



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

PETITION NO. 2 OF 2016

MWANGI WA IRIA.....PETITIONER

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATES COURT, MAKADARA LAW COURTS.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The petitioner pleads that his constitutional rights were violated by the respondents through execution of an irregular or unlawful search warrant on his person and residence.
2. He also argued that the conduct was arbitrary and was superintended by an unlawful entity being the Ethics and Anti-Corruption Commission (hereafter *the 1st respondent* or *the EACC*). Those matters are set out at length in the *amended petition* dated 16th October 2018 and in the original deposition sworn on 16th March 2016.
3. The genesis of this dispute can be traced to an *ex parte* search warrant issued on 19th January 2016 by the subordinate court at Makadara in Nairobi (hereafter *the 3rd respondent*). The subject was stated as *Francis Mwangi Wa Iria*, a discrepancy pointed out to the police by the petitioner whose official name is *Wa-Iria Mwangi* or *Mwangi wa Iria*. In that regard, he has annexed a copy of his national identity card marked *MI2*.
4. It is not disputed that on 21st January 2016, officers drawn from the EACC and reinforced by other armed police officers gained entry into the petitioner's home in Gatanga, Murang'a County to execute the warrant. In the process, the petitioner complains that he was assaulted; that the officers confiscated his cell phone and personal documents without making an inventory; and, that he and his family were subjected to inhuman and degrading treatment in breach of the **Constitution**.
5. The petitioner avers that he reported the assault to Kirwara Police Station and was issued with a P3 Form. He also filed a complaint against the EACC officers under O.B Number 16/22/1/2016. He asserts that to date, no action has been taken by the Police or the Director of Public Prosecutions (hereafter *the 2nd respondent*).
6. He deposes that on 8th February 2016, he was summoned by the EACC to answer to a charge of "*obstruction against EACC officers*" during the search at his residence. The petitioner recorded a statement denying the allegations. But on 14th March 2016, at about 14:00 hours, he was arrested by the 1st respondent at Aga Khan Hospital where he had gone to visit a patient. He was detained at the EACC offices at Integrity Centre for nearly six hours. His plea for bail was refused. He claims that he was only released later in the night when Sabina Chege, the Murang'a Women Representative, and other Members of Parliament from the county brought pressure to bear on the police.
7. The petitioner's case is that "*the oppressive, inhuman and degrading manner in which [EACC] carried out the illegal raid....and subsequent arrest clearly points to malice, ulterior motive and unjustified use of power to settle scores*". The score he had in mind was EACC's loss in Nairobi High Court Petition 194 of 2015 two months earlier. In that petition, the High Court quashed the decision by the EACC to prosecute him for the offence of swearing a false declaration.
8. A major plank of the amended petition is that at the time the investigations were conducted; or, the warrant was obtained; or, the warrant was executed, the EACC was not properly constituted for want of a chairman or commissioners. The petitioner contended that in the absence of the chairman or commissioners, EACC could not undertake investigations or make recommendations for prosecution.

9. Reliance was placed on the decisions in *Michael Sistu Mwaura Kamau & 12 others v EACC & 4 others* Nairobi High Court Pet. 230 of 2015 [2016] eKLR; and, the resultant appeal in *Michael Sistu Mwaura Kamau v EACC & 4 others*, Court of Appeal, Nairobi, Civil Appeal 102 of 2016 [2017] eKLR.

10. The petitioner thus seeks various declarations and reliefs which I will set out verbatim-

a) A declaration that the Search Warrant given by the 3rd Respondent on 19th January 2016 in respect of the Petitioner to access and gain entry into his office, residential and business premises and search and carry away documents and given to Mulki Abdi Umar in Makadara Chief Magistrate Miscellaneous Criminal Case No. 41 of 2016: **Ethics and Anti-Corruption Commission versus Francis Mwangi wa Iria**, or any other Search Warrant issued against the Petitioner breached his rights and fundamental freedoms under the provisions of Articles 31, 40, 47(1)&(2), 48 and 50(1) of the Constitution of Kenya, 2010 hence void for all intents and purposes.

b) A declaration that the purported search carried out on 21st January 2016 on the strength of the search warrant given by the 3rd Respondent on 19th January 2016 in respect of Petitioner's office, residential and business premises was null and void for being tainted by illegality and being in contravention of the provisions of Articles 31, 40, 47(1)&(2), 48 and 50(1) of the Constitution of Kenya, 2010.

c) A declaration that no lawful criminal charges of any kind can be instituted or prosecution mounted against the Petitioner and/or his associates, security detail or any other person premised on alleged obstruction or otherwise acts or omission in connection with the search warrant given by the 3rd Respondent on 19th January 2016 or the purported search carried out on 21st January 2016.

(ca) A declaration that in the absence of Commissioners, the 1st Respondent was not properly constituted and as such could not lawfully undertake the functions of investigations and recommendations for prosecution of the Petitioner which are decisions reserved for the Commissioners

(cb) A declaration that the report of the 1st Respondent submitted to the 2nd Respondent recommending prosecution of the Petitioner was not a decision of the Commission as it did not bear the signature of the Chairperson of the Commission.

(cc) A declaration that the purported investigations, raid on the Petitioner's home and the recommendation for his prosecution for alleged obstruction undertaken in the absence of the 1st Respondent's Commissioners, are null and void ab initio and cannot be the basis for criminal charges against the Petitioner.

d) This Honourable Court be pleased to Issue an Order of Certiorari to remove into the Honourable Court and quash Search Warrants given by the 3rd Respondent on 19th January 2016 or any other Search Warrant issued in respect of the Petitioner to access and gain entry into his office, residential and business premises and search and carry away documents given to Mulki Abdi Umar in Makadara Chief Magistrate Miscellaneous Criminal Case No. 41 of 2016.

(da) This Honourable Court be pleased to Issue an Order of Certiorari to remove into the Honourable Court and quash the report of the 1st Respondent to the 2nd Respondent recommending prosecution of the Petitioner.

e) This Honourable Court be pleased to Issue an Order of Certiorari to remove into the Honourable Court and quash any criminal prosecution whether instituted or contemplated against the Petitioner, his aides, associates and/or any person premised on alleged obstruction or otherwise acts or omission in connection with the search warrant given by the 3rd Respondent on 19th January 2016 or the purported search carried out on 21st January 2016.

f) This Honourable Court be pleased to Issue an Order of Judicial Review by way of an order of prohibition directed to the Ethics and Anti-Corruption Commission either by itself, agents and or associates from obtaining any search warrant or Order from any Court against any property held by the Petitioner or his associates without giving the Petitioner Notice and due process as protected and decreed by Articles 47, 48 and 50(1) of the Constitution and Sections 23-28 of the Anti-Corruption and Economic Crimes Act, 2003.

g) Exemplary damages against the 1st Respondent.

h) Costs.

11. The petition is strongly opposed by all the respondents.

12. The 1st respondent filed *Grounds of Objection* dated 9th May 2016. There are also two replying affidavits. The first is the deposition sworn by Francis Kamwara on 10th May 2016. He was the investigating officer for the obstruction charges against the petitioner. He averred that Mulki Abdi Umar, another investigator with the Commission, obtained the impugned warrant at Makadara Law Courts "to have access and/or entry into offices, residential and business premises of Mr. Francis Mwangi Wa Iria".

13. He admits that on 21st January 2016 at around 6:30 a.m., five officers from EACC and two uniformed and armed police officers from Thika Police Station entered the compound of the petitioner after identifying themselves. However, the petitioner insisted that his lawyer be present. After his counsel arrived at 8:00 a.m., they displayed the warrant and conducted a search in all the rooms. They recovered several documents including banking slips, title deeds, company registration documents, I-pads, mobile phones, CPUs, laptops, Murang'a County

Budget file, several Local Service Orders and cheque books.

14. However, as they exited through the kitchen, they were confronted by rowdy youth. He said the latter were incited by the governor and snatched the materials, put them into a waiting car and sped off. According to him, it was impossible to provide an inventory in the circumstances. He averred that the EACC officers were rescued by the County Commissioner Miss Kula Hache, the OCPD Mr. Barasa Siaya and AP Commandant Mr. Michael Wambua.

15. There is then his further affidavit sworn on 21st November 2018. The new and key response is that the President appointed new commissioners for the EACC on 17th December 2015 for a period of six years. A copy of Gazette Notice No. 9443 of even date is annexed as *FK-01*. He averred that save for the Chairman, *Mr. Phillip Kinisu*, who resigned on 31st August 2016, the rest of the commissioners remained in office.

16. He deposed that under sections 11 and 13 of the **Ethics and Anti-Corruption Act** and **Article 252(1)(a)** of the **Constitution**, the Commission is empowered to carry out investigations into allegations of corruption and economic crime. Regarding the procedure of obtaining the impugned warrant, he relied on sections 118 of the **Criminal Procedure Code** and sections 23 and 29 of the **Anti-Corruption and Economic Crimes Act**.

17. He argued further that the investigators were entitled to carry out the search and retrieve information and documents under sections 23 of the latter Act as read together with section 64 of the **National Police Service Act**. He opined that the amended petition is *mala fides* and against the public interest.

18. The 2nd respondent also opposed the petition. Reliance was made on **Article 157 (10)** of the **Constitution** which provides that in the sphere of criminal prosecutions, the DPP shall not be under any control or direction of any person. Learned counsel was of the view that the present petition is aimed at curtailing the independence of the DPP. In particular, she submitted that the petitioner has not presented cogent evidence to demonstrate that the DPP has abused his powers.

19. The 2nd, 3rd and 4th respondents relied further on *Grounds of Objection* dated 24th May 2016. That pleading is signed by *Mr. Solomon Njeru*, Senior Prosecution Counsel on behalf of all three respondents.

20. Their objections are three-pronged: Firstly, that the petition is an affront to the constitutional independence of the office of the DPP as decreed by **Article 157 (10)**. Secondly, that a close reading of sections 104, 110, 111(3) and 118A of the **Criminal Procedure Code** demonstrates that the impugned warrant was valid and did not require any further endorsement by the Chief Magistrates Court at Murang'a. Thirdly, that in the event there were such irregularities, they were permissive or curable under section 113 of the Code.

21. In their written submissions, the 2nd to 4th respondent take similar positions to those of the 1st respondent. In a synopsis, they contend that EACC is empowered to carry out investigations into allegations of corruption and economic crime by dint of **Article 252(1)(a)** of the **Constitution** as read with sections 11 and 13 of the **Ethics and Anti-Corruption Act** and sections 23 and 29 of the **Anti-Corruption and Economic Crimes Act**. They were also of the view that the petitioner's constitutional rights were subject to limitation under **Article 24**. On this issue, I must point out at the earliest that it is the duty of the party justifying the *limitation* to demonstrate that the Article has been complied with.

22. On 29th July 2021, directions were taken that the petition be heard by highlighting written submissions. Learned counsel for the petitioner, *Mr. Ng'ang'a Mbugua*, lodged submissions with a list of authorities on 7th September 2020. The 1st respondent filed submissions on 17th August 2021 with a separate list of precedents. The 3rd and 4th respondents' submissions are dated 28th July 2021.

23. The 2nd respondent (DPP) did not file any submissions. However, I allowed learned prosecution counsel to make brief oral submissions. She associated herself fully with the submissions by the 1st, 3rd and 4th respondents.

24. On 2nd September 2021, I heard closing arguments from learned counsel for all the disputants.

25. I take the following view of the matter. It is not disputed that at the material time, the petitioner was the governor of the County Government of Murang'a. The 1st respondent on the other hand is a creature of **Article 79** of the **Constitution** as read together with Section 3 of the **Ethics and Anti-Corruption Commission Act 2011**. The office of the 2nd respondent is established by **Article 157(1)** of the **Constitution**. The 3rd respondent is a subordinate court as defined in **Article 169(a)** while the 4th respondent is sued in his capacity as the Principal Legal Adviser to the Government of Kenya under **Article 156(4)**.

26. The 3rd and 4th respondents submitted that the amended petition has not been pleaded with precision. It is trite that a petitioner seeking relief for violation of a right or fundamental freedom, must show the constitutional provisions alleged to have been infringed, the manner of infringement and the jurisdictional basis for it. *Anarita Karimi Njeru v Republic No.1* [1979] 1 KLR 54.

27. From the body of the amended petition, the original affidavit in support of the petition and materials before the court, I find that the petitioner has identified the provisions of the **Constitution** and statute that were violated and has also particularized the offending conduct of the respondents and particularly the 1st respondent. The amended petition is thus properly before the court.

28. Although a tome of materials was placed before the court, there are four straightforward issues. Firstly, whether the EACC had legal capacity at the material time to investigate or execute the warrant; secondly, whether the impugned warrant was lawful or properly executed; thirdly, whether the respondents violated the petitioner's constitutional rights relating to the warrant or his subsequent arrest for obstructing

the execution of the warrant; and, fourthly, whether the petitioner is entitled to damages or other prayers in the amended petition.

29. The petitioner submitted that the EACC was not properly constituted at the time it investigated, sought the warrant or executed it. The position taken by the courts is that the commissioners of the EACC are at the heart of the commission; and, that in their absence, the EACC *cannot* undertake investigations or make recommendations for prosecution. See **Michael Sistu Mwaura Kamau & 12 others v EACC & 4 others** Nairobi High Court Pet. 230 of 2015 [2016] eKLR as well as the subsequent decision of the Court of Appeal in the same matter in **Michael Sistu Mwaura Kamau v EACC & 4 others**, Civil Appeal 102 of 2016 [2017] eKLR.

30. At the High Court in **Michael Sistu Mwaura Kamau** case [supra], the 3-Judge bench held-

[357] From the foregoing it is clear that the conduct of the Commission's business can only be performed in a meeting at which two-thirds of the members are present. The said members in our view are the Commissioners. One of the businesses of the Commission under section 11(1)(d) of the EACC Act is to:

investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution.

[358] If the Commissioners are not in office, it would follow that the business of the Commission contemplated under paragraph 5 of the Second Schedule to the EACC Act as read with section 11(1)(d) of the EACC Act cannot be undertaken. [Underlining added].

31. That decision was upheld by the Court of Appeal at Nairobi in **Michael Sistu Mwaura Kamau v EACC & 4 others** Civil Appeal 102 of 2016 [2017] eKLR. The learned judges of appeal delivered themselves thus-

It is clear from the provisions of both section 11(1) and 11(6) that the Act has separated the powers of the EACC and those of the commissioners. This in our view is not in vain. The EACC has been given powers and functions, which can only be exercised and performed by the commissioners. The law also recognizes that the commissioners may not have the technical, professional and administrative skills needed to perform all the aforesaid functions and in that regard has mandated EACC to recruit appropriate staff to help in discharging its functions. Such staff, who form the secretariat, is ultimately subject to the direction, control and oversight of the commissioners. [Underlining added]

32. It is common ground that on 18th January 2016, the 1st respondent (EACC) made the *ex parte* application for the search warrant at the subordinate court at Makadara (the 3rd respondent). The search warrant was issued on 19th January 2016. It is not also in dispute that the search was conducted in the early morning hours of 21st January 2016 at Murang'a. In the amended petition, the petitioner contends that there were no commissioners in office until 18th January 2016. It was submitted that EACC could not therefore undertake investigations or make recommendations for prosecution.

33. But it is not lost on me either (which conclusion is clear from the judgments of the High Court and the Court of Appeal above) that at the time the DPP concurred with EACC to charge **Michael Sistu Mwaura Kamau** on 28th May 2015, the Chair of the Commission, *Mr. Mumo Matemu* and Commissioners *Jane Onsongo* and *Irene Keino* had resigned on 31st March 2015, 30th April 2015 and 12th May 2015 and no replacement had been made. I agree with retort by the 1st respondent that the two judgments in the above case are not *evidence* that at the time petitioner here was arrested, the commission was bereft of commissioners.

34. The 1st respondent avers that the President appointed new commissioners for the EACC on 17th December 2015 for a period of six years. A copy of *Gazette Notice No. 9443* of even date is annexed to the further affidavit of Francis Kamwara. He averred that save for the Chairman, *Mr. Phillip Kinisu*, who resigned on 31st August 2016, the rest of the commissioners remained in office. But hidden from view of the court is the *date* on which the new commissioners took their *oath of office* or reported to the EACC.

35. A cardinal precept of the law of evidence is that he who alleges must prove. Section 107(1) of the **Evidence Act**. In this case however, the actual date that the commissioners took oath of office and reported to duty was a matter *especially within the knowledge* of EACC but it has opted to keep the court in a blind spot. In paragraph 34 of the amended petition, the petitioner pleads that the commissioners reported to office on 18th January 2016. It is backed up by paragraph 4 of the affidavit in support of the motion to amend the petition sworn by the petitioner on 15th May 2017.

36. Section 212 of the **Evidence Act** provides as follows-

In civil proceedings, when the fact is especially in the knowledge of any party to those proceedings, the burden of proving or disproving that fact is on him. [Underlining added]

37. This petition is proceeding on the basis of pleadings and depositions on record. I thus readily find that under section 212 of the **Evidence Act** the burden of proving or disproving the date when the commissioners reported to office shifted to the EACC because it was a matter *especially within its knowledge*. The date in question is pivotal in view of the Court of Appeal decision in **Michael Sistu Mwaura Kamau's** case [supra].

38. My conclusion is that the EACC thus failed to *disprove* that the commissioners reported to office on 18th January 2016. Following the decision of the Court of Appeal decision in **Michael Sistu Mwaura Kamau's** case [supra], it now means that all the investigations done in this case and alluded to by *Mulki Abdi Umar* prior to 18th January 2016 were *unlawful* for want of commissioners. That finding does not obviously apply to events that took place on or after that date.

39. Regarding the second issue, it is a truism that EACC is empowered to carry out investigations into allegations of corruption and economic crimes. Authority is found in **Article 252(1)(a)** of the **Constitution** as read together with sections 11 and 13 of the **Ethics and Anti-Corruption Act**. The procedures of obtaining a warrant to search a person or his premises is set out in sections 118 of the **Criminal Procedure Code** and sections 23 and 29 of the **Anti-Corruption and Economic Crimes Act**.

40. I agree with the submissions by learned counsel for the 1st respondent that where a warrant is *properly* extracted under the above legal regime and the *right* procedures of execution are applied, the court will be hesitant to intervene. See generally, **Kofinaf Company Ltd & another v. Ethics and Anti-Corruption Commission & another; Simon Gicharu & 3 others (Interested Party)**, High Court, Nairobi, Pet. 37 of 2019 [2020] eKLR.

41. Sadly, that was not entirely the case here. An investigator with EACC, *Mulki Abdi Umar*, obtained the impugned warrant at Makadara Law Courts “to have access and/or entry into offices, residential and business premises of Mr. *Francis Mwangi Wa Iria*”. From the affidavit presented to the subordinate court, the Commission alleged that it had “received information to the effect that one Mr. *Francis Mwangi wa Iria* has corruptly misappropriated Government funds thus in the process kept in his offices and houses tender, correspondence, bank accounts, documents and monies corruptly obtained”.

42. The warrant sought would invade the privacy of the subject. It was thus important to be less casual and to present sufficient material to the subordinate court that went beyond *suspicions*. On that score, I concur with *Lenaola J* (as he then was) in **Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others**, High Court, Nairobi, Pet. 122 of 2015 [2016] eKLR -

[85] I am in agreement with the exposition of the law as above and the principle emerging from the above cases is that there must be some degree of reasonable basis upon which an investigator would seek to investigate a bank account. In that regard therefore, the Courts have been categorical that mere suspicion of commission of a crime, is not a sufficient basis to seek a search warrant....
[Underlining added].

43. In view of the provisions I set out earlier, it is doubtful that the petitioner was entitled to be heard at the *ex parte* hearing before the magistrate. However, I find that the warrant that was finally issued had a number of discrepancies. Firstly, it bore the *wrong* name of the person to be investigated. I say so in view of the petitioner’s national identity card annexed which reads *Wa-Iria Mwangi*.

44. Secondly, and on the face of the warrant, it was from the Milimani Chief Magistrates Court Nairobi but issued by the Subordinate Court at Makadara, Nairobi. As stated before that court, the investigator deposed that the petitioner had “*kept in his offices and houses tender, correspondence, bank accounts, documents and monies corruptly obtained*”. So much so that EACC knew from the beginning that the search would be conducted in certain locations. But it did not specify the residence, offices or location to be searched.

45. However, and this is material, the EACC proceeded to execute the warrant in another county, to be exact, at the petitioner’s residence in Gatanga, Murang’a. I readily find that the latter fell within the local jurisdiction of the Chief Magistrate’s Court at Murang’a. Accordingly, an *endorsement* was required by dint of section 111 of the **Criminal Procedure Code**.

46. No such effort was made by the EACC. In its pursuit of a stealth operation, it offended key procedures of the Code. It follows as a corollary that the execution of the warrant issued at Nairobi against the person known as *Mwangi Wa Iria* at his residence in Gatanga, Murang’a County was highly irregular and unlawful.

47. Obviously, the execution of a defective and unlawful search warrant cannot found the subsequent charge of obstruction. That is not to say that other offences did not take place at Gatanga. The point to be made is that the EACC, as is clear from the bond issued to the petitioner, was now following up on a charge of *obstructing* the unlawful search warrant. For the foregoing reasons, that enterprise was on a legal quicksand.

48. Furthermore, the respondents have not rebutted the allegations by the petitioner that the warrant, which I have found to be invalid, was executed at the crack of dawn without regard to the rights of the petitioner and his family to privacy. The petitioner avers that the officers arrived at 05:30 hours. The 1st respondent claims they got there at 06:30 hours. Either way it was a raid on a family residence without notice. It is instructive that, as deposed at paragraph 20 of the affidavit supporting the petition, that the petitioner had “*never been invited by EACC to record any statement in relation to any complaint levelled against [him] that they sought to investigate*”.

49. Furthermore, the police officers also used brute force. In the process, they injured the petitioner and disrupted the peace of his family. The petitioner reported the assault at Kirwara Police Station and was issued with a P3 Form which was filled out by a medical officer. In the annexed medical form dated 22nd January 2016, (annexture *MI7*) he suffered tenderness and swelling on the wrist joint and shoulder joint. He also filed a complaint against the EACC officers at Kirwara under O.B Number 16/22/1/2016 and to the Independent Policing Oversight Authority. That evidence was not controverted by the respondents.

50. **Article 28** of the **Constitution** provides that every person has inherent dignity and the right to have that dignity respected and protected.

51. **Article 31** on the other hand provides as follows-

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.

52. I have found that the investigations by EACC prior to 18th January 2016 were illegitimate. I have also held that the procedures employed in executing a defective warrant were unlawful. I have also found that the 1st respondent's officers injured the petitioner and abused his rights to dignity and privacy. I thus find that he has proved violation of the rights enshrined in **Articles 28** and **31** that I set out above *in extenso*.

53. There is then the subsequent arrest on 14th March 2016 on charges of obstructing the execution of the impugned warrant. The petitioner had earlier been summoned on 8th February 2016 and recorded a statement. At paragraphs 33 to 36 of the affidavit in support of the petition he deposes as follows-

[33] *THAT despite the foregoing, on the 14th March 2016 at about 2pm while at Aga Khan Hospital to visit a patient, I was accosted by EACC officers who forcefully bundled me into a waiting vehicle after disarming my security personnel and drove me to EACC offices at Integrity Centre.*

[34] *THAT therein I was informed that I was under arrest for alleged obstruction of EACC detectives while carrying out the impugned search warrant.*

[35] *THAT a charge and caution was administered and my finger prints taken and was informed that I would spend the night at the Integrity Centre Police Station to be arraigned in court the next day.*

[36] *THAT when I sought to be released on bail, the OCS Integrity Centre Police Station informed me that he was under strict instructions not to release me insisting that I had to spend the night at the police station.* [Underlining added].

54. Those averments have not been meaningfully refuted by the 1st respondent. As stated earlier, the petitioner was not given a police bond until later in the night and only upon pressure on the police by elected leaders from Murang'a County.

55. I have already held that the search warrant was illegal; and, that the subsequent obstruction charges could not hold. Despite the petitioner willingly answering to the summons and recording a statement on 8th February 2016, the 1st respondent chose to forcefully arrest him a month later without any further summons, and to hold him for several hours in its cells and to expressly deny him bond. I find that the conduct of the 1st respondent was high-handed, arbitrary, and capricious. It also contravened **Article 49 (1) (h)** of the **Constitution**.

56. The petitioner has prayed for damages in paragraph 90 (g) of the amended petition. But neither his counsel nor the respondents' counsel addressed me on the issue in their submissions.

57. From the gross violations of the petitioner's rights to dignity, privacy and due process of the law; and, in view of his unchallenged averments cited above, I find that he is entitled to damages.

58. I have compared recent trends in damages for violation of the **Constitution**. In **Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited**, High Court, Machakos, Pet. 10 of 2020 [2021] eKLR, the petitioner was awarded Kshs 2,000,000 for violation of his right to dignity and privacy. In **GSN v Nairobi Hospital & 2 others**, High Court, Nairobi, Pet. 24 of 2019 [2020] eKLR, the petitioner was awarded Kshs 2,000,000 for the "physical and psychological suffering occasioned by the unlawful and unconstitutional violation of her right to privacy". In **MWK & another v AG & 3 others**, High Court, Nairobi pet 347 of 2015 [2017] eKLR, general damages were assessed at Kshs 4,000,000.

59. I accept the wisdom of Waki, Kiage and Mohammed JJA in **Koigi Wamwere v Attorney General**, Nairobi, Court of Appeal, Civil Appeal 86 of 2013 [2015] eKLR that an *award of damages is not an exact science; and, no monetary sum can really erase the scarring of the soul*. Doing the best that I can and in view of the circumstances in this case, I award the petitioner general damages of Kshs 3,000,000 for violation of his rights to dignity, privacy and due process of the law. I however decline to award exemplary or aggravated damages. The damages granted shall be met by the 1st respondent who was the key actor at all the relevant stages of this case.

60. For all those reasons, judgment is entered in favour of the petitioner as follows-

a) That a declaration shall forthwith issue that all the investigations conducted in this case by the 1st respondent prior to 18th January 2016; and, the ensuing report submitted to the 2nd respondent recommending prosecution of the petitioner were unlawful for want of a chairman and commissioners of the 1st respondent.

b) That a declaration is hereby issued that the search warrant issued to the 1st respondent through its investigator, Mulki Abdi Umar, in Makadara Chief Magistrates Miscellaneous Criminal Case No. 41 of 2016: Ethics and Anti-Corruption Commission versus Francis Mwangi wa Iria on 19th January 2016 to access and gain entry into the petitioner's office, residence and business premises and to search and carry away documents was unlawful.

c) That a declaration is hereby issued that the search carried out on 21st January 2016 by the 1st respondent pursuant to the search warrant above at the petitioner's residence in Gatanga, Murang'a County was unlawful and contravened the petitioner's rights enshrined in **Articles 28** and **31** of the **Constitution**.

d) That an order of Certiorari shall issue to remove into the High Court for quashing the search warrant given by the 3rd Respondent on 19th January 2016.

e) A declaration is hereby issued that the subsequent criminal charges brought against the petitioner, his aides, security detail or any other person for obstructing the execution of the above search warrant at Gatanga, Murang'a County on 21st January 2016 are unlawful.

f) That accordingly, an order of Prohibition shall issue directed to the 1st and 2nd respondents restraining them from commencing or proceeding with criminal charges against the petitioner, his aides, security detail or any other person for obstructing the execution of the above search warrant at Gatanga, Murang'a County on 21st January 2016.

g) That the petitioner is hereby awarded general damages in the sum of Kshs 3,000,000 for violation of his rights to dignity, privacy and due process of the law to be paid by the 1st respondent.

h) That the claim for exemplary damages is disallowed.

i) The petition against the Attorney General (the 4th respondent) is dismissed with no order on costs.

61. Costs follow the event and are at the discretion of the court. I award the petitioner costs of the petition to be met by the 1st respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 19TH DAY OF OCTOBER 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Mbuthia holding brief for Mr. Ng'ang'a for the petitioner instructed by Ng'ang'a Mbugua & Company Advocates.

Ms. Omari for the 1st respondent instructed by the Ethics and Anti-Corruption Commission.

Ms. Gakumu for the 2nd respondent instructed by the Office of the Director of Public Prosecutions.

Ms. Gakumu holding brief for Ms. Chiringa for the 3rd & 4th respondents instructed by the Hon. Attorney General.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.