00/= to M/s Schiffs-und Yachtwerft DD GmbH.
 - g. Payments were made directly to M/s Schiffs-und Yachtwerft DD GmbH through Letters of Credit by National Bank of Kenya, Porthouse Branch, Mombasa; The payments made in favour of M/s Schiffs-und Yachtwerft DD GmbH were done irrespective of the fact that no contract had been entered into between Kenya Ferry Services and the said firm; and Contrary to the provisions of the Public Procurement and Disposal Act, 2005; the Petitioner being the then Accounting Officer at Kenya Ferry Services facilitated irregular payments to M/s Schiffs-und Yachtwerft DD GmbH.
 - h. EACC's on-going investigation have established that about Kshs. 500,000,000.00/= cannot be accounted for by the Kenya Ferry Services at a time that the Petitioner was the Accounting Officer at Kenya Ferry Services;
 - i. The Petitioner is in possession and ownership of several properties which so far, he has been unable to satisfactorily explain to the Respondent how he acquired them.; Since 27/10/2010 the Petitioner has been uncooperative with the Respondent's Investigative Team and in spite of concerted efforts, he is yet to record his statement on the said procurement;
 - j. The Petitioner being the then Accounting Officer at Kenya Ferry Services failed to ensure that the procurement of the two new ferries was lawfully undertaken; The Petitioner alongside other public officers at Kenya Ferry Services breached sections 45(2)(a)(ii) (b) and 46 as read with section 48 of the [Anti-Corruption and Economic Crimes Act](#)
4. The Respondent also contends that the original title deeds are in the Respondent's safe custody and are subject to ongoing investigations and pursuant sections 55 of the [Anti-Corruption and Economic Crimes Act](#), the Petitioner is yet to satisfactorily explain how he acquired the said properties, and, in the event that he is unable to satisfactorily explain how he acquired the nine properties under investigations, the Respondent has the legal mandate to recover the said properties pursuant to section 11(1)(j) of the Ethics and Anti-Corruption Commission Act (EACA) as read with section 55 of the ACECA. Additionally, the Respondent contends that the Petitioner has not disclosed when the Respondent obtained his Birth Certificate, Share Certificates, Log Books and Academic Certificates as alleged.
 5. The Respondent attributed the alleged delay to the lapse occasioned by the resignation of its then chairperson and one Commissioner on 12/05/2015, 31/03/2015 and 30/04/2015 which deprived the



Respondent quorum to function; the change of the legal framework governing its operations; the delay by the Republic of Germany to avail crucial information that would aid in the investigations pursuant to the Mutual Legal Assistance Act and the Petitioner's failure to cooperate with the Respondent's Investigative Team. Also, on record is the Replying affidavit of Abdulhamid Low dated 18th December 2020 which essentially replicated matters deposed in the above affidavit.

6. The Petitioner filed the supplementary affidavit dated 20th October 2021 essentially disputing the Respondent's Response.
7. The Respondent filed a further affidavit dated 25th November 2021 and 4th November 2021 also sworn by a one Abdulhanid Low essentially rebutting the contents of the Petitioner's supplementary affidavit.
8. Lastly, the Petitioner a filed a supplementary affidavit dated 15th November 2021 in reply to the Respondent's further affidavit dated 4th November 2021 reiterating that the Respondent took his original birth certificate and academic certificates.
9. The Petition was canvassed by way of written submissions. The Petitioner argued that section 30 of ACECA prohibited the Respondent from retaining the seized properties for an unreasonable period. He argued that section 35 of the ACECA in peremptory terms required the Respondent to report on the results of the investigations to the Attorney General including its recommendations. He argued that investigations pursuant to section 45 of the ACECA must be premised on reasonable apprehension that a person may have committed an offence. He argued that he acquired the subject properties before he was employed at Kenya Ferry Services.
10. Additionally, the Petitioner submitted that under section 55 of the ACECA, the Respondent was required to commence proceedings for recovery of any unexplained wealth while section 55(2) (b) requires the person to be charged to be afforded a reasonable opportunity to explain the disproportion between the assets and his compensation as a public officer. He argued that the conservatory orders were not extended after the 6 months period. He argued that even after the enactment of the EACC Act, the ACECA remained the substantive law governing proceedings relating to corruption or economic crimes. He argued that under section 21 of the ACECA, the Respondent is obligated to be impartial, independent and to act professionally. He argued that the seizure of his documents and restrictions on his properties amounts to abuse of office and the Respondent's code of conduct.
11. He argued that he has been affected mentally, sexually, psychologically and his fundamental rights and freedoms have been violated. He cited Edward Akongo Oyugi and 2 others v Attorney General and Irene Wangari Gacheru & 6 others v AG{ both of which underscored the tests applicable in determining monetary compensation for violation of rights. He urged the court to award Kshs. 108,800,000/= as general damages. He also cited Kenya National Human Rights Commission v Non-Governmental Organizations Co-ordination Board which stressed the need to restore the Petitioner as nearly as possible to the position he was in prior to the injury. He argued that he based on his assessment of damages on the period of 12 years he has suffered. Additionally, he cited Gitobu Imanyara & 2 others v Attorney General which held that the purpose of a constitutional remedy is not compensatory or punitive but it is to vindicate the rights violated and to prevent or deter any future infringements. He also cited Koigi Wamere v AG where the court awarded Kshs. 12,000,000/= for breach of rights. He cited Otieno Mak'onyango and urged the court to award punitive damages of Kshs. 50,000,000/=.
12. The Respondent submitted that the Petitioner has not sufficiently demonstrated how the Respondent breached his constitutional rights and that this Petition seeks to frustrate public interest which requires investigations to be undertaken and it does not disclose any cause of action against the Respondent. It submitted that it is mandated under article 252(1)(a)(d) of the Constitution as read with section 11 (1) (d) (j) of the EACC Act and the provisions of the ACECA to undertake investigations into



- allegations of corruption and economic crimes, and related issues. It submitted that all documents that were obtained by its officers were listed in inventories which were shared with the Petitioner's son who was present during the search.
13. Regarding the alleged delay, it submitted that it has no control on the period the requests made under section 5, 6, 9, 12 and 14 of the *Mutual Legal Assistance Act* will take and on 27/07/2011 it prepared a Letter of Request to the Competent Judicial/State Authority of the Federal Republic of Germany and to date it is yet to get a response.
 14. It submitted that the Petitioner has not met the test in *Anarita Karimi Njeru v The Republic* which requires a link to be established between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. It relied on *John Mbau Mburu v County Government of Mombasa; Robinson Onyango Malombo (Interested Party)* for the proposition that for a constitutional petition to succeed there has to be a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement.
 15. It argued that the Petition does not disclose the specific and sufficient details on how and when the Respondent violated the Petitioner's constitutional rights, nor has he demonstrated that he is entitled to the damages claimed. It distinguished the authorities cited by the Petitioner arguing that the circumstances and the factual issues in the cases relied upon by the Petitioner are materially distinct and distinguishable from the instant case because the provisions of section 5, 6, 7, 9 12 and 14 of the *Mutual Legal Assistance Act* are applicable in the subject investigations, and that the Respondent has the legal mandate under Articles 79 and 252(1)(a)(d) of *the Constitution* as read with section 11(1)(d) (j) of the EACCA and the *Mutual Legal Assistance Act* to undertake investigations both in Kenya and in the Federal Republic of Germany touching on subject investigations.
 16. I prefer to commence my investigations by stressing that Article 79 of *the Constitution* provides that Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of Chapter six of *the Constitution*. Pursuant to the said provision, Parliament enacted the EACC Act which establishes the EACC. A notable function under *the Constitution* is the power to oversee the implementation process and compliance with the provisions of Chapter six of *the Constitution* on leadership and integrity.
 17. Additional functions of the commission under the Act are:-(a) In relation to State officers:- (i) Develop and promote standards and best practices in integrity and anti-corruption; (ii) Develop a code of ethics; (b) Work with other state and public offices in the development and promotion of standards and best practices in integrity and anticorruption; (c) Receive complaints on a breach of the code of ethics by public officers; (d) Investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under the Act or any other law enacted pursuant to chapter six of *the Constitution*; (e) Recommend appropriate action against state officers or public officers alleged to have engaged in unethical conduct; (f) Oversee the enforcement of codes of ethics prescribed for public officers; (g) Advise, on its own initiative, any person on any matter within its functions; (h) Raise public awareness on ethical issues and educate the public on the dangers of corruption, and enlist and foster public support in combating corruption but with due regard to the requirements of the *Anti-Corruption and Economic Crimes Act*, 2003 on confidentiality;(i) Subject to Article 31 of *the Constitution*, monitor the practices and procedures of public bodies to detect corrupt practices and secure the revision of methods of work or procedures that may be conducive to corrupt practices; and (j) Institute and conduct proceedings in court for purposes



- of recovering or protecting public property, or freezing or confiscating proceeds of corruption or those related to corruption, or the payment of compensation, or other punitive and disciplinary measures.
18. The EACC whose composition and aspects of its mandate are specifically statutory replaced the Kenya Anti-Corruption Commission (KACC). As we construe its mandate under Section 11 of the EACC Act, it is imperative emphasize that the said mandate must be read in manner that is consistent with the mandate contemplated under article 79 of *the Constitution* which is to "ensure compliance with, and enforcement of, the provisions of Chapter Six of *the Constitution*."
 19. Chapter 6 of *the Constitution* is predicated upon the assumption that State officers are the nerve Centre of the Republic and carry the highest level of responsibility in the management of state affairs and, therefore, their conduct should be beyond reproach. This means that those whose conduct does not bring honor, public confidence and integrity have no place in the management of public affairs. This is to ensure that those entrusted with the management of public affairs and resources are persons of good character, probity and uprightness. The chapter lays down the principles upon which the State Officers should conduct themselves. According to Black's Law Dictionary, the term Integrity means "soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with "probity," "honesty," and "uprightness."
 20. The design and architecture of Constitution was intended to deal with a long legacy of impunity, institutional frailties and embedded corruption. The center-piece of anti-corruption and public integrity reform is Chapter Six of *the Constitution*, the *Anti-Corruption and Economic Crimes Act* and the *Leadership and Integrity Act*.
 21. EACC is mandated under section 11(1)(d) of the ACECA 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*. Under section 35 of ACECA as read with the section 11(1)(d) of EACC 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.
 22. A key issue which the parties did not accord sufficient attention in their submissions is whether the EACC overstepped its mandate in undertaking the subject investigations and the seizure complained of. Article 252 (1) of *the Constitution* provides that Each commission, and each holder of an independent office—
 - (a) may conduct investigations on its own initiative or on a complaint made by a member of the public;
 - (b) has the powers necessary for conciliation, mediation and negotiation;
 - (c) shall recruit its own staff; and
 - (d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.
 23. Section 11 of the EACC Act in addition to the functions conferred by *the Constitution*, prescribes additional functions enumerated earlier. Provided there is no abuse of process, the issuing of search warrants and the seizure of articles consequent thereupon is a vital, indeed a necessary element in the effective combating of crime. On the other hand, all citizens have constitutionally enshrined rights to dignity, privacy, freedom, security, trade and property. Thus, courts must strike a wholesome balance



between, on the one hand, the dignity and privacy of every citizen and, on the other, support for the State in combating crime.

24. Section 118 of the *Criminal Procedure Code* provides that-

“Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.”

25. A brief outline of the basic principles relevant to search warrants is apposite. In *Minister of Justice & others vs Desai the South African* court held that it has long been recognized in law that a search warrant constitutes a serious encroachment on the rights of the individual and a careful scrutiny by the courts is required. In *Minister of Safety and Security v Van der Merwe & others* Mogoeng J, delivering the unanimous judgment of the court stated:- "What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligible manner:-

- (a) states the statutory provision in terms of which it is issued;
- (b) identifies the searcher;
- (c) clearly mentions the authority it confers upon the searcher;
- (d) identifies the person, container or premises to be searched;
- (e) describes the article to be searched for and seized, with sufficient particularity; and
- (f) specifies the offence which triggered the criminal investigation and names the suspected offender.

In addition, the guidelines to be observed by a court considering the validity of the warrants include the following: -

- (a) the person issuing the warrant must have authority and jurisdiction;
- (b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;
- (c) the terms of the warrant must be neither vague nor overbroad;
- (d) a warrant must be reasonably intelligible to both the searcher and the searched person;
- (e) the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and
- (f) the terms of the warrant must be construed with reasonable strictness."



26. Even though there is no argument before me challenging the validity of the search warrants or the process for the sake of brevity, I must point out that the guidelines stated in the above decision include: - (a) the person issuing the warrant must have authority. (b) the person authorizing the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts. The terms of the warrants have not been said to be vague or overbroad. Further, there is no allegation that the warrants were not reasonably intelligible to both the searcher and the person to be searched. However, search warrants ought to be scrutinized with "sometimes technical rigour and exactitude." This is because as the Supreme Court of Appeal of South Africa observed: -

"A search warrant is not some kind of mere, interdepartmental correspondence "or note."
It is, as its very name suggests, a substantive weapon in the armoury of the State. It embodies awesome powers as well as formidable consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere, checklist approach."

27. In the absence of evidence of abuse of power or a gross violation of the rights of a person to be searched, a court would be slow to find that a search warrant is unlawful on purely technical grounds. The statutory procedure for conducting search and seizure by the police has three inbuilt requirements to be met. Such requirements are that: - (a) prior to the search and seizure the police should obtain a search warrant; (b) such warrant should be issued by a judicial officer; and (c) lastly there should be proof on oath that there is reasonable suspicion of commission of an offence.

28. Police officers or other state agents cannot without a search warrant, lawfully enter upon and search any premises, nor can they carry away any property without the authority of the court. From the provisions of the *Criminal Procedure Code*, the onus is on the person seeking the search warrant to prove the necessity for such warrant. In *Vitu Limited v The Chief Magistrate Nairobi & two others* the court stated: -

"It is therefore expected that when a police officer or any other investigator approaches the Court for a warrant, there must be reasonable suspicion of an offence being about to be committed or having been committed..."

29. As observed above, there is no contest as to the manner in which the search warrant was obtained or enforced. The contestation as I see it relates to the long delay in concluding the investigations and the long detention of the seized documents/items which the Petitioner describes as an embargo to its right to have his documents and access to property. He is also aggrieved by the caveat imposed on his properties. It is argued that that the conservatory orders lapsed and a competent court so held. That is not disputed. But the counter argument proffered by the Respondent is two-fold. One, pursuant to the provisions of the *Mutual Legal Assistance Act*, the Respondent is still waiting for response from the Federal Republic of Germany; and, two, notwithstanding the delay, the Petitioner still has an obligation to explain how he acquired the said properties. These two questions remain unanswered.

30. The Petitioner deployed a lot of energy explaining his displeasure over the 10 years plus delay in finalizing the investigations. At one point the Petitioner argued that there are no ongoing investigations. I share the Petitioner's concern that there has been an inordinate delay in finalizing the investigations. However, much as the delay is worrying and without demeaning the reason proffered for the delay, the Petitioner appears to have overlooked the twin issues confronting him, which are: - (a) the criminal investigations which have taken long to be finalized; and, (b) the legal requirement under the law that he is obligated to explain the source of his wealth. This later legal requirement easily dislodges the Petitioner's complaint. This requirement is essentially a civil claim properly founded on



- the law. The Petitioner has an obligation to explain how he acquired the properties. The Petitioner has a burden to explain the source of his wealth. The principle of unexplained assets is based on the aspect that a person who has assets that are not in any way comparable to his known legitimate source of income and the fact that he or she cannot not explain satisfactorily the source of the assets.
31. The rationale for the above burden here as I see it is that when a public official cannot explain his or her asset that may be regarded as unjust enrichment. Article 20 of [United Nations Convention Against Corruption \(UNCAC\)](#) defines illicit enrichment as a “significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. UNCAC was signed and ratified by the Republic of Kenya of 9th December 2003. In *Stanley Mombo Amuti v Kenya Anti-Corruption Commission*, the Court of Appeal stated that: - “entrenched in the Act is the concept of “unexplained assets” which is a legal innovation to combat the vice of “doubtful source of wealth, money laundering and suspicious corrupt practices.” Underlying the concept is the theme “You fail to satisfactorily explain the lawful source of assets, you forfeit it.”
 32. Section 55 of ACECA provides for the basis of forfeiture of unexplained assets. Section 55(2) (a) provides that EACC may commence proceedings under the section against a person if, after investigation, the Commission is satisfied that the person has unexplained assets. The process envisioned by section 55 of the Act is regarded as a non-conviction-based asset forfeiture. Clearly, the Petitioner appears to have overlooked this process.
 33. Section 2(1) of ACECA defines “Unexplained assets” means assets of a person – “(a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and (b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.” Section 2(1) of ACECA offers a clear threshold in making the determination of what constitutes unexplained assets.
 34. The Court of Appeal in the Amuti’s case summarized the threshold for existence of unexplained assets as per sections 2 and 55(2) of ACECA to be “(i). There must be set time period for the investigation of a person; (ii). The person must be reasonably suspected of corruption or economic crime; (iii). The person must have assets whose value is disproportionate to his known sources of income at or around the period of investigation and (iv). There is no satisfactory explanation for the disproportionate asset.” Section 26 of ACECA requires a person to offer an explanation as to how the assets under investigations were acquired. The onus is therefore on the person to clearly explain how he or she acquired the assets. The Petitioner seeks orders which have the potential of exonerating him from the provisions of section 26 of ACECA citing alleged breach of constitutional rights which is impermissible and an affront to the cannon of constitutional interpretation which requires a holistic approach as opposed to hoisting high one provision over others. As was held in [Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission \(Interested Party\)](#) that “where the person against whom allegations have been made does not give a satisfactory explanation to rebut the allegations, it means what has been presented is not challenged.”
 35. I am acute aware that before me is not are not proceedings for asset recovery. The point am making is that there is a danger of the orders sought in this case if granted forestalling any asset recovery proceedings should they be preferred. The instant Petition is a thinly veiled attempt to use the court to assist in evading the wrath of the legal provisions governing asset recovery. Simply put, the orders sought I granted will be contrary to the law on asset recovery and an affront to public interest.
 36. Section 55(3) of ACECA provides that proceedings under the Act shall be commenced by Originating Summons and the proceedings are of a civil nature where the standard of proof is on balance of probability. The Commission during the proceedings is not required to prove that there was criminal



conduct on the person who is under investigations. Hence in such proceedings, the question of innocence does not arise. The Petitioner appears to have focused on the aspect of possible criminal prosecution and overlooked the equally important aspect of the provisions of ACECA which govern the concept of unexplained assets and its forfeiture.

37. As was held by the Court of Appeal in the Amuti case, that “the concept of “unexplained assets” and its forfeiture under sections 26 and 55 (2) of ACECA is neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. Sections 26 and 55 of ACECA are non-conviction based civil forfeiture provisions. The Sections are activated as an action in rem against the property itself. The sections require the Anti- Corruption Commission to prove on balance of probability that an individual has assets disproportionate to his/her legitimately known sources of income. Section 55 (2) of the Act make provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it...”
38. In any event, Section 55(2)(b) requires EACC to ensure that a person who is under investigations for unexplained assets to be afforded a reasonable opportunity to explain the disproportion between the assets concerned and his or her known legitimate sources of income. If the Commission is not satisfied with the explanation, it may file proceedings under the section. This position was underscored in *Jimmy Mutuku Kiamba & 3 others v Ethics & Anti-Corruption Commission & 4 others* which held that sections 55 and 56 of the ACECA have provision for a person suspected of having corruptly acquired assets to give an explanation.
39. In my view, the Petitioner should (as be required by the above provisions), table evidence before the Respondent to prove ownership and allow the legal process to take its full course. It has been said that for over 10 years, he is yet to record a statement with the Respondent. He cannot turn around and cite delay in concluding the investigations. In fact, to a great extent, the key to the release of his documents/ items is in his pocket and he has failed to unleash it. By now inviting this court to issue orders sought in this Petition, the Petitioner in my view seeks orders which may shield him from offering the explanation required from him under the law. Such orders if granted will undermine the various provisions of the law cited above. I decline the invitation to travel that route and refuse to grant the orders sought.
40. The above finding essentially disposes this Petition. It renders the orders sought particularly the alleged breach of constitutional rights or the provisions of *the Constitution* totally unavailable from this court. In any event, no breach of rights or breach of constitutional provisions have been proved. It’s not enough to cite provisions of *the Constitution* and claim violation. Much more is required. Article 40(6) provides that the right to property does not extend to any property that has been found to have been unlawfully acquired. Under the law, the burden lies on the Petitioner to demonstrate that the properties in question were lawfully acquired. Its only after discharging this burden and establishing bad faith on the part of the Respondent that the Petitioner can mount a claim for the alleged violations, and even then, he will have to surmount the tests of establishing that the Respondent acted outside the law and abused its powers.
41. In view of my analysis of the facts, the submissions by the parties, the law and authorities, the conclusion becomes irresistible that this Petition must fail. Accordingly, I dismiss the Petition dated November 20, 2020 with no orders as to costs.

Orders accordingly.

SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF JULY 2022



JOHN MATIVO

JUDGE

SIGNED, DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2022

Olga Sewe

Judge

