



**Hongo & 2 others v Muthaura & 4 others (Petition 467 of 2017) [2022] KEHC 13288 (KLR)
(Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 467 OF 2017

HI ONG'UDI, J

SEPTEMBER 30, 2022

BETWEEN

**PETER HONGO 1ST PETITIONER
PAUL MURGOR 2ND PETITIONER
PAMELA LUTTA 3RD PETITIONER**

AND

**PAUL MUTHAURA 1ST RESPONDENT
CAPITAL MARKETS AUTHORITY 2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT
INSPECTOR GENERAL OF POLICE 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

JUDGMENT

1. The petitioners filed petition dated September 21, 2017 seeking the following reliefs:
 - A. A declaration be made that warrants issued pursuant to the Chief Magistrates Court Miscellaneous Application Nos 1128, 1129 and 2207 all of 2017 to investigate the 1st petitioner's bank account No xxxx at Prime Bank Nakuru Branch, bank accounts No xxxxx and No xxxx at Prime Bank Riverside Westlands Branch respectively obtained irregularly, illegally and unlawfully on the basis of a defective affidavit hence unconstitutional.
 - B. A declaration be made that the action by the 1st respondent to circulate to third parties the 1st petitioner's bank account statements and details No xxxx at Prime Bank Nakuru Branch,



bank accounts No xxxx and No xxxx at Prime Bank Riverside Westlands Branch was irregular, illegal, unlawful and violated the 1st petitioner's right to privacy hence unconstitutional.

- C. A declaration be made that the purported investigation by the 1st and 2nd respondents of the petitioners personal bank accounts in various banks within Kenya contravenes article 27 (equality and freedom from discrimination), article 28 (right to human dignity), article 31 (right to privacy) and article 47 (right of fair administrative act) and article 50 (right to fair hearing) of the Constitution of Kenya and its therefore illegal, irregular, unlawful and unconstitutional.
- D. A declaration be made that section 11(3) (h) of the Capital Markets act cap 485A which gives the 2nd responder powers to commence investigations against a person on its motion without giving prior written notice to the affected person is ultravires article 31 (right to privacy) and article 47 (right of fair administrative action) and article 50 (rights to fair hearing) and therefore unconstitutional, null and void.
- E. An order of permanent injunction be issued restraining the 1st, 2nd and 4th respondents, whether by themselves, agents, servants, proxies and/or any other person acting under their authority or direction from investigating the bank accounts of the petitioners during and after the end of their employment at Mumias Sugar Company Ltd.
- F. An order of permanent injunction be issued restraining the 1st, 2nd and 4th respondent, whether by themselves, agents, servants, proxies and/or any other person acting under the authority or direction from continuing with the purported inquisitorial administrative inquiry on allegations based on the media sources.
- G. An order that the 1st and 2nd respondents be and hereby jointly and severally compelled to compensate the 1st petitioner for damages and/or loss arising from violation of the 1st petitioner's right to privacy and to fair administrative action.
- H. An order that the 1st and 2nd respondents be and hereby jointly and severally compelled to compensate the 2nd and 3rd petitioners for damages and/or loss arising from violation of their right to fair administrative action.
- I. Any other relief that this honourable court may deem fit and just to grant in the interest of justice.
- J. The honourable court be pleased to award the costs of this petition to the petitioners.

Petitioner's Case

- 2. The petitioners' case is supported by the 1st, 2nd and 3rd petitioners supporting affidavits sworn on September 21, 2017 and response to the 1st respondent's replying affidavit sworn by the 1st petitioner on October 17, 2017. A summary of the petitioners' case is that they were employees of Mumias Sugar Company (MSC) in various capacities between the years 2007 to May 2017, September 2008 to August 2014 and February 1999 to May 2016 respectively.
- 3. Vide a letter dated January 12, 2017 sent by various emails, the 2nd respondent requisitioned for their interview. The said letter included an information notice apart from the summons for a meeting with the 1st respondent's investigators but did not require them to avail their bank accounts and statements to the 1st respondent in relation to the investigation of their tenure as the former head of sales and marketing, commercial director and head of marketing respectively of MSC.



4. They attended the said interview as scheduled and subsequently there was no communication from the 2nd respondent as regards the interview but for the availing of the interview transcript to the 2nd petitioner.
5. On March 29, 2017 and July 10, 2017 respectively, CPL Kodheck Omari an investigator with the Capital Markets Fraud Investigation Unit of the Directorate of Criminal Investigations on the request of the 2nd respondent obtained a warrant in the Chief Magistrates Court Miscellaneous Application Nos 1128, 1129 and 2207 all of 2017 to investigate the 1st petitioner's Account Nos xxxx at Prime Bank Nakuru Branch for the period 1st February 2011 to date and xxxx at Prime Bank Riverside Westlands Branch respectively for the period January 1, 2010 to December 31, 2010.
6. It is averred that the affidavits used to obtain the warrants were not executed in accordance with sections 5 & 12 of the Oaths & Statutory declarations Act. Vide a letter of notice to show cause (NTSC) dated July 31, 2017 and issued by the 1st respondent, the 1st and 2nd petitioners were accused of providing excessive discounts amounting to Kshs 3.1 billion, to some customers.
7. In the said notice the 1st respondent circulated the 1st petitioner's bank account statement and details to a number of third parties, including the 2nd and 3rd petitioners. Investigations carried out had nothing to do with the contents of the NTSC.
8. In a further letter dated June 12, 2017 addressed to the Banking Fraud Investigation Unit the 2nd respondent through the National Police Service decided to investigate all the personal accounts of the petitioner's. An order of stay was obtained vide Pet No 79/2017 (Dr Evans Kidero v Ethics & Anti-corruption Commission) staying the investigation of the petitioner's personal bank accounts. In the said petition the 3rd and 4th respondent are parties. That they wish to circumvent the order so as to investigate them.
9. The actions of the 1st and 2nd and 4th respondents violated articles 27, 28, 31, 47 and 50 of the Constitution. Further section 11 (3) (h) is unconstitutional as it contravenes article 47 and 10 (2) (a) of the Constitution.
10. In the response to the 1st respondent's replying affidavit, the 1st petitioner reiterated the contents of the petition on the 1st respondent circulating his bank statements to third parties and that having misled the Chief Magistrates Court. The information obtained pursuant to the warrants to access the bank accounts were purportedly being used by the 1st and 2nd respondent to investigate a different issue of excess discounts given to select customers of Mumias Company Ltd.
11. He depones that all the investigations were meant to circumvent the court order of September 26, 2017. Further that there is a process in the MSC Sugar & Administration Policy 2010 on how discounts or quantities of sugar are negotiated and approved by the Head of Sales & Distribution and Managing Director. Despite their advocates writing requesting for price lists of sugar the 2nd respondent replied saying the same was not in issue. Further no report of the theft of Kshs 16,419,432/= has even been supplied.
12. It was the 1st petitioners submission that several conservatory orders were issued by this court against the respondents but they were not complied with as investigations continued in their personal accounts.
13. He suspected the order from the court on investigations as the name of the Magistrate was not shown. He denied their having been given a right to be heard through the NTSC; as the 1st petitioners bank details were in the public domain prior to the NTSC hearing.



14. It was his case that the 1st respondent has admitted that no notices were issued to petitioners to furnish information on their personal bank accounts and that they exercised their discretion to proceed without the said notification. Further the 1st respondent has misdirected himself that investigation is not an administrative acting subject to the requisites of article 50(1) and 47 of the Constitution.

The 1st and 2nd Respondents' Case

15. The 1st and 2nd respondents filed a replying affidavit by Paul Muthaura sworn on October 6, 2017. He deposed that no allegation was made against him in the petition of personal conduct that was not in good faith in any of his decisions. Thus, the case against him should be dismissed.
16. He deposed citing sections 11 (1)(c), & 11(3) of the Capital Markets Act, which outline the functions, objectives of the Authority including appointment of an auditor. Further under section 13A and B of the Capital Markets Act the Capital Market Authority has power to obtain search warrants, entry, and to obtain documents held by a bank where it has reasonable cause to believe on its own motion or upon receipt of a complaint, that a person may have committed an offence under the Act and/or engaged in embezzlement, fraud, misfeasance or other conduct in connection with a regulated activity.
17. It further has the powers to require any person whom the investigator reasonably believed or suspects to be in possession or in control of any record or document which contains, or which is likely to contain, information relevant to an investigation to produce documents or records as required by the Authority; give an explanation of further particulars on such documents or records; attend before the investigator to answer questions put forward pertaining to the investigation; and assist the investigator to the best of their ability; the contravention of which requirement by any such person constituting an offence.
18. He deposed that Mumias Sugar Company Limited is a public listed company whose shares are traded at the Nairobi Stock Exchange hence Capital Market Authority has oversight on the affairs with a view of protecting the investing public to foster public confidence in the Nairobi Stock Exchange and capital markets. He averred that the CMA commenced an inquiry into the affairs of MSCL in 2015 which subsequently led to investigations into the petitioner's bank accounts of the petitioners. This was after there had been reports in the media from mid-2014 suggesting that MSCL was experiencing both financial and operational challenges.
19. Due to security issues CMA enlisted the services of M/s John Miles Arbitration Investigations & Consultancy Limited to carry out the forensic audit inquiry pursuant to section 11(m) of the Act. The petitioners were notified and requested to present themselves for interviews. At the end of the exercise a report was submitted. Based on it CMA made further inquiries including the roles played by the petitioners in the affairs of MSC. This led to the need to obtain the petitioners personal bank accounts. That's how the Capital Markets Fraud Investigation Unit came on board.
20. During the inquiry, it was noted that the senior management of MSCL issued excessive trade discounts in form of credit notes to certain customers which was contrary to best interest of MSCL noting that the discounts were above the 10% approval limited to management. It was further established that no board approval was sought before granting the approvals of discounts in excess of the 10% management limit.
21. That in the cause of the inquiry, records in the form of three months bank statements for the period between March to May belonging to the 1st petitioner were uncovered evidencing what appeared to be suspicious and substantial cash inflows and out flows which were not commensurate with the 1st petitioners known income at MSCL. This raised reasonable suspicion in the perception of the CMA



- that the 1st petitioner's bank account may have been a collection and distribution account for monies due to MSCL but irregularly redirected to persons working for or related to those working at MSCL.
22. A court order was obtained for the search of the 1st petitioner's account at Prime Bank Ltd. It revealed shady transactions to the accounts of the 2nd & 3rd petitioners. From the findings a further application was made before the Nairobi CM's Court for warrants to investigate the petitioners' accounts, and the same was granted. The affidavits in support of the application were not defective and were accepted by the magistrate.
 23. He deponed that the petitioners were given a hearing platform before the CMA board to answer to the allegations against them. All the information sought was furnished to them vide their letter of September 15, 2017. They were given more time to respond to the NTSC. He denied any discrimination against them, saying there were eight (8) other individuals excluding the petitioners. He also denied claims that the investigations were a scheme to intimidate Dr Kidero.
 24. He further deponed that the request to investigate the accounts was not an invasion of the petitioners privacy as it was based on reasonable apprehension that the bank accounts may have been used in the commission of illegal acts relating to MSC. There was a lawful court order, in place.
 25. On the alleged unconstitutionality of section 11(h) of the *Capital Markets Act*, he averred that the position taken by the petitioners is incorrect and it is misleading for the petitioners to aver that the CMA's power to investigate on its own motion under section 13(h) of the *Capital Markets Act* constitutes an adverse action which is to investigate a person with the intention to find a person culpable. An inquiry is not an administrative action, it is a fact-finding exercise, where persons of interest are interviewed, relevant documents examined and relevant data analysed and CMA only takes enforcement administration action after issuing the persons adversely mentioned in inquiry with a NTSC which gives them an opportunity to be heard and defend themselves.
 26. Further that it is misleading for the petitioners to state that the CMAs power to commence an inquiry on its own motion into the affairs of persons or entities under its oversight pursuant to section 13 (3) (h) of the *capital Markets Act* was enacted in the year 2011 through the Amendment No 37 of 2011 and consequently there was a requirement for public participation under the *Constitution*. The power of the CMA to commence an inquiry of its own motion was legislated in 1989 when the Capital Markets Authority was first passed by parliament under section 11(2)(g) of the Capital Markets Authority Act. This enactment was substantially before the passage of the 2010 Constitution and article 10 was not in force.
 27. That the only amendment to the CMA's power to inquire on its own motion carried in Amendment No 37 of 2011 on the said provision now section 11(3) (h) is to add the following words at the end of the provisions "or on an over the counter market". It is those amending words of the original provisions of section 11 (3) (h) of the *Capital Markets Act* that were subject to the requirement of public participation. The Amendment No 37 of 2011 was passed by Parliament after public participation had been undertaken.
 28. Further that contrary to the petitioners suggestions the power to require information from a party is separate and distinct from the power to inquire by the CMA. He averred that they carried out their duty as per the law under sections 11(3) (h) & 13 (1) of the Act.
 29. Regarding the proceedings in Petition No 78 of 2012, he averred that the same are separate and distinct from the current; the petitioners are neither parties to the suit nor are the subject accounts in the present petition the subject of the proceedings therein or the orders that were issued therefrom. The said petition was concerned with seeking orders to stop the ECAAA from investigating specific



accounts by staying the warrants that had been issued to the EACC investigators to investigate the specific accounts which are not related in any way to the petitioners or the subject matter is this suit; CMA has never conducted any joint investigations with the EACC nor participated in any proceedings where the EACC obtained warrants to investigate the petitioners accounts; CMA is not a party to the proceedings in the said petition and was therefore not aware of the stay orders therein.

30. He deposed that the fact pattern set out above was not created by the CMA. It exists from documents and investigations conducted by CMA and it would therefore be stretching the extent or probability that the set of circumstances were made to exist for the sole purpose of circumventing the stay orders in the petition aforementioned.

The 3rd Respondent's Case

31. The 3rd respondent filed grounds of opposition dated October 16, 2017. The summary of the grounds is that:
- i. The warrants to investigate the accounts of the petitioner were lawfully issued pursuant to section 180 of Evidence Act cap 80 as read with section 118 & 121 of the Criminal Procedure Code cap 75.
 - ii. The petitioner's rights under article 31, 40, 47, 50(1) are subject to constitutional limit enshrined in article 24 of the Constitution so as to protect public interest underlying the detention, prevention and prosecution of crimes.
 - iii. That article 24(3) (a) (i) is clear that property such as personal account can be properly searched, and such a search, if properly found, cannot be a basis for a breach of right of privacy.
 - iv. That indeed the purpose of warrants is to protect the right of a person from unreasonable searches and seizures and unnecessary arrest in tandem with protections conferred by article 29 and 31 of the Constitution. Therefore, the duty imposed on the Judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual. The court ought to be satisfied that reasonable course is established in order to issue search warrants.
 - v. Therefore it is submitted that there was reasonable basis which the investigator sought to investigate the Bank Accounts based on reasonable suspicion established in the supporting affidavit.
 - vi. That though article 40 (1) of the Constitution protects any property that is capable of being owned by any person including bank accounts. the petitioner's bank accounts have not been frozen, they have not been denied access or money appropriated from their accounts. Therefore, there is no violation of right to property. That in any event the petitioner's' right under article 40 of the Constitution does not extend to any property that has been found or suspected to be unlawfully acquired.
 - vii. That the petitioners assert breach of the right to issue a prior notice pursuant to section 31 of the Capital Markets Authority Act, and a clear reading of section 118 & 121 Criminal Procedure as read with section 80 of the Evidence Act cap 80 an application to for warrants to investigate accounts under does not require a prior notice.
 - viii. That the petitioner has not demonstrated *prima facie* case with likelihood of success that there is real or threatened, abrogation, breach or violation of the Constitution or fundamental right and freedoms and/or any others written law.



The 4th and 5th Respondents' case

32. The 4th and 5th responses filed grounds of opposition dated May 19, 2022 raising the following grounds:
- i. The orders sought by the petitioner in application dated October 17, 2017 are final in nature and have the effect of determining the petition.
 - ii. Both the application and petition offend and seek to unjustly curtail the authority and exercise of constitutional and statutory powers and functions of the offices of the 4th respondent as provided for under articles 245 of the *Constitution*.
 - iii. The impugned actions of the 4th respondent as outlined by the petitioners in their pleadings have been reasonably undertaken in good faith and upon lawful and relevant grounds anchored upon the *Constitution* and statute law; in particular sections 24 of *National Police Service Act*.
 - iv. In exercise of its constitutional powers and functions, the 4th respondent is bound by the national values and principles of governance as provided for under article 10 where public interest, interests of the administration of justice and the need to prevent and avoid abuse of legal process must be observed.
 - v. The constitutional and statutory mandate conferred upon the 4th respondent can only be interfered with by court where it has been sufficiently demonstrated that they have acted arbitrarily and contrary to their constitutional powers and mandates.
 - vi. The mere allegation that a human right or fundamental freedom of the petitioners has been or is likely to be contravened is not of itself sufficient to entitle the petitioners the remedies sought. The petitioners must demonstrate real danger so imminent and evident, true and actual and not fictitious; so that it deserves immediate redress by this honourable court.
 - vii. Conducting investigations is a legal process provided for by law with specific constitutional safeguards, and do not amount to infringement on the fundamental rights and freedoms of the petitioners.
 - viii. The investigating falls within the mandate of the National Police Service the alleged infringement could not be levelled against the 4th respondent.
 - ix. If the orders sought in this application and petition are granted, it will be tantamount to the determination of investigation and any likely or probable prosecution of the petitioners for their alleged criminal conduct.10. No evidence has been adduced before the court to show that the petitioners have suffered prejudice, damages or violation of their rights and freedoms under the *Constitution* as a result of the ongoing investigations thus rendering their continued investigation an outright abuse of constitutional powers.
 - x. The petition is merely based on unsubstantiated apprehension since the petitioners have not demonstrated that unless the temporary orders are granted, there is real danger which will be prejudicial to them.
 - xi. The petitioners have filed this petition purely to frustrate the investigations against them. They ought to face their accusers, prove their innocence or otherwise and submit to the consequences of the law if found culpable.
 - xii. The prayers sought in the petition against the 4th respondent have been overtaken by events.



- xiii. Both the application and petition are frivolous, without merit, an abuse of the court process and ought to be dismissed with costs to the respondents.

The Petitioners' Submissions

33. The petitioners filed submissions through Apollo & Co Advocates dated October 30, 2020. Counsel relied on Civil Application 26 of 2018 *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* and reiterated that the oath two the two affidavits administered by the Chief Magistrates Court were not in compliance with sections 5 and 12 of the Oaths and Statutory Declarations Act.
34. He reiterated that the warrants issued by the court on the strength of the two affidavits dated July 29, 2017 Cpl Kodheck Omari stated that the Directorate of Criminal Investigations is undertaking investigations relating to the theft of Kshs 16,419,432/= by way of fraudulent shares of MSC for which the said bank account was opened and the proceeds of sale were banked. However the NTSC to the petitioners alleged that between 2009 to 2012, the 1st and 2nd petitioners together with senior managers of the MSC provided excessive discounts at the point of sale or subsequently through credit notes to select customers amounting to Kshs 3.1 billion allegedly above the Board approved rate of 10%.
35. Relying on Petition 113 of 2006 *Standard Newspapers Limited & another versus Attorney General & 4 others*, they argued that a police officer is not legally empowered to apply for or obtain a warrant of a person's bank account just because he imagines that someone may commit or has committed an offence. There must be substantial acts and circumstances already available to the police officer to enable him create or to have a reasonable suspicion in mind that the account holder has committed an offence and there must have been a complaint. Also relying on the case of *William Moruri Nyakiba & another vs Chief Magistrate Nairobi & 2 others*, Misc Crim Appli 414 of 2006 [2006] eKLR, counsel submitted that instead of the 1st and 2nd respondent placing the evidentiary material obtained before the court as required of them by the law, they started distributing the bank statements of the petitioners.
36. Regarding misuse of the warrants, they submitted that instead of taking the evidence retrieved to court twenty days later, by a letter dated July 31, 2017, the 1st respondent issued a letter of NTSC to the 1st, 2nd and 3rd petitioners. It was alleged that between 2009 and 2012, the 1st and 2nd petitioners together with senior managers of the MSC provided excessive discounts at the point of sale or subsequently through credit notes to select customers amounting to Kshs 3.1 Billion allegedly above the Board approved rate of 10%.
37. It was counsel's submission that the *Companies Act*, 2015 deals with issues concerning the company while the CMA deals with securities and traded shares hence the allegations that the 1st and 2nd petitioners together with senior management officers of the MSC provided excessive discounts at the point of sale or subsequently through credit notes to select customers amounting to Kshs 3.1 billion allegedly above the board approved rate of 10% was not within the purview of the CMA. It was an attempt to usurp the powers of the director and internal mechanisms of a company to handle the conduct of its employees. Further that issues involving alleged impropriety of an employee of a company regarding sale of its manufactured products are governed by relevant company manuals.
38. He contended that the investigations being undertaken by the 2nd respondent as contained in the NTSC to the 1st and 2nd petitioners are not related to the reasons for which the warrants were obtained from court that led to the access to the petitioner's bank accounts which was theft of Kshs 16, 419, 432 by way of way fraudulent shares of MSC Counsel reiterated that Since the company nor its board have levelled such allegations, the CMA exceeded its statutory mandate by suo moto purporting to



- investigate the petitioner. He relied on section 11 of the [CMA](#) and the case of [Chadwick Okumu v Capital Markets Authority](#) [2018] eKLR.
39. On the violation of right to privacy, he submitted that in issuing the NTSC, the 1st respondent was in violation of the 1st petitioner's rights to privacy, by circulating bank accounts statement and details to several third parties including Dr Evans Kidero, Mr James Chege, the 2nd and 3rd petitioners without his consent. He relied on article 31 of the [Constitution](#) and the cases of High Court Petition No 628 of 2014 consolidated with Petition No 630 of 2014 and Petition No 12 of 2015 [Coalition for Reform Democracy \(CORD\) & 2 others vs Republic of Kenya & 10 others](#); Petition 4 of 2011 [Samura Engineering Limited 7 10 others v Kenya Revenue authority](#) [2012] eKLR for the argument that every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed.
40. Regarding violation of the right to fair administrative action, and while relying on article 47(1) of the [Constitution](#), counsel submitted that every citizen has a right to fair and reasonable administrative action that is allowed by the law; and to be given reasons for administrative action that affects in them in a negative way. He submitted that the 2nd respondent through the letter dated January 12, 2017 issued an information notice to the petitioners detailing all information that it required from them and there was no request for provision of particulars of the 1st petitioner's personal bank account details in the information notice therein. By virtue of section 13(1) of the [Capital markets Act](#), the 1st respondent had the statutory duty to give notice in writing to the 1st petitioner.
41. It was counsel's submission that the 1st & 2nd respondents should have forwarded the information received from the bank accounts to the court that issued the warrants. Secondly the 1st & 2nd respondent's jurisdiction does not include investigation of all or any employees of a listed company on operational issues that are within the purview of the Board of directors. He submitted that the petitioners were taken through the process without any formal complaint and were not accorded the right to cross examine their accusers. Counsel relied on
- i. Petition No 353 of 2012 [Geothermal Dev Company Ltd v Attorney General & 3 others](#);
 - ii. Petition No 385 of 2016 [Ernst & Young LLP v Capital Markets authority & another](#) [2017] eKLR
 - iii. Section 4 (3) & (4) [FAAA](#).
42. Relying on High Court Petition No 628 of 2014 consolidated with Petition No 630 of 2014(supra) they argued that to the extent that section 11(3) (h) of the CMA gives the 2nd respondent power to take an adverse action investigating with intent to find a person culpable without giving notice it violates article 47 hence unconstitutional.
43. He submitted that the petitioners ceased being employees of the MSC in May 2014, August 2014 and May 2016 respectively yet the 2nd respondent is seeking to investigate their personal bank accounts for periods after they had ceased being employees of the MSC hence was malicious and it acted ultra-vires the objects of the Capital Markets Authority as enshrined under sections 3 and 11 of the [Capital Markets Act](#). It was therefore unlawful as it was done contrary to sections 11 and 13 of the Act and infringed on the right to privacy under article 31. They relied on *Berstein vs Bester* NO (1996) (2) SA 751 in support.
44. Counsel submitted that the 2nd respondent violated article 27 by singling them out from other employees during the tenure and making them the sole subject of investigation when it is the decision of the Board that is under scrutiny.



45. On the constitutionality of section 11(3) (h) of the *Capital Market Act*, he submitted that the same was enacted pursuant to amendment 37 of 2011 after the new *Constitution*. Article 10 (2) (a) makes it mandatory for public participation to be taken into account in the enactment of any provisions of the law. They relied on Petition 120 of 2017 *Josephat Musila Mutua & 9 others v Attorney General & 3 others* [2018] eKLR for that argument.
46. Counsel submitted that the said investigations constituted intimidation, harassment with the aim of humiliating and degrading them in the eyes of general public in violation of article 28 of the *Constitution*. He thus argued that the petitioners had established a *prima facie* case with a likelihood of success and the court needs to grant the orders sought.

The 1st and 2nd Respondent's Submissions

47. The 1st and 2nd respondents submissions dated April 22, 2022 were filed by Githendu Eric Timothy advocate. The issues raised were:
- a. The propriety of the suit against the 1st respondent
 - b. Constitutionality of section 11(3) (h)
 - c. Constitutionality or lawfulness of the 1st respondent's investigations
 - d. Whether the petitioners' other constitutional rights have been violated
 - e. Allegations that existence of other court cases bars administrative action
48. On the propriety of the petition, counsel submitted that while the petitioners have sued the 1st respondent personally, section 10(1) of the *Capital Market Act* insulated him against such suits as the petition herein.
49. On the constitutionality of section 11(3) (h), he submitted that the material part of the said section was enacted in 1989. Consequently, the constitutional requirements of public participation were inapplicable to the power conferred upon the 2nd respondent. Further the amendment referred to by the petitioner enacted in 2011 did not in any way impact on the already existing power of the 2nd respondent to inquire into the affairs of the petitioners and is inapplicable in the current situation.
50. Counsel relied on the case of *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others* [2013] eKLR, for the argument concerning the duty of parliament to ensure public participation in the legislative process. He submitted that the members of the public were made aware of the impending amendments to the CMA and that they were afforded an opportunity to participate. Further contrary to the petitioner's assertion, the said section of the CMA predated article 24 of the *Constitution*. It falls outside the purview of the requirements of article 24(2) of the *Constitution*.
51. Relying on the Court of Appeal case of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, he submitted that the right to fair administrative action is not absolute and that section 11 (3)(h) of the CMA imposes a limitation to the notice aspect of the said right. Hence, the 1st respondent had legitimate cause to proceed as it did. Parliament must have been conscious of the risk of the 2nd respondent's investigations being prejudiced through tampering of evidence, if notice was to be given beforehand.
52. Counsel submitted that a similar limitation is imposed by sections 118 and 122(1) of the *Criminal Procedure Code* and section 180 of the *Evidence Act* which allows the courts to issue warrants for investigation, without notice to the targeted party. Further that the investigations conducted by the



respondents are preparatory and are not judicial or quasi-judicial in nature to warrant the application of article 47 of the Constitution. Also no adverse decision has been made in the process as investigations are a step preceding the taking of an administrative action and the petitioners will be afforded an opportunity to respond upon conclusion. They relied on the case of Busia County Government v Ethics and Anti-Corruption Commission [2016 eKLR in support.

53. It was argued that the right to privacy is also not absolute. Counsel reiterated that the fact that the impugned section does not impose the requirement of a notice does not make the said section unconstitutional. Reliance was placed on Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR. Thus, counsel argued that section 11(3) (h) of the CMA is a justifiable limitation to the right to privacy under the Constitution to enable the 1st respondent inquire into the affairs of public listed companies and persons like the petitioners who are authorised and serve such companies. He urged the court to affirm the constitutionality of the impugned section.
54. On the constitutionality or lawfulness of the 1st respondent's investigations, he submitted on three sub headings; allegations of illegal warrants based on supposedly defective warrants; allegations of violations of petitioner's right of privacy under article 31 of the Constitution; and allegations for failure to furnish the petitioners with an information notice under section 13 (1) of the Act.
55. On the allegations of illegal warrants based on defective warrants, he submitted that there was plausible explanation for this. That there was an inadvertent use of the word "shares" instead of "sugar" since the bulk of the investigations ordinarily deal with fraudulent sale of "shares". Further based on the facts pointed put in the respondents replying affidavit, a reasonable suspicion and a clear nexus was provided on why the 2nd respondent moved to court to obtain the warrants in the first instance.
56. Counsel submitted that contrary to the petitioners' assertions, the affidavits in support of the application for the material warrants are not defective as the oath therein was administered before a Chief Magistrate who is a competent person pursuant to sections 8 and 12 of the Oaths and Statutory Declarations Act as read with section 2 of the Magistrate's Court Act, No 26 of 2015. Further the jurat therein, complied with the provisions of section 5 of the Oaths and Statutory Declarations Act.
57. On the allegations of violations of the petitioners' right of privacy under article 31 of the Constitution, and relying on the case of Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption commission & 5 others (supra) counsel argued that investigating one's account is not a violation of ones right to privacy as long as the same is done according to the law. The respondents had reasonable suspicion that the monies obtained through illegal activities at MSC had been channelled through the 1st petitioner's account and distributed to former members of senior management and the board of MSC and related persons. The applicable laws were also followed. They relied on Gordon Ngatia Muriuki vs Director of public Prosecutions & 2 others Petition No 207 of 2014; Innocent Momanyi Obiri v Ethics and Anti-Corruption Commission and another ACEC MISC No 24 of 2019; and Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates and 3 others, on the purpose of warrants.
58. On the allegations of failure to furnish the petitioners with an information notice under section 13 (1) of the Act, it was submitted that the power to require information from a party under section 13(1) of the CMA is separate and distinct from the power to conduct inquiries by the 2nd respondent under section 13(1) of the said Act. Further that the petitioners have misconstrued the provisions of section 13(1) of the CMA by stating that the 2nd respondent was mandatorily required to issue a notice to the petitioners for them to furnish information on their personal bank accounts. The said requirement for



notice is discretionary as the operative word used is “may”. Hence given the nature of the investigations the 2nd respondent was right in proceeding the way it did.

59. On whether the petitioners’ other constitutional rights have been violated, and in regard to article 27, counsel submitted that the same is false as the inquiry covers a total of eight (8) other individuals excluding the petitioners. The petitioners have also not presented any material before the court to demonstrate that there are other persons, in respect of whom, like in this case, there exists a reasonable cause for investigation by the 2nd respondent and against whom no investigation has been instituted. Counsel relied on Tom Ojienda case (supra).
60. Regarding article 28, counsel reiterated that being that none of petitioners’ rights and freedoms have been violated as alleged this allegation cannot stand.
61. On article 47 and 50, he submitted that the provisions of article 50 (1) of the Constitution are inapplicable to the inquiry and investigations conducted by the 2nd respondent who is neither a court of law nor an independent and impartial tribunal or body constituted to hear and determine disputes. He relied on Dry Associated Limited v Capital Markets Authority & another Interested Party Crown Berger (K) Ltd [2012] eKLR for that proposition. On article 47, counsel submitted that the 2nd respondent has demonstrated that it has conducted the investigations in accordance with the law. He further argued that the present inquiry is a fact-finding exercise, where persons of interest are interviewed, relevant documents examined and relevant data analysed.
62. Thereafter the 2nd respondent takes further administrative action which is enforcement proceedings after issuing the adversely affected parties with NTSC which gives them an opportunity to be heard and defend themselves. The petitioners have admitted that the same was done by the 2nd respondent hence there was compliance.
63. On the allegations that existence of other court cases bars administrative action, he submitted that the administrative proceedings in Petition No 79 of 2017 Dr Evans Kidero vs Ethics and Anti- Corruption Commission & others (previously known as Constitutional Petition 78 of 2016) are separate and distinct from the current administrative proceedings; the respondents are also not parties to the said case hence not subject to any orders issued therein and furthermore they have never conducted joint investigations with the EACC into the petitioners accounts (in that case).
64. Counsel submitted that the 2nd respondent was discharging its statutory mandate and was acting without knowledge or reference to the stay orders in the Kidero case. No basis has been laid for that proposition, by the petitioners.

The 3rd Respondent’s Submissions

65. The 3rd respondent filed submissions dated March 30, 2022, through Mr Achochi learned prosecution counsel. He urged the court to dismiss the petition against the 3rd respondent with costs on the premise that no prayers had been made against him. That no allegations in the submissions and pleadings related to violation of rights of the petitioners by the 3rd respondent. Relying on Republic v Principal Secretary, Ministry of Defence Ex Parte George Kariuki Waithaka [2018] eKLR, he urged that no orders should issue against the 3rd respondent.

The 4th and 5th respondents’ submissions

66. The 4th and 5th respondents’ filed submissions dated May 19, 2022 by counsel for the Attorney General. Relying on article 245 of the Constitution and section 24 of the National Police Service Act counsel argued that the National Police Service is a Constitutional body created under the Act. It has a lawful



mandate to conduct investigations in any particular offence including offences relating to procurement and corruption and give effect to the constitutional mandate of investigation of crimes. Counsel relied on *Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR and *Pauline Adhiambo Raget v DPP & 5 others*, (2016) eKLR with regard to the power of the police to investigate.

67. Counsel submitted that prayers against the 4th respondent have been spent and overtaken by events and that the court ought not to act in vain. She relied on *Anita Cbeleagat O'Donovan & 2 others – vs- Fredrick Kwame Kuma & 2 other* (2015) eKLR and *Kalyasoi Farmers Cooperative Society -vs- Paul Kirui & another* (2013), while urging the court to dismiss the petition with costs.

Analysis and Determination

68. Having carefully considered the parties pleadings, submissions, cited cases and the law I find the following issues to arise for determination: -
- i. Whether the warrants were obtained irregularly, illegally and unlawfully on the basis of a defective affidavit hence unconstitutional
 - ii. Whether section 11(1) (h) of the Capital Markets Authority is unconstitutional
 - iii. Whether the 2nd and 4th respondents' acted contrary to the law
 - iv. Whether the petitioners' rights under articles 27, 28, 31, 47, and 50 were violated
 - v. Whether the prayers sought in the petition should be granted

Issue No. (i). Whether The Warrants Were Obtained Irregularly, Illegally And Unlawful On The Basis Of A Defective Affidavit Hence Unconstitutional.

69. Section 5 of the *Statutory Oaths and Declarations Act* cap 15 Laws of Kenya provides as follows:
5. Particulars to be stated in jurat or attestation clause Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.
70. Section 12 provides;
12. Powers of magistrates and certain court officers to administer oaths a magistrate, the Registrar of the High Court, a deputy registrar and a district registrar may administer any oath or affirmation or take any affidavit or statutory declaration (voluntarily made and subscribed in accordance with the provisions of part III) which might lawfully be administered or taken by a commissioner for oaths appointed under part II.
71. In the case of *Regina Munyiva Ndunge vs Kenya Commercial Bank Limited* (2005) eKLR, the court addressed itself to the issue of compliance with section 5 of the *Oaths and Statutory Declarations Act* As follows:

“The second issue raised by the applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the Oaths and Statutory Declarations Act provides that:

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made ... shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”



... The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbuthia, Commissioner for Oaths, on October 13, 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that the stamp was just affixed. This court should have no alternative but strike off the replying affidavit as it is not properly commissioned and that the application would stand unopposed.”

72. The petitioners submitted that the oaths in the two affidavits administered by the Chief Magistrates Court were not in compliance with sections 5 and 12 of *Oaths and Statutory Declarations Act*. That they were purportedly administered before the Chief Magistrate Court Nairobi but not before a judicial officer. They also submitted that warrants were issued for a different cause different from that stated in the NTSC.
73. The 1st respondent submitted that the affidavits in support of the application are not defective as the oath therein was administered before a chief magistrate who is competent pursuant to section 8 and 12 of the *Oaths and Statutory declarations Act*. Further that it complied with section 5 of the said Act. They also submitted that there was an inadvertent use of the word shares instead of sugar since the bulk of investigation ordinarily deal with fraudulent sale of shares. That based on the facts pointed out in the respondents replying affidavit, a reasonable suspicion was provided on why the 2nd respondent moved to court to obtain the warrants in the first instance.
74. I have perused the affidavit being referred to and I note that the same provides the place, the date and before the chief magistrate though not mentioning the name of the chief magistrate. It even has the Court seal and was signed. It is thus not defective. I also note that in the case of Civil Application No 26 of 2018 *Gideon Sitelu Konchellah v Julius Ole Sunkuli & 2 others* before Supreme Court of Kenya the issue there concerned the replying affidavit that was not signed, dated or commissioned. In my view therefore that case is not relevant to the case herein, as the affidavit was properly commissioned.

Issue No (ii). Whether Section 11(3) (h) Of The *Capital Markets Act* Cap 485 A Laws Of Kenya Is Unconstitutional

75. The petitioners submitted that the said section was enacted pursuant to amendment 37 of the 2011 and after the new *Constitution* 2010. That pursuant to article 10 (2) (a) of the *Constitution* it was mandatory for it to undergo public participation before enactment hence unconstitutional as it was enacted without public participation and contravenes article 47 of the *Constitution*.
76. The 1st and 2nd respondents submitted that the material part of the said section was enacted in 1989 before the *Constitution* 2010 hence the requirement of public participation is inapplicable herein. Further that the amendment referred to by the petitioner enacted in 2011 did not in any way impact on the then already existing power of the 2nd respondent to inquire into the affairs of the petitioner. They further submitted that the members of the public were made aware of the impending amendments to the *Capital Markets Act* and that they were afforded an opportunity to participate.



77. Section 107 of the *Evidence Act*, cap 80 Laws of Kenya is trite that whoever alleges must prove. In what way is the said section of the law unconstitutional? The Court of Appeal in Nairobi Civil Appeal 261 of 2018 *Haki Na Sheria Initiative v Inspector General of Police & 3 others* [2020] eKLR held as follows: -

“32. . As we embark on determining whether the impugned sections of the Act pass constitutional muster, we take cognisance of the fact that there is a general, although rebuttable presumption, that a provision of law is constitutional, and that it falls on the party alleging otherwise to prove its claim. This was the precedent set in *Ndyanabo vs Attorney General* [2001] 2 EA 495 where the Court of Appeal of Tanzania held as follows: ...”

78. In *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR the court stated;

“47. There is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples’ representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In *Ndyanabo v Attorney General of Tanzania* [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the country.”

Also see *Zachary Olum and another v Attorney General* (Constitutional Petition 6 of 1999) [2000] UGCC 3 (06 June 2000)

79. Based on the above cited case laws, an impugned section of the law is presumed constitutional and it is for the person alleging otherwise to prove, the unconstitutionality.

80. Section 11(2) (g) of the Capital Markets Authority Act 1989 provided as here under: -

(g) to inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public company the securities of which are traded on an approved securities exchange;

81. Section 11 (3) (h) of the *Capital Markets Act* currently provides:

(h) inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market”;

82. In light of the above cited provisions of the law, I agree with the 1st respondent that the said section of the Act only added “or on over the counter market”. Hence the power of the capital markets authority to inquire on its own motion or pursuant to a complaint and without a requirement for notice has always been there and was made way before the promulgation of the *Constitution* 2010.

83. As for the words added there after the amendment, the petitioners had the onus of demonstrating that there was no public participation before the amendment was made. They have failed to demonstrate so. The 1st respondent on the other hand indicated that the Amendment No 37 of 2011 was passed by parliament after public participation had been undertaken. Hence the said section is not unconstitutional and does not offend the requirement of public participation.



84. On the allegation that section 11(3)(h) offends article 47 of the *Constitution* on the premise that it gives the 2nd respondent power to take an adverse action investigating without giving notice, the 1st respondent submitted that the right to fair administrative action is not absolute and that section 11 (3) (h) of the *Capital Markets Act* imposes a limitation to the notice aspect of the said right. Further that parliament was conscious of the risk of the 2nd respondent's investigations being prejudiced through tampering of evidence if notice is given beforehand.
85. In the case of *Judicial Service Commission Mbalu Mutava & another* [2015] eKLR the Court of Appeal held:
- The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law.
86. It is evident that the right to fair administrative action under article 47 of the *Constitution* is not one of the limited rights and the same can be limited with justification. The 1st and 2nd respondents argued that the rationale for the limitation of such a right is that if the person from whom the inquiry is being sought is given notice they may tamper with the evidence. The 3rd respondent was also in agreement with the 1st and 2nd respondents that the said right is limited. My finding is that this right is not limited and there is justification for the limitation complained about.
87. In arriving at this decision, I am guided by the case of *Evans Odhiambo Kidero & 9 others v Chief Magistrates of Milimani Laws Courts & 6 others* [2020] eKLR, where the court held;
219. To the question whether the 3rd petitioner in that case, the 1st petitioner before me, should have been given notice, the court stated as follows:
117. On whether the third petitioner ought to have been given notice prior to the issuance of the warrant, we are persuaded that the Criminal Procedure Code provides a simple yet effective mode of obtaining authority through the court. The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of the investigations. Section 118A of the Criminal Procedure Code provides that "An application for search warrant shall be made ex-parte before a Magistrate."
118. The order or warrant is never to be granted as a matter of course. To us, to give the notice to the person to be investigated can easily jeopardize the incriminating evidence. On this ground, we entirely agree with Onguto J. in the earlier cited decision in *Mape Building & General Engineering vs A.G & 3 Others*. Clearly, it is understandable why warrants or seizure orders are obtained ex parte when any matter is still at the investigation stage. The justification seems to fall within the provisions of article 24 (1) of the *Constitution*, hence, we find that the allegation for breach of article 50 fails." (Footnotes omitted)
220. The court went on to cite the decision of Onguto J in *Mape Building & General Engineering vs Attorney General & 3 others* (supra) in which the Learned Judge stated:
- "In the circumstances of this case, the warrants and freezing orders were evidently necessary for the purposes of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations the 2nd Respondent was, in my view, justified in making the application for both the warrants and freezing order ex parte."



Issue No. (iii) Whether The 2nd And 4th Respondents Acted Contrary To The Provisions Of The Law

88. The petitioners argued that for a police officer to apply or obtain warrants on a person's bank account, there must be substantial acts and circumstances already available to enable the police officer create or have a reasonable suspicion in mind that the account holder has committed an offence and that there must be a complaint. They further submitted that instead of placing the evidence obtained in court the 1st and 2nd respondents issued a notice to show cause letter and distributed the bank statements of the petitioners to 3rd parties. Further that the warrants obtained were used differently from the reason for which they indicated they were being obtained.
89. Regarding the CMA it was submitted that it is the company that deals with company issues while the CMA deals with securities and traded shares hence the allegation against the petitioners was not within their purview and was an attempt to usurp powers of the director and internal mechanisms of a company to handle the conduct of its employees. They further submitted that the CMA could not on its own motion investigate them as there was no accusation against them either by the company or the board.
90. The 1st and 2nd respondents submitted that the 1st respondent pursuant to section 10 (1) of the Capital Markets Act was insulated against such suits as this was done while acting in their official capacity and in good faith. On the lawfulness of the 1st respondent's investigations, they submitted that they inadvertently used the word "shares" instead of "sugar" and that based on the facts pointed out a reasonable suspicion and a clear nexus was provided on why the 2nd respondent moved the court to obtain the warrants. Their replying affidavit explicitly set out the mandate of the 2nd respondent under sections 11(1) (c), 11(3) and (m), 13A and B of the Capital Markets Act.
91. On the allegation of failure to furnish the petitioners with an information notice under section 13 (1) of the Act, they submitted that the power to require information is separate from the power to inquire by the 2nd respondent. That the petitioners had misconstrued the provisions of section 13(1) of the Capital Markets Act assuming that the 2nd respondent was mandatorily required to issue notice to them to furnish information on their personal bank accounts. Even so the word used is may and not shall.
92. The 3rd respondent submitted that the petitioner did not make any prayers against him and that the petition should be dismissed. The 4th and 5th respondents submitted that the 4th respondent was discharging statutory mandate within the confines of the law and that the prayers against had been overtaken by events.
93. On the mandate of the 4th respondent, article 245 (1) of the Constitution, establishes the office of the Inspector- General of the National Police Service. Sub-article (4) provides for its mandate and the autonomy of that office with regard to, the investigation of any particular offence or offences, the enforcement of the law against any particular person or persons and the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. Article 157 (3) of the Constitution, empowers the Director of Public Prosecution to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and he is required to comply.
94. Section 28 of the National Police Service Act establishes the office of the Director of Criminal Investigation. Section 34 of the said Act provides for the functions of the director and section 35 provides for the functions of the directorate among them, collecting and providing criminal intelligence; undertaking investigations on serious crimes; maintaining law and order; detecting and



preventing crime; apprehending offenders; maintaining criminal records; conducting forensic analysis; executing the directions given to the Inspector General by the Director of Public Prosecution etc.

95. In the case of *Republic v The Commissioner of Police & Director of Public Prosecution Ex parte Michael Monari & another* Misc application No 68 of 2011 the court held;

“It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene. It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”

96. What is evident from the cited provisions of the law and the case is that the mandate of the 4th respondent is not subject to anyone’s control and should not be interfered with unless there is reasonable ground to do so. Looking at the replying affidavit by the 1st respondent, the warrants were obtained after the 2nd respondent had made inquiries and involved the conduct of a forensic audit. It’s after that, that they sought the assistance of the Capital Markets Fraud Investigations Unit to obtain a court order to search the petitioners’ bank accounts. Therefore there was reasonable suspicion and the said warrants were not obtained out of an imagination as alleged by the petitioners.

97. The other point to note is that although the petitioners allege that the warrants were obtained based on a different cause other than that which it was used for, they have not demonstrated any prejudice occasioned to them. In my view therefore, the 4th respondent acted within the confines of the law.

98. On the mandate of the Capital Markets Authority, it is established under section 5(1). Sec 5 (2) of the Act. Section 10 provides- for the extent of liability of actions done in good faith.

99. Section 11 provides for the objectives of the Authority. Section 11 (3) (h) and (m) provides:

h) Inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market”;

(m) appoint an auditor to carry out a specific audit of the financial operations of any collective investment scheme or public company the securities of which are traded on an approved securities exchange, if such action is deemed to be in the interest of the investors, at the expense of such collective investment scheme or company;

100. Section 13(1) provides:



13. (1) The Authority or any person officially authorized in that behalf by the Authority may by notice in writing, require any person to furnish to the Authority or to the authorized person, within such period as is specified in the notice, all such returns or information as specified in such notice.
- (2) The Authority or any member thereof, or any officer or servant of the Authority, shall not disclose to any person or use any return or information acquired under subsection (1) except for the purpose of achieving the objectives of the Authority unless required to do so by a court of law.

101. Section 13A and B provide:

13A (1) The Chief Executive Officer may authorise an officer of the rank of Senior Officer or above to inquire into the affairs of a person under this Act.

- (2) An officer authorised under subsection (1) may, where he is satisfied that a person has committed or is reasonably suspected of committing an offence under this Act in Kenya or elsewhere, apply to a magistrate for a warrant to search the premises of that person.
- (3) The magistrate may issue a warrant authorizing the officer to exercise all or any of the following powers
 - a) to enter any premises between sunrise and sunset to search for money, documents or other assets relevant to the inquiry;
 - b) to seize money, documents or assets which maybe necessary for the inquiry or for the purpose of civil or criminal proceedings and to retain them for as long they are so required; and
 - c) to direct any person who has control over such assets to take any action with respect to such assets as the Authority may reasonably require with a view to protecting the assets until the court determines the appropriate course of action.
 - (4) In the interest of bank confidentiality, the powers of the officer in respect of any documents held by a banker shall be limited to making copies or extracts therefrom.

102. Section 13B provides:

13B. Where the Authority has reasonable cause to believe, either on its own motion or as a result of (1) a complaint received from any person, that –

- (a) an offence has been committed under this Act; or
 - (b) a director, manager or employee of a licensee, approved person or an issuer or any other person, may have engaged in embezzlement, fraud, misfeasance or other misconduct in an issuer, licensee or approved person in connection with its regulated activity; or
 - (c) the manner in which a licensed or approved person has engaged or is engaging in the regulated activity is not in the interest of the person's clients or in the public interest, the Authority may in writing depute a suitably qualified person to conduct investigations into the matter on behalf of the Authority.
- (2) An investigator appointed under subsection (1) may require any person whom the investigator reasonably believes or suspects to be in possession or in control of any record or document



which contains, or which is likely to contain, information relevant to an investigation under this section –

- (a) to produce to the investigator, within such time and at such place as the investigator may require in writing, any record or document specified by the investigator which is, or may be, relevant to the investigation, and which is in the possession or under the control of that person;
- (b) to give an explanation or further particulars in respect of any record or document produced under paragraph (a);
- (c) to attend before the investigator at the time and place specified in writing by the investigator, and to the best of his ability under oath or affirmation answer any question relating to the matters under investigation as the investigator may put to him, and
- (d) to assist the investigator with the investigation to the best of the person's ability.

(3) A person who contravenes the provisions of subsection (2) commits an offence.

103. Based on the above provisions of the *Capital Markets Act* which I have deliberately set out it is clear that the 2nd respondent has the capacity to sue and be sued. By dint of section 10(1) of the said Act, the employees are insulated from suits if they were acting in good faith and in their official capacities. The petitioners have not demonstrated the contrary, hence the suit against the respondents was unnecessary.
104. It is also important to note that under section 11(3) (h) when the 2nd respondent is making an inquiry it does not need the person to whom the inquiry is being made to be given notice. Section 11(3) (m) allows the 2nd respondent to involve an auditor to carry out a specific audit on financial operations of a public company. When seeking for information under section 13(1) of the Act, the word used is may which means that it is not mandatory to send the notice to the person from whom the information is sought. Lastly section 13A and B mandate the authority to designate someone to investigate the affairs of a person on reasonable suspicion. I find that the Authority complied with the provisions of the law.

Issue No (iv). Whether The Petitioners' Rights Under Articles 27, 28, 31, 47, And 50 Were Violated

105. The petitioners submitted that the above-mentioned rights were violated. That by circulating bank accounts statements and details to several third parties and making a decision to investigate all their personal bank accounts the 1st respondent violated their rights to privacy. Regarding article 47 of the *Constitution*, they submitted that through letter dated 12th January 2017 the 2nd respondent issued an information notice to them detailing all the information that it required from them and there was no request for provisions of particulars of the applicant's personal bank account details in the information notice therein. That by virtue of section 13(1) of the *Capital Markets Act* the 1st respondent had the statutory duty to give notice in writing to the applicant.
106. They complained that they were taken through the process without a formal complaint and a complainant, yet they were employees of a limited company; they were not accorded the right to cross examine their accusers and to present witnesses and were not informed of their right to appear with a counsel. On article 27 of the *Constitution*, they submitted that they have been singled out from other employees during their tenure and making them the sole subject of investigation when it is the decision of the Board that is under scrutiny. On article 28 of the *Constitution*, they submitted that the said investigations constitute harassment with the aim of humiliating and degrading them in the eyes of the general public.



107. The 1st respondent submitted that the right to fair administrative action was not absolute and that section 11(3) (h) of the [Capital Markets Act](#) imposes a limitation on the said right. They also submitted that the investigations conducted by the respondent are preparatory and not judicial or quasi-judicial in nature to warrant the application of article 47 of the [Constitution](#). Further no adverse decision had been made against the petitioners in undertaking the investigations and that they would be afforded an opportunity to respond upon conclusion.
108. Regarding the right to privacy, they submitted that the same is not absolute and there was a justifiable limitation to enable the 1st respondent inquire into the affairs of a public listed company. The bank statements were circulated to those who benefitted from the 1st petitioner's account and that they were legally obtained vide a court order. Lastly the statements formed a crucial piece of evidence in support of the NTSC. They dismissed the allegation on Article 27 arguing that there were eight (8) other people who were also being investigated. They dismissed the allegations on articles 28 & 50 the(1) of [Constitution](#).
109. In respect of article 47, they submitted that they had demonstrated that they conducted the investigations according to the law. The present inquiry was a fact finding exercise where persons of interest were interviewed, and all necessary documents examined. The 2nd respondent only took further administrative action which is the enforcement of proceedings after issuing the adversely affected parties with NTSC where they would be given an opportunity to defend themselves.
110. From my analysis I find that there was no breach of article 50 of the [Constitution](#). In [Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger \(K\) Ltd](#) [2012] eKLR the court held that:-
62. Article 47 and 50(1) protect separate and distinct rights which should not be conflated. Although the two rights embody and give effect to the general rules of natural justice they apply to different circumstances. Article 50(1) applies to a court, impartial tribunal or a body established to resolve a dispute while article 47 applies administrative action generally. Article 50(1) deals with matters of a civil nature while the rest of the article deals with criminal trials. Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (cap 26 of the Laws of Kenya) but is to be measured against the standards established by the [Constitution](#).
63. What is clear to me though, is that article 50 is not applicable to the circumstances of this case. The petitioner did not contend that it was entitled to a public hearing as required by article 50(1) nor did I hear it state that it was an accused facing a criminal trial for article 50(2) to apply. It is in the context of a fair trial that some of the cases that were cited by Mr Kahonge must be seen. I will therefore consider this matter as one brought to enforce the provisions of article 47.
111. Regarding article 27 of the [Constitution](#), discrimination was defined in [Peter K Waweru v Republic](#) [2006] eKLR as follows;
- “Under section 82 (3) of the [Constitution](#) of Kenya, “discriminatory” means “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject



or are accorded privileges or advantages which are not accorded to persons of another such description”.

112. The court in the above case further while referring to the [*Black's Law Dictionary*](#) 11th Edition on the meaning of discrimination stated;

“Discrimination” In constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.

Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

113. In the case of [*Mbona v Shepstone and Wylie*](#) [2015] ZACC11, the court therein laid down the factors to be considered in determining whether the conduct complained of amounts to discrimination. It stated thus:-

“(26) The first step is to establish whether the respondent’s policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of the [*Constitution*](#), it is presumed to be unfair... Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair”

114. In [*James Nyasora Nyarangi & 3 others v Attorney General*](#) [2008] eKLR Nyamu J while discussing discrimination stated:

“Discrimination which is forbidden by the [*Constitution*](#) involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word “discriminatory” in section 82 of the [*Constitution*](#).

Both discrimination by substantive law and by procedural law, is forbidden by the [*Constitution*](#). Similarly, class legislation is forbidden but the [*Constitution*](#) does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:-

- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and
- (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question.
- (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification.”

Also see:



- i. [*Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others*](#) [2019] eKLR,
- ii. [*John Harun Mwau v Independent Electoral and Boundaries Commission & another*](#) [2013] eKLR,

115. Based on the above cases, it is evident that for the petitioners to succeed on the issue of discrimination, they must prove unfavourable bias and the said bias must be based on the grounds set out in the [*Constitution*](#). A point to note is that discrimination does not act in isolation; to prove it, a comparison must have been made. In the case herein, the petitioners have not adduced any evidence to show that they were treated any different from other petitioners or other parties. The 1st and 2nd respondents have however submitted that there are eight other persons apart from the petitioners who are being investigated. This was not rebutted. I therefore do not find that this right was contravened.

116. Article 47 of the [*Constitution*](#), provides for the right to fair administrative action. Sub- article (1) provides “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

117. In [*Governmental Organizations Co-ordination Board & another*](#) [2018] eKLR, the Court observed that;

“ 35. the [*Constitution*](#) is the Supreme law of the Republic and decrees as such in article 2(1). It binds all persons and all state organs in the course of performing their duties. The provisions in article 47 to the extent that they require that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person’s right or fundamental freedom, the affected person is entitled to be given written reasons for the action, is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of article `19(1) of the [*Constitution*](#) which states that the Bill of Rights is an integral part of Kenya’s democratic state as the framework for social, economic and cultural policies..”

118. The Court of Appeal in the case of [*Judicial Service Commission v Mbalu Mutava & another*](#) [2014] eKLR emphasized the importance of the right to fair administrative action. It stated;

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. 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.”

119. In interpreting article 47 of the [*Constitution*](#) Korir J in *Egal Mohammed Osman vs Inspector General of Police & 3 others* [2015] eKLR made reference to *Dry Associates Ltd v Capital Markets Authority*



and another Petition No. 328 of 2011, where Majanja J agreeing that the right to be heard is one of the two cardinal rules established under the principle of natural justice and is generally expressed as *audi alteram partem* (that a party should not be condemned unheard).

120. The learned judge further quoted the case of *Onyango Oloo v Republic* (1986- 1989) EA 456 on the right to be heard:

“It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.”

121. Section 4 of the *Fair Administrative Actions Act*, 2015 provides as follows:

- “ 4. Administrative action to be taken expeditiously, efficiently, lawfully etc
1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. Every person has the right to be given written reasons for any administrative action that is taken against him.
 3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - a. Prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. An opportunity to be heard and to make representations in that regard;
 - c. Notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. A statement of the reasons pursuant to section 6;
 - e. Notice of the right to legal representation, where applicable;
 - f. Notice of the right of cross examine or where applicable; or
 - g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 4. The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - a. Attend proceedings, in person or in the company of an expert of his choice;
 - b. Be heard;



- c. Cross-examine persons who give adverse against him; and
 - d. Request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
 6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in article 47 of the Constitution, the administrator may act accordance with that different procedure.
122. In the instant case, I find that the said article was not contravened. I say so because as rightly stated by the 1st and 2nd respondents, the investigations being done were of an inquisitorial nature and it is only after the petitioners have received the NTSC that they would be granted an opportunity to be heard. As at this point in time, the investigations have been done, there has been a probable cause and the NTSC has been issued. It was at this point that came to court prematurely. In my view they have not demonstrated that they have been denied this right. Also looking at the further affidavit in response to the 1st respondent’s replying affidavit, the petitioners admit that they were supplied with information albeit not all the crucial documents. Further looking at the mandate of the 2nd respondent and as has been discussed above their right was not violated. It is also not unlimited as rightly stated by the respondents.
123. On the right to privacy under article 31 of the Constitution, it provides that:
- “31. Every person has the right to privacy, which includes the right not to have—
- (a) their person, home or property searched;
 - (b) their possessions seized;
 - (c) information relating to their family or private affairs unnecessarily required or revealed; or
 - (d) the privacy of their communications infringed.”
124. In the case of Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR Muriithi J ,held
26. In dealing with informational privacy, an aspect also protected under our article 31 (c) of the Constitution of Kenya, the learned authors of the Handbook consider the decision of Mistry v. Interim National Medical and Dental Council of South Africa 1998 (4) SA 1127 (CC), and write as follows:
- “In Mistry the Constitutional Court considered the following factors to be important when considering the informational aspect of the right to privacy: whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicant’s personal life; whether it involved data provided by the applicant for one purpose which was then used for another; whether it was disseminated to the press or to the general public or persons from whom the applicant could reasonably expect such private information would be withheld.



In *Mistry*, information about a possible violation of the law by the applicant was provided by a member of the public to the Medical Council. This information was communicated by the Council to an official who had a statutory responsibility for carrying out regulatory inspections for purposes of protecting the public health. Moreover, all the officials that dealt with the information were subject to the requirements of confidentiality. Needless to say, the Court found no violation of the applicant's right to privacy."

125. This right is not absolute and the reasons for disseminating the materials was explained hence met the threshold of section 24(1) for limiting a right. There is no evidence showing that the material was given to people besides the co-petitioners.

126. On article 28 of the *Constitution*, it provides that every person has inherent dignity and the right to have that dignity respected and protected. The court in the case of *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* [2021] eKLR held that:

" 50. As regards the right to dignity, in *Ahmed Issack Hassan vs. Auditor General* [2015] the Court held that:

"...the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated". See *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) SCR (2) 516."

127. In *Francis Mulomba Nguyo v Nation Media Group Limited & 2 others* [2021] eKLR, Korir J, stated with regard to article 28 of the *Constitution*:

47. In regard to the claim that the Petitioner's right to human dignity was violated by the respondents' actions, I rely on the statement in *Dawood v Minister of Home Affairs*, [2000] (3) SA 936 (CC), as cited at paragraph 132 of the Supreme Court case of *Martin Wanderi & 106 others v Engineers Registration Board & 10 others* [2018] eKLR, that:

"Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. . . dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."

48. The Supreme Court interpreted the cited paragraph to mean that "the right to dignity [is] at the core of a violation of other fundamental rights and freedoms." In other words, where it is established that a right under the *Constitution* has been infringed upon, then the infringement of the right to human dignity under article 28 is highly likely to have also occurred. In this case, I have found that the Petitioner's right to privacy was infringed upon by the actions of the respondents and it therefore follows that his right to human dignity was also violated



128. Just as was the case with the other allegations of constitutional violations the petitioners have failed to prove how their dignity was interfered with by the respondents, who were simply carrying out their mandate in a dignified manner.
129. Having said that, I note that the petitioners submitted that there were stay orders in Constitutional Petition No 79 of 2017 Dr Evans Kidero v Ethics and Anti-Corruption Commission & others staying the investigation of the applicant's personal accounts which petition the 3rd and 4th respondents were party to. The 1st respondent in the replying affidavit submitted that the said proceedings are separate and distinct from the current; the petitioners are neither parties to the suit nor are the accounts in the present suit subject therein; the said petition was seeking to stop EACC from investigating accounts by staying the warrants that had been issued to the EACC investigators to investigate the specific accounts which are not related to the petitioners or subject matter in this suit; the 2nd respondent has never conducted joint proceedings with the EACC; and was not a party to the proceedings.
130. The stay orders issued in Petition No 79/2017 were never pronounced as being applicable to the matter involving the parties herein. Therefore the petitioners cannot hide under that cover, to avoid being investigated.
131. The upshot is that this petition lacks merit and is dismissed with costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

