



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 11 OF 2020

IN THE MATTER OF: ARTICLES 2, 3, 10, 12, 20, 21, 22, 23, 24, 27, 29, 39, 47 & 165 OF THE CONSTITUTION

AND

IN THE MATTER OF: RULE 10 (1) AND 23 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: SECTION 27 AND 62 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT

AND

IN THE MATTER OF: VIOLATION OF THE RIGHTS TO FREEDOM OF MOVEMENT AND FAIR ADMINISTRATIVE ACTION

BETWEEN

MICHELLE BIBI FONDO.....1ST PETITIONER

AMINA NASSORO ABDALLA.....2ND PETITIONER

RIZIKI MATANO.....3RD PETITIONER

ALIO ADAN IBRAHIM.....4TH PETITIONER

BILAL MADZOYA YUSUF.....5TH PETITIONER

BENJAMIN KAI CHILUMO.....6TH PETITIONER

VERSUS

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

DIRECTORATE OF PUBLIC PROSECUTION.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

Coram: Hon. Justice R. Nyakundi

John Bwire Advocate for the Petitioners

J. N. Mbaka Advocate for the 1st respondent

RULING

Introduction

The 1st respondent was in the process of investigating allegations of corruption touching on irregular payments of Legal Fees made by the County Government of Kilifi as well as the construction and equipping of the Kilifi Covid-19 Medical Complex whereupon it is alleged that the petitioners declined to provide information within their custody. The 1st, 3rd and 6th Petitioners were arrested and released on cash bail. This Petition seeks among other things to challenge the Constitutionality of the Notice of request for information issued by the 1st respondent pursuant to Section 27 (3) of the Anti-Corruption and Economic Crimes Act 2003.

The 1st petitioner, is the **County Attorney County Government of Kilifi**. The 2nd petitioner is the **Chief Officer Office of the Governor**, the 3rd petitioner is the **Head of Supply Chain Management Kilifi County Government**, the 4th petitioner is the **Chief Officer Public Health**, the 5th petitioner is the **Chief Officer Medical Services** and the 6th petitioner is the **Chief Officer, Finance**.

The 1st respondent is a commission established under Section 3 (1) of the Ethics & Anti-Corruption Commission Act 2011 pursuant to Article 79 of the Constitution charged with the responsibility under Section 11 inter alia of investigating and recommending to the 2nd Respondent the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the EACC Act and the Ethics and Anti-Corruption and Economic Crimes Act 2003. The 1st Respondent is also empowered by Section 13 (2) (c) of the Ethics & Anti-Corruption Commission Act 2011 to conduct investigations on its own initiative or on a complaint made by any person. The Ethics and Anti-Corruption and Economic Crimes Act (ACECA) 2003 provides for the prevention, investigation and punishment of corruption, economic crime and related offences.

The 2nd respondent is the Director of Public Prosecution established under article 157 of the Constitution and is responsible for instituting and undertaking criminal proceedings against the any person before any court (other than a court martial) in respect of any alleged offence. The 3rd respondent, the Inspector General of Police, is the head of the Kenya Police Service.

The Case

The Petitioners' case

The Petitioners filed a Notice of Motion Application and Petition on the 18th of May 2020 seeking grant of anticipatory bail to the petitioners/respondents and conservatory orders restraining the 1st and 2nd respondent from arresting, charging or prosecuting them pending hearing and determination of the application and petition. The Notice of Motion sought the following orders inter alia:

1. That...spent

2. That pending the hearing and determination of this Motion or until further orders of the court, bail pending arrest be and is hereby granted to each of the Petitioners on such terms as the Court may deem fit on an interim basis so as to assure the security of their respective persons and their freedom of movement and specifically, to prevent the Ethics & Anti-Corruption Commission, the 1st Respondent herein, by itself, its agents and or officers from depriving them of their liberty by arresting and detaining them in their custody or otherwise pending the completion of investigations into any matter relating to the Kilifi County Covid-19 Medical Complex or any other matter.

3. That pending the hearing and determination of this Motion or until further orders of the court, a conservatory order be and is hereby issued restraining the 1st and 2nd Respondents from arresting, charging and or prosecuting any of the Petitioners in respect of any matter relating to the alleged non-compliance of the 1st respondent's letter dated 11th May 2020 or the alleged procurement on the construction and equipping of the Kilifi County Covid-19 Medical Complex or any other matter.

4. That pending the hearing and determination of this Motion or until further orders of the court, bail pending arrest be and is hereby granted to each of the Petitioners on such terms as the Court may deem fit on an interim basis so as to assure the security of their respective persons and their freedom of movement and specifically, to prevent the Ethics & Anti-Corruption Commission, the 1st respondent herein, by itself, its agents and or officers from depriving them of their liberty by arresting and detaining them in their custody or otherwise pending the completion of investigations into any matter relating to the Kilifi County Covid-19 Medical Complex as well as the consequential arraignment in court if necessary or any other matter.

5. That pending the hearing and determination of this Motion or until further orders of the court, a conservatory order be and is hereby issued restraining the respondents from arresting, charging and or prosecuting any of the Petitioners in respect of any matter relating to the alleged non-compliance of the 1st Respondent's letter dated 11th May 2020 or the alleged procurement on the construction and equipping of the Kilifi County Covid-19 Medical Complex or any other matter.

6. That any other or further interim relief or reliefs pending Petition as deemed just and expedient by the court in the circumstances.

The application is premised on the grounds (a) – (z) on the face of the application. It is further supported by supporting affidavit of **Michelle Bibi Fondo** dated 18th May 2020.

The petitioners filed this petition seeking the following reliefs:

a. A declaration that the letter dated 11th May 2020 served on the 12th May 2020 violates section 27 (3) of the Anti- Corruption and Economic Crimes Act and is therefore null and void.

b. A declaration that the letter dated 11th May 2020 served on the 12th May 2020 and the subsequent arrests and detention of the Petitioners violates articles 10, 27, 29, 39 and 47 of the Constitution.

c. A declaration that the respondents cannot and should not arrest or cause the arrest and prosecution of the petitioners before any court of Law in the absence of a clear and patent refusal of the Petitioners to assist in the investigations touching on the matters raised in the letter dated 11th May 2020 or any other matter.

d. A conservatory order to permanently prohibit the 1st respondent from arresting any of the petitioners or if arrested, from holding or continuing to detain or hold the Petitioners or any of them in their custody delayed to respond to the 1st respondent's letter dated 11.05.2020 or that the 1st respondent is conducting investigations into Kilifi County Covid-19 Medical Complex or any other matter.

e. A conservatory order to permanently prohibit the 2nd respondent from arraigning, charging or if already charged from proceeding with the prosecuting of the petitioners or any one of them in respect of any offence alleged to have been committed by the petitioners or any one of them in relation to the 1st respondent's letter dated 11.05.2020 or in relation to the Kilifi County Covid-19 Medical Complex or any other matter.

f. An order compelling the 1st respondent to issue to the petitioners or to the petitioners' offices requests for information and or documents which are fully compliant with the provisions of section 27 (3) of the Anti-Corruption and Economic Crimes Act in respect of the investigations relating to Kilifi County Covid-19 Medical Complex or any other matter under investigation.

g. Bail pending arrest on such terms as the court may deem just and expedient to assure the petitioners of the freedom and security of their person and their freedom of movement and to prevent the 1st respondent or any person acting on behalf or at their instance from arbitrarily arresting and detaining the petitioners in custody during the course of their investigations and/or pending arraignment before a court of law.

h. Any other or further just and expedient relief as the Court may deem just and expedient to grant.

i. The respondents be and are hereby directed to bear the costs of this Petition jointly and severally.

j. That this Honorable Court be pleased to grant such further order or orders as may be just and appropriate.

In their Petition the petitioners alleged that on the 13.03.2020 the National Government through H. E. the President declared the first Covid-19 patient through a presser to media houses. Soon after the announcement the National and County governments and other Public institutions issued several preventative measures to contain and manage the spread of Covid-19 including the restriction of movement of persons in and out of Nairobi Metropolitan, Mombasa County, Kilifi County and Kwale County vide Legal Notices Number 51, 52, 53 and 54. Further, it is their contention that the National Government communicated that where possible government offices allow their employees to work from home with exceptions of employees working in critical or essential services. The petitioners aver that it was on this basis the Kilifi County Government on 18.03.2020 resolved to send majority of its staff on leave and others to work from home and that the Legal department staff were among those requested to work from home. They also aver that by Public Notice of 9.04.2020 the 1st respondent suspended submission of hard copies of documentations including self-declaration forms.

The petitioners aver that despite having knowledge of the afore said directives including that a number of Kilifi County Staff were working from home the 1st Respondent by letter dated 11.05.2020 addressed to the office of the County Secretary and delivered on the 12.05.2020 demanded pursuant to Section 27 (3) of the Anti-Corruption and Economic Crimes Act to be furnished immediately with certain documents and information relating to the Construction and equipping of the Kilifi County Covid-19 Medical Complex. The said letter had demanded the immediate release of 22 original files plus all other correspondences relating to the construction and equipping of the Kilifi County Covid-19 Medical Complex. The petitioners aver that the County Government was willing to comply but would require more time as the information requested was bulky and considering government procedure of releasing original files the County Government would need sufficient time to make copies of the files and prepare inventories before releasing the original files. Further, they state that since the County Government had scaled down operations due to the Covid-19 pandemic, majority of the support staff who could quickly retrieve the files from the archives and make copies were working from home and others were affected by the lockdown in Mombasa County. They further aver that some of their staff were on self-quarantine imposed as a result of the alleged exposure to the Deputy Governor as being Covid-19 positive and were asked to remain at home until their offices are disinfected and until formal communication was given and that the heads of the respective departments are currently engaged in the prevention and management of the Covid-19 pandemic and its effects.

They aver that soon after the receipt of the 1st respondent's letter the County Secretary forwarded it to the attention of the 3rd, 4th and 5th petitioners for compliance which letter was never served nor brought to the attention of the other petitioners and that the 1st, 2nd and 5th Petitioner only came to know of it on the morning of 13th May 2020 through social media immediately after their arrest. They further aver that immediately after the receipt of the said notice the 4th and 5th petitioners expressly communicated to the County Secretary that they are willing to comply but the notice given was unreasonably short in the circumstances.

Further it is the petitioner's contention that despite their willingness to comply, the 1st respondent deployed officers early in the morning of the 13th of May 2020 to arrest and cart them away to their offices in Malindi for subsequent arraignment in court. The basis of their arrest as

communicated by the 1st Respondent's officer was the alleged reluctance, neglect and failure by the Petitioners to provide the 1st Respondent with information as requested. At that juncture, the County Government issued a presser explaining that it was ready to comply but the notice given was unreasonably short. However, and regardless the 1st respondent detained the petitioners from 10.00am morning until midnight before releasing them on Kshs.100,000/- cash bail and directed them to appear before the commission on 20th May 2020.

They aver that the Commission by arresting and detaining them for such long hours with a contrived offence of obstruction of justice and /or any other offence relating to this matter in a manner which is outside the law, the 1st respondent appears to be in pursuit of motives other than enforcement of the law and shall end up violating the fundamental rights and freedoms of the petitioners unless restrained by this Court pending the hearing and determination of the Application and after hearing of the main Petition. For these averments the petitioners relied on Article 10, 21 (1), 29, 39 (1) and 47 of the constitution to the extent that the 1st respondent's letter did not give reasonable notice and that they were not given reasonable opportunity to provide the documents and information sought as well as the arrest and detention.

In their Supplementary affidavit dated 22.06.2020 and filed on 25.06.2020, the 1st petitioner, **Ms. Bibi Fondo** averred that the Notice issued on 11.05.2020 by the 1st respondent under Section 27 (3) of the ACECA was not compliant on the grounds that; the Notice was addressed to the County Secretary and as such cannot be enforced against the petitioners, that the word "**immediately**" as used in the Notice is not a specified time and cannot be reasonable time within the meaning of Section 27 (3) of ACECA and finally that the Notice is not specific in terms of the person or the specific transaction under investigation and as such amounts to a fishing expedition.

She further avers that since the Notice does not meet the criteria of section 27 (3) it cannot be used as a basis for their arrest and detention and the only person prosecutable under Section 27 (4) ACECA is the person to whom the Notice was addressed to and not the petitioners.

It was her contention that there was a strained relationship between the Kilifi County Department of Legal Services and the 1st respondent that began in October 2016 after the Kilifi County Government's Integrated Financial Management System was hacked and a sum of Kenya shillings 51 million was stolen. By a letter dated 13.10.2016 the County Government informed and requested the 1st respondent to take action against the perpetrators of the heist but the 1st respondent did not take action prompting the County Government to institute recovery proceedings in various law suits and got judgment in their favor, after which the 1st respondent filed an application for joinder and asked for the funds to be released to it, which application the County Government opposed. On 14.04.2016 the court dismissed the 1st respondent's application with costs which ruling the Petitioners claim is the genesis of the numerous requests for information by the 1st respondent in a view to fish for any information to implicate the County Government's officers as on 30.03.2017 the 1st respondent issued a letter indicating that it was probing the out-sourcing of lawyers by the County Government, which enquiry the petitioners argue is in bad faith and is a fishing escapade to see what may turn up.

Further the petitioner avers that the letter dated 30.03.17 was responded to by a letter dated 19.04.2017 requesting for particulars including the specific law firms or persons under investigation and that the same has not been responded to date. They further aver that the 1st respondent then issued another letter dated 12.02.2020 requesting for information relating to cases and payment of legal fees to all law firms and on 26.04.2020 the County Secretary responded to said letter requesting for the specific law firms under investigation.

The petitioners aver that as the 1st respondent is unable to provide information of the specific law firms under investigations even after several requests, it all amounts to a fishing expedition driven by extraneous considerations rather than investigation as envisaged by law.

They further state that they were not made aware of the said letters as they had interacted with the Deputy Governor who was allegedly positive for Covid-19 and had been placed under mandatory self-quarantine and they did not report to work until 13.05.2020 when they were informed that they should come and facilitate collection of information on the Covid-19 Medical Complex, and after their arrest and detention they were directed to go for Mandatory quarantine and are yet to report to work as their offices are yet to be fumigated.

Further, the petitioner states that she is unable to collect the information on the law firms as most had closed shop due to Covid-19 and that some of the advocates had been locked out of their places of work as a result, further that there are more than 1,000 active cases and she does not have the resources to collect all the data requested by the 1st respondent within the short period of time given and that she is ready to comply with a notice which is clearly limited to a specific scope , person(s) or law firm(s) and possibly payment of legal fees under investigation.

The 1st Respondent's case

The 1st respondent filed Grounds of Opposition dated 28.05.2020 to the main Petition stating inter alia that the Petition and application thereof as filed, breached valid judicial administrative directions issued through the Practice Directions of the Anti-Corruption and Economic crimes Division of the High Court issued by the Chief Justice on 26.06.2018 and that there was no written authority or evidence adduced by the 1st petitioner to demonstrate that the 2nd, 3rd, 4th, 5th and 6th petitioners have granted her authority to plead on their behalf.

The 2nd application by way of Notice of Motion dated 3.06.2020 and filed on 4.06.2020 by the 1st Respondent/Applicant sought to have the Petition transferred to the Anti-Corruption and Economic Crimes Division of the High Court arguing that this court did not have jurisdiction to hear this Petition on grounds that the Chief Justice had pursuant to the Practice Directions dated 9.12.2016 established the Anti-Corruption and Economic Crimes Division of the High Court of Kenya at Nairobi which was mandated to hear and determine Petitions as well as Judicial Review Applications relating to anti-corruption and economic crimes.

The 1st respondent on 29.05.2020 filed a Replying Affidavit sworn in opposition to the Notice of Motion by the Petitioners dated 28.05.2020 by one **Ignatius Wekesa**, an Investigator and the Regional Manager Upper Coast Regional Office-Malindi of the 1st respondent. He stated that, inter alia, in discharging its mandate the 1st respondent may write to any person holding crucial information and ask to be provided with

such information pursuant to Section 27 of the Anti-Corruption and Economic Crimes Act, 2003 and that failure of any such person to provide such information constitutes an offence. He stated that the orders sought were an abuse of the justice system as they sought to curtail the 1st respondent's statutory powers to effect arrest on any person and charge them with any applicable offence and to detain them for the purposes of an investigation pursuant to section 32 of the Anti-Corruption and Economic Crimes Act, 2003. Further he stated that the freedom of movement granted by the constitution is not absolute but has a limitation by law the Anti-Corruption and Economic Crimes Act, 2003 being one of such laws and that the orders sought were meant to give the petitioners blanket immunity. He also avers that the grounds in support of the application and contentions by the 1st Petitioner can only be adduced in court as the petitioners' defence once they are charged and prosecuted and not as a ground to seek the said orders consequently turning this court into a trial court. It was his averment that the 1st respondent received a report that the County Government of Kilifi made irregular legal fees payments to firms of advocates during the financial years 2015/2016 and 2016/2017 and that as part of the investigations the 1st respondent wrote a letter dated 30.03.2017 (which he produced as **IW1**) to the County Secretary requesting for information and documents in that regard to which the petitioners replied in a letter dated 19.07.2017 (which he annexed as **IW2**) but did not avail said documents.

He stated that again on 10.02.2020 they received another report that the County Government of Kilifi made irregular legal fees payments to firms of advocates during the financial years 2017/2018 and 2018/2019 and wrote a letter to the County Secretary dated 12.02.2020 (which he annexed as **IW3**) requesting for information and documents on the same to be provided before 24.02.2020, the County Secretary wrote to the 1st, 2nd and 6th petitioner (which he annexed as **IW4**) requesting them to coordinate and provide the information as requested by the 1st respondent and getting no response from the Petitioners, the County secretary wrote a reminder dated 25.02.2020 (which he annexed as **IW5**) to which the 1st respondent received a response dated 5.03.2020 (which he annexed as **IW6**) but the said documents were never provided as requested. This prompted the 1st Respondent to issue notices to the 1st, 2nd and 6th petitioners under section 27 (3) of the Anti-Corruption and Economic Crimes Act, 2003 requesting for documents by 20.03.2020 (which he annexed as **IW7a, 7b and 7c**) which also did not elicit any response from the Petitioners.

Further he stated that the 1st Respondent received another report on allegations of irregular procurement in the construction and equipping of the Kilifi County Covid-19 Medical complex and wrote a letter dated 11.05.2020 (which he annexed as **IW8**) to the County Secretary requesting for information and documents pertaining procurement of the project. The County secretary then wrote letters to the 3rd, 4th and 5th petitioner for compliance (which he annexed as **IW9**) but the same was not submitted as requested. He further stated that due to the continuous disregard and blatant denial of information requested by the 1st respondent he directed Officers of the 1st respondent to the offices of the Kilifi County Government officials on 12.05.2020 with firm instructions to obtain the said documents which officers were denied said documents and instead humiliated and insulted by the 3rd Petitioner prompting the said officers to return to the office empty handed. He avers that the continuous denial of information and documents amounts to obstruction contrary to section 66 (1) (a) of the Anti-Corruption and Economic Crimes Act 2003.

He averred that on the 13.05.2020 he arrested the County Secretary as well as the 1st, 4th, 5th and 6th petitioners and has their statements recorded in respect to the blatant denial of information and documentation (which statements he annexed as **IW10(a), 10(b), 10(c), 10 (d) and 10 (e)**). Further he stated that upon consideration of the statements recorded the 1st respondent did not find culpability on the part of the County Secretary and he was released in light of the fact that he does not hold the said documents in his custody as they are domiciled in the respective departments. Further he stated that the 1st, 4th, 5th and 6th petitioners were taken to Malindi Police Station where they were booked and released on cash bail of Kshs.100,000.00/- each and required to report to the 1st Respondent's offices in Malindi on 20.05.2020. That upon further consideration of the statements recoded as well as further evidence obtained the 1st Respondent discharged the 4th and 5th petitioners from culpability as they were not involved in the allegations pertaining to the illegal payments of legal fees and had not been issued with the Notice under section 27 (3) of the Anti-Corruption and Economic Crimes Act 2003. The same was communicated to them on 20.05.2020 and they were asked to collect their cash bail of Kshs.100,000.00/- each from the Officer Commanding Station-Malindi Police Station. He avers that the 1st respondent does not intend to charge the 4th and 5th petitioners with failure to provide information regarding the irregular payments of the legal fees but once the investigations are complete the 1st respondent will charge 1st, 3rd and 6th petitioners with various offences including obstruction and failure to provide documents.

He also responded to the petitioners' grounds of opposition by stating that the Public Notice issued by the 1st respondent dated 16.03.2020 is to the effect of scaling down operations rather than suspending the entire operations and it did not in any way negate the requirement to provide the information when required to do so. Secondly, he stated that the 1st respondent's notice issued on the 9.04.2020 is only suspending the submission of hard copy self-declaration forms which clearly is not among the information sought by the 1st respondent. Further he stated that the decision to arrest the said petitioners was majorly on the issue of failure to provide information in respect to the irregular payments of legal fees and not the construction and equipping of the Kilifi County Covid-19 Complex and that the documents had been requested since 30.03.2017 and that 12.02.2020 way before the Corona Virus pandemic hit the country and that the prevailing circumstances do not mean the complete suspension of operations but rather the scaling down of operations in different government entities. Finally, he stated that the 1st respondent was only desirous to discharge its mandate in accordance with the law and the Petitioners are put to strict proof it is pursuing other motives and that the arrested petitioners had been given an opportunity to be heard and had their statements recorded by the 1st respondent.

In a supplementary affidavit dated 28.05.2020 and filed on 29.05.2020 the 1st respondent's Lizbeth Kawira an Investigator with the 1st respondent averred that she was part of the team tasked with investigating the allegations of irregular procurement of the Kilifi County Covid-19 Medical Complex and the equipping thereof. That on 12.05.2020 alongside other team members they proceeded to the Kilifi County Government Office of the Company Secretary to deliver a letter requesting for documentation regarding the aforementioned Medical Complex. That upon arrival they were escorted to the County Secretary who read the letter and noted the contents thereof and then escorted them to 4th and 5th petitioners as well as the Chief Executive Committee Member for Health who were also handed the letter and read it individually and noted its contents. She averred that the 4th Petitioner requested for leave to attend to his sick mother in Mombasa who had been admitted and it was agreed that the 5th Petitioner would provide the said documents and that they should check on the progress of retrieval of the documents by 2.30pm. That at 2.30pm they proceeded to the 5th petitioner officer to find out the progress where he informed them that he had instructed the Principal Procurement Officer for the Department to retrieve the documents and he promised to avail some

documents before close of business. She avers that the 3rd petitioner later joined in and informed them that their request had been made known to him however there was no project by the name Covid-19 Medical Complex and as such there were no documents in that regard. He further informed them that the documents in relation to the procurement of the equipment for said Medical complex could not be given as the items were procured through direct sourcing and that they were working backwards to create the requisite file. She averred that he further insulted them and told them that they did not understand procurement law and that they did not know their work and that they should go back to school and learn. She concluded that the actions of the 3rd petitioner amounted to an offence under Section 27 and obstruction contrary to section 66 (2) of the Anti-Corruption and Economic Crimes Acts, 2003.

2nd Respondent's Replying Affidavit

The 2nd respondent filed a Replying Affidavit dated 4.06.2020 on 11.06.2020 stating that they concurred with the responses filed by the 1st respondent and would be adapting the same as part of their response. They further averred that the Petitioners had not demonstrated to the court any substantial reasons or prejudice that they would suffer in the event that they are arrested by the 1st and 3rd respondents to compel the court into granting them any conservatory orders as stipulated in the notice of motion dated 18.05.2020.

They averred that Article 157 of the Constitution gives power to the 2nd respondent to institute and undertake and criminal proceedings against any person to any offence alleged to have been committed after perusal and issuing directions to the investigating agencies to the appropriate charges. As such if all the Petitioners are to be arrested and charged by the 1st, 2nd and 3rd respondents it is within the ambit of Article 157 and 245 of the Constitution of Kenya 2010 and Section 11 of the EACC Act.

They further averred that Article 49 and 50 of the Constitution will be at the disposal of the petitioners in the event of their arrest and charged and that the issue of Covid-19 is not a compelling reason for issuance of conservatory orders and as such the petition should be dismissed for lack of merit and the court should allow the respondents to carry out their mandate as stipulated by the law.

On 4.06.2020 this Court directed the parties to look at the **Chief Justice** Practice Direction Rules governing Ethics and Anti-Corruption cases with a view to persuade this court whether it had Procedural Jurisdiction. Further, Parties were directed to submit both oral and written submissions on the Petition as well as the Applications.

Petitioners' Written Submissions on the Interpretation of the Chief Justice Rules Governing Ethics and Anti-Corruption Cases

In his written submissions dated 10.06.2020 and filed on the same date, **Mr John Bwire Advocate** for the petitioners, submitted that on 9.12.2016 vide Kenya Gazette Notice No. 10263 the Honourable Chief Justice made Practice Directions Rules whose effect were that all new cases relating to corruption and Economic Crimes Division were to be filed in the Principle Registry of the division at Nairobi however, soon after the Constitutionality of the said Directions was subject to litigation vide **Nairobi High Court Constitutional Petition No. 534 of 2016, Peter Wanyama Mayonge v Chief Justice of the Republic of Kenya & 5 others** wherein a consent was recorded amending Rule 2 of the Directions and allowing the Chief Justice to establish sub registries outside Nairobi.

They further submitted that the Chief Justice had no powers to take away the jurisdiction of any court or to confer jurisdiction to any court and that the High Court had unlimited original jurisdiction in both criminal and civil matters by virtue of powers conferred upon it by the Constitution under Article 165 (3) and that pursuant to the same Article and section 12 (1) and (3) of the High Court (Organisation and Administration) Act the Petition is properly before the Court and to transfer the case will defeat the very objective of the Practice Directions which as indicated are already amended to allow sub-registries out of Nairobi and that the Practice Directions as already held by this Court violates right to access to justice.

For these submissions Counsel relied on the following cases; **Ethics and Anti-Corruption Commission & Another V William Baraka Mtengo & 4 Others [2017] eKLR, Shakeel Ahmed Khan & Another V Republic & 4 Others [2019] eKLR, Hadija Mlao Mlingo v Director of Public Prosecutions & 3 Others; Wilberforce Malanga Wambulwa & 5 Others (Interested Parties) [2020] eKLR and Kanyi J. & Co. Advocates V Director of Public Prosecutions & 2 Others; Kikambala Development Company Limited & 10 Others eKLR 2019.**

Petitioners' Written Submissions on the Petition and the Applications

In his written submissions dated 22.06.2020 and filed on 19.06.2020 **Mr. John Bwire advocate** for the petitioners submitted that the notice requesting for information issued by the 1st respondent was too wide so as to constitute a fishing expedition and it violates the principle of specificity and reasonableness as required under Section 27 (3) ACECA. He submitted that the right to be supplied with documents or information is not absolute but is subject to the following; the Commission must address the Notice specifically to the person in possession of the documents, the request must give reasonable time to comply, the time must be specifically stated in writing in the request and the request must be against a specific person under investigations. He further submitted that where a request does not fully comply with Section 27 (3) it *ipso facto* violates the rights of the Petitioners to a fair administrative action and the right to equal protection of the law as well as the right to equal benefit of the law as guaranteed under Article 47 and 27 of the Constitution and when that illegal request results in an arrest, the fundamental freedom not to be deprived of freedom arbitrarily and without just cause, as guaranteed under Article 29, is violated.

It was also his submission that an offence under Section 27 (4) of the Act cannot be sustained against the Petitioners as the letters dated 30.03.2017, 112.02.2020 and 11.05.2020 are addressed to the County Secretary and copied to H. E. the Governor. The offence is committed by the person to whom the request was made and such person has refused to comply with the request within the reasonable time specified in the request, consequently, the said offence could only be committed by the County Secretary and H. E. the Governor of Kilifi County.

He further submitted that the court had jurisdiction to hear interlocutory applications as well as the Petition itself regardless of Gazette Notice Number 7262. He submitted that the Petition relates to the enforcement of the petitioners' fundamental rights and freedoms and that Article

163 (3) (b) of the Constitution gives this Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened and that it cannot be taken away or conferred by the **Chief Justice** as alleged in the Practice Directions. He submitted that considering the challenges brought by Covid-19 pandemic and the challenges of technology and resources of travelling to Nairobi, this Court is better equipped to achieve the overriding objective of the practice directions. Further it was his submission that Article 165 (6) of the Constitution gives the High Court Supervisory jurisdiction over the subordinate courts and that since the 1st respondent intends to charge the petitioners before the Chief Magistrate's Court in Malindi for failure to produce the requested documents and information as such it is in this Court and not the High Court in Nairobi where the petitioners can challenge the intended arraignment, plea and prosecution.

On the issue of whether the time provided in the letters dated 11.05.2020 and 11.03.2020 is reasonable and or specified in writing it was his submission that the word **'immediately'** is not a specified time and in any case not reasonable and that it was impossible to gather the information within the time requested due to the Covid-19 pandemic situation. They submitted that the period of eight (8) days given in the notices is not reasonable in view of the current prevailing circumstances.

On whether the information sought is wider and amounts to a fishing expedition Counsel submitted that the powers conferred to the Commission under Section 27 (3) of ACECA is akin to the powers given to trial court in notice to produce and sub peona in civil and criminal proceedings respectively and that it is also similar to an application for scrutiny in election petitions. It was his submission that Section 27 (3) of the Act addresses two persons; the person in possession of the information or documents and the person suspected of corruption or economic crimes as such he submitted that the phrase **"investigating allegations of irregular legal fees payments by the county government of Kilifi"** was wide and lacked specificity and the same does not state the suspect to enable the county government to comply. Further it was his submission that the term **"several firms"** as used by the 1st respondent's letter dated 11.03.2020 is not a person within the meaning of Section 27 of the Act.

On whether a proper case for issuance of conservatory orders had been made it was counsel's submission that the notices violate the petitioners' right to fair administrative action as guaranteed in Article 47 (1) of the Constitution and that by issuing notices that are against the law and the actions of the 1st respondent to arrest, detain and prefer charges against the petitioners denies them the equal benefit of the law to avail information as to the reasonableness and specificity of notices under Section 27 (3) ACECA.

For these submissions counsel relied on the following cases; **Ethics and Anti-Corruption Commission & Another V William Baraka Mtengo & 4 Others [2017] eKLR, Shakeel Ahmed Khan & Another V Republic & 4 Others [2019] eKLR, Hadija Mlao Mlingo v Director of Public Prosecutions & 3 Others; Wilberforce Malanga Wambulwa & 5 Others (Interested Parties) [2020] eKLR, Civil Appeal No. 109/2016 Director of Public Prosecutions v Tom Ojienda t/a Prof. Tom Ojienda and Associates & 3 Others (2019) eKLR, US v Walter Forbes and Kanyi J. & Co. Advocates V Director of Public Prosecutions & 2 Others; Kikambala Development Company Limited & 10 Others eKLR 2019.**

1st Respondent's Written Submissions on the Interpretation of the Chief Justice Rules Governing Ethics and Anti-Corruption Cases

In his written submissions dated 8.06.2020 **Mr. J. N. Mbaka** Counsel for the 1st respondent submitted that Petitions on claims of infringement or the threatened infringement of constitutional rights relating to corruption and or economic crimes related matters should be heard by the Anti-Corruption and Economic Crimes Division of the High Court as per the Honourable Chief Justice directions issued on 26.06.2018. He submitted that the Chief Justice directions are specific as to the nature of orders to be sought in relation to claims on infringement or threatened infringement of constitutional rights relating to corruption and/or economic crimes. He submitted that these are rights accruing to suspects or accused persons in the process of enforcement of Anti-Corruption and Economic Crimes laws that emanate from a breach or violation of a right by agencies mandated with enforcement of such laws. As such a party should lay claim at the Anti-Corruption and Economic Crimes Division of the High Court pursuant to the Chief Justice Directions issued pursuant to section 11 of the High Court (Organization and Administration) Act 2015 which directions were issued in the interest of justice and consistency and in mandatory terms. It was his contention that the Petition as field breaches valid judicial administrative directions issued by the Honourable Chief Justice on 26.06.2018.

In his further submissions dated 7.07.2020 Counsel for the 1st respondent submitted that the Petition should be transferred to Anti-Corruption and Economic Crimes Division of the High Court as the Practice Directions are constitutional as they are issued under Section 5 of the Judicial Service Act 2011 and Section 16 of the High Court (Organization and Administration) Act 2015 where the Chief Justice Constitutionally and mandatorily created a Division of the High Court. In doing so the Chief Justice exercises powers granted to him by Article 161 (2) (a) of the Constitution, Section 5 of the Judicial Service Act 2011 and sections 11, 16 and 27 of the High Court (Organization and Administration) Act 2015 making the Practice Directions Mandatory. He submitted the Practice Directions are meant to facilitate the administration of justice without delay as required under Article 159 (2) (b) of the Constitution. He submitted that the Chief Justice had not taken way the constitutional mandate of the High Court through the practice Directions but aimed at promoting efficient and timely disposal of matters touching on corruption and economic crimes as such the Chief Justice did not take way the jurisdiction of the other judges of the High Court to hear Petitions on claims of infringement or threatened infringement of constitutional rights relating to corruption and/or economic crimes related matters.

For his submissions Counsel relied on the cases of; **Ondiek Nyairo V Paul Chepkwony & 2 Others [2017] eKLR, Ethics and Anti-Corruption Commission & Another V William Baraka Mtengo & 4 Others [2017] eKLR, Civil Appeal No. 62 of 2016 at Malindi, Christopher Orina Kenyariri t/a Kenyariri Associates Advocates V Salama Beach Hotel Limited & 3 Others, Hadija Mlao Mlingo V DPP & 3 Others, Wiberforce Malanga Wambulwa & 5 Others [2020] eKLR and Kanyi J & Co. Advocates V DPP & 2 Others; Kikambala Development Company Limited & 10 Others [2019] eKLR.**

1st Respondent's Written Submissions on the Petition and Applications

In his submissions dated 29.06.2020 and filed on 01.07.2020 **Mr. J. N. Mbaka** Counsel for the 1st respondent submitted that his client

intends to charge the 1st, 3rd and 6th petitioners over continuous denial of information and documents in respect to request for information and documents pertaining legal fees payments in the County Government of Kilifi and the insults on the part of the 3rd petitioner on 12.05.2020 when the 1st respondent's officers had gone to collect said documents which amounts to obstruction contrary to Section 66 (1) of the Anti-Corruption and Economic Crimes Act 2003. He clarified that the 1st respondent's letter dated 11.05.2020 does not relate to allegations of irregular payment of legal fees but allegations pertaining to the procurement on the Kilifi County Covid-19 Medical Complex and equipping thereof as submitted at the beginning of the Petitioners' submissions.

He further submitted that at the moment the 1st respondent is not intending to charge the petitioners over denial of information and documents or non-compliance in respect to letter dated 11.05.2020 pertaining to the procurement on the Kilifi County Covid-19 Medical Complex and equipping thereof except the 3rd petitioner who insulted and belittled the said officers. He further submitted that the investigations pertaining to the Kilifi County Covid-19 Medical Complex and equipping thereof were separate and the 1st Respondent shall act in accordance with its powers and mandate depending on the outcome of the investigations as the investigations have not been dropped as the petitioners were suggesting as the 1st respondent will not abrogate its mandate in that regard.

It was his submission that at the moment the 1st respondent had not threatened to arrest and charge the 2nd petitioner and that it will not charge the 4th and 5th petitioners over allegations pertaining to irregular legal fees payments which form the basis of the anticipated charges but will charge the 1st, 3rd and 6th petitioners. He submitted that whereas the 1st and 5th petitioner were arrested and released on a cash bail of Kshs.100,000.00/- each but the 4th petitioner was never arrested. He submitted that Section 32 of the Ethics and Anti-Corruption and Economic Crimes Act 2003 gives the 1st respondent powers to arrest any person for and charge them with an offence and to detain them for purposes of an investigation to the like extent as a police officer.

He submitted that the 1st respondent received a report that the County Government of Kilifi made irregular legal fees payment to firms of advocates during the financial years 2015/2016, 2016/2017, 2017/2018 and 2018/2019, on that basis commenced investigations into the allegations. He submitted that while exercising its mandate the 1st respondent looks at the individual persons or officers involved in corruption and the relationship with the Kilifi County Legal Department as an entity is not strained as submitted by the petitioners. He submitted that the continuous blatant denial of information and documents to the 1st respondent by the petitioners and the insults by the 3rd petitioner amounted to obstruction contrary to section 66 (1) (a) of the Anti-Corruption and Economic Crimes Act 2003 and that the petitioners were subsequently arrested and taken to Malindi Police Station where they were booked and released on a cash bail of Kshs.100,000.00/- each and required to report to the 1st Respondent offices in Malindi on 20.05.2020 and that none had been arraigned in court or taken plea as the petitioners submit.

He submitted that the said letter was not a notice under section 27 (3) of ACECA and the arrests were not in respect to the Kilifi County Covid-19 Medical Complex and equipping thereof but rather in respect to the allegations of irregular payments of legal fees and as such notices under this section had been issued to the 1st, 3rd and 6th Petitioners. He submitted that no evidence had been provided in regard to the contention that the 1st respondent was on a fishing expedition to implicate officers working in the Legal department of the county.

He further submitted that the respondents agree that the letters dated 30.03.2017 and 12.03.2020 are not notices pursuant to Section 27 (3) of ACECA but were general letters requesting for documents and information written to the County Secretary as the central point through which all correspondences pass through as such it is not on the basis of those letters that the respondents will charge and prosecute the petitioners but the notices. He submitted that the 14 days' notice given by the 1st respondent's letter dated 30.03.2017 was reasonable and that be as it may the documents have not been provided as requested to date, more than 3 years later. He further submitted that the information sought as to the law firms involved in the irregular legal fees payments was specific and in no uncertain terms that it was all law firms that were offering legal services to the County Government of Kilifi at that time and thus the effect of the narrowing down the scope of the 1st respondent's investigations was tantamount to dictating the path of the investigations. Further, he submitted that the 1st respondent is not bound to give out information in that regard more especially during investigations and let alone to the entity whose offices are being investigated.

On the issue of the cases filed at the Magistrate Court in Kilifi raised by the petitioners Counsel submitted that those cases are separate and distinct from the investigations on the irregular payments of legal fees and have no bearing on said investigations.

On the issue of the Covid-19 pandemic it was Counsel's submissions that the investigations into the irregular payments of Legal fees began way back in 2017 before the pandemic hit and that the Pandemic was being used as a scapegoat by the petitioners. He further submitted that there was no record on evidence to show that the Petitioners had interacted with the Deputy Governor of Kilifi County and that they had been placed on quarantine and that there was no evidence to show that the petitioners were not working until 13.05.2020 or that directions were issued to the petitioners not to report for duty until their offices had been fumigated or that they were yet to report to work to date. He submitted that the information and documents requested are meant to be in the custody of the petitioners as officials of Kilifi County and not the specific law firms involved as submitted by the petitioners. He submitted that the Petitioners had enough time to provide the said documents and were trying to exaggerate the bulkiness of the documents. He submitted that the petitioners had enough time to comply and not having done so amounted to blatant and deliberate denial of information.

On the issue of whether the notices complied with Section 27 (3) Counsel submitted that the requirements for such notice as set out in the provision is that it should be; in writing, require a person to provide information or documents, a reasonable time to provide said documents or information, the time allocated should be specified in the notice, the information or documents sought be in the person's possession and finally the information or documents should relate to a person suspected of corruption or economic crime. He submitted that there is no requirement of specifically in the provision and as such the 1st Respondent can generally request multiple documents without narrowing down to particular documents and information. They submitted that the wordings "List of firms" and "list of all courts cases" are sufficient in that regard. He further stated that the notices are not application to the court.

He further submitted that the petitioners had failed to demonstrate that the 1st respondent had breached Articles 27 (1) and (2), 29 (a) and 47 seeing as compliance with Section 27 (3) of the ACECA or lack of it has no bearing with Article 29 (a) and that the petitioners were given an opportunity to be heard and had their statements recorded. He further submitted that the Petitioners had not met the threshold for grant of anticipatory bail and that the same is only applicable to the 3rd petitioner who is yet to be arrested and he has to demonstrate that the 1st respondent (should he deem it fit to arrest him) will be denying, violating or infringing or is threatening his rights, which violation has not been demonstrated as the 1st respondent is justified to exercise its statutory mandate under Section 32 of ACECA to arrest any person and charge them with an offence and to detain them for investigations which does not in any way interfere with their rights.

Mr. Mbaka further submitted that a party seeking to restrain the 2nd respondent from charging them and prosecuting them must demonstrate that the intended charging and prosecution amounts to breach of their fundamental rights and that the 2nd respondent is acting outside or contrary to Article 157 of the Constitution. He submitted that the Petitioners had not met the threshold to warrant grant of conservatory orders to restrain the 2nd respondent from charging and or prosecuting the 1st, 3rd and 6th petitioners. He submitted that the no justifiable reason or evidence had been adduced to demonstrate that the likely arrest of the 3rd petitioner and prosecution of the 1st, 3rd and 6th petitioner will amount to a violation of his constitutional rights or usurping of its powers and mandate. Finally, he submitted that the instant application and Petition is a baseless attempt by the petitioners to prevent the 1st and 2nd Respondents from discharging their legal mandate and an abuse of the Court process as the petitioners have failed to demonstrate that they deserve any of the orders sought.

To buttress this position Counsel relied on the cases of; **Pamela Akinyi Odhiambo V Ethics and Anti-Corruption Commission [2018] eKLR, W' Njuguna V Republic, Misc. CR. Case No. 710 of 2002 [2002] 1 KLR 520** and **Speedex Logistics Limited & 2 Others V Director of Criminal Investigations & 3 Others [2018] eKLR**.

Legal Analysis

I have considered the pleadings and submissions filed by Counsel for all parties, I have also considered the oral submissions made by counsel I however wish to concur with the Justices of Appeal's *obiter dictum* in the case of **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2018]**

"It is settled law that a case is only an authority for what it decides."

In my opinion there are only two issues for determination in this matter are:

1. Whether this Court has jurisdiction to entertain this application and the adjacent Petition?

2. Whether the orders as prayed should issue?

1. Whether this Court has jurisdiction to entertain this application and the adjacent Petition?

The Constitution in article 1 decrees that;

"Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution".

The scope of judicial authority to adjudicate over disputes is a matter of the utmost public importance. In **Samwel Kamau Macharia & Another v Kenya Commercial Bank Ltd & Another [2012] eKLR**:

"A Courts jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written Law it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law."

The Court in the matter of the interim **Independent Electoral Commission Constitutional Petition No. 2 of 2011** stated that:

"Where the Constitution exhaustively provides for a jurisdiction of a Court of Law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a Court of Law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a Court of Law or tribunal the legislative would be within its authority to prescribe. The jurisdiction of such a Court or tribunal by statute Laws."

The view quoted in the Judgment of **Mutunga C. J.** in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate [2013] eKLR** said thus:

"The Kenya Constitution has given the High Court the exclusive jurisdiction to deal with matters to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. (Article 23 (1) of the Constitution)."

Further in Article 165 (3) the Constitution gives this Court unlimited original jurisdiction in both Civil and Criminal matters. **Article 165 (6)** of the Same Constitution gives the High Court supervisory jurisdiction:

“...over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.....and may call for the record of any proceedings before any subordinate court or person, body or authorityand may make any order or give any direction it considers appropriate to ensure the fair administration of justice”.

In the case of **Multi-serve Oasis Company Limited V Kenya Ports Authority (supra)** that;

“It is quite obvious, in my opinion, that the limitations to the High Court’s jurisdiction aforementioned only relate to matters reserved to other Courts: such as the Supreme Court; an Industrial Court if established by Parliament; and an Environmental Court if established by Parliament. This does not suggest a general parliamentary power to limit the High Court’s jurisdiction, outside the clear terms of the delimitations in the Constitution itself..... it is clear that the new Constitution is today, the basis of the jurisdiction of the High Court; and it is not permissible to limit this jurisdiction on the basis of ordinary Statutes not provided for within the terms of the Constitution.”

In Article 79 of the Constitution of Kenya 2010 provides:

“Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.”

Pursuant to Article 79, Parliament enacted the Ethics and Anti-Corruption Commission Act which established the 1st respondent and Section 3 of the Act provides:

(1) There is established an Ethics and Anti-Corruption Commission.

(2) In addition to the powers of the Commission under Article 253 of the Constitution, the Commission shall have the power to

(a) acquire, hold, charge and dispose movable and immovable property; and

(b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution, this Act or any written law, as may lawfully be done or performed by a body corporate.

Section 2 of ACECA defined the Commission as:

“Commission” means the Independent Ethics and Anti-Corruption Commission established under [Section 3](#) of the Independent Ethics and Anti-Corruption Commission Act, 2011 ([No. 22 of 2011](#)), pursuant to Article 79 of the Constitution;

Section 36 of the Ethics and Anti-Corruption Commission Act amended Section 2 of ACECA as follows:

The Anti-Corruption and Economic Crimes Act, 2003 ([No. 3 of 2003](#)), is amended in [Section 2](#), by deleting the definition of “Commission” and substituting therefor the following new definition—

“Commission” means the Ethics and Anti-Corruption Commission established under [Section 3](#) of Ethics and Anti-Corruption Commission Act, 2011, pursuant to Article 79 of the Constitution.

It is the 1st respondent’s contention that the Petition before this Court should have been filed at the Ethics and Anti-Corruption Division of the High Court and not this court as the Hon. Chief Justice did in his practice directions dated 9.12.16 as amended on 9.7.18 directed vide Kenya Gazette Notice No. 77262. That applications relating to economic crimes and filed under the Anti-Corruption and Economic Crimes Act be filed in the ACEC Division in Nairobi. The petitioners however oppose the application to transfer the Main Application to the ACEC Division in Nairobi stating that this would violate their rights of access to justice and fair hearing and that it will be costly for them as it will entail incurring travel and accommodation costs and that this Court has the prerequisite jurisdiction to hear and determine the main Petition.

Further, the Court of Appeal addressed the issue of respecting constitutional rights in the case of **Attorney General v Kituo cha Sheria & 7 others [2017] eKLR** and stated;

“The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”

Since this petition alleges a violation of the Constitution by the petitioners/respondents, the invitation to this Court to intervene is more than welcome and the respondents cannot obstruct it from doing so by placing road-blocks on its path. As this is a Constitutional Court the Constitution itself grants authority to this court to hear the petitioners so as to determine whether or not their rights have been violated.

From the foregoing it is clear that this Court is vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution as such it has the duty and is obliged to intervene in actions of other arms

of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation.

However, it is not lost to this Court that the **Hon. Chief Justice** did in his practice directions dated 9.12.16 as amended on 9.7.18 direct vide Kenya Gazette Notice No. 77262 that applications relating to economic crimes and filed under the Anti-Corruption and Economic Crimes Act be filed in the ACEC Division in Nairobi.

Consequently, the question this Court has to deliberate upon is whether the transfer of the Main Application to the ACEC Division in Nairobi will hinder the Applicants' right to access to justice or limit their right to a fair trial or indeed delay the hearing and determination of the Main Application. Direction 6 of the Practice Directions lists the matters that shall be heard by the ACEC Division. These include *inter alia*:

(c) cases relating to corruption and economic crimes filed under the following Acts:

(i) Ant-Corruption and Economic Crimes Act, Cap 65...

It is clear that the matter herein relates to corruption and economic crimes. The 2018 Practice Directions amended the 2016 Practice Directions. This followed the decision in **Nairobi High Court Constitutional Petition No. 534 of 2016 Peter Wanyama Manyonge v Chief Justice of the Republic of Kenya & 5 others** where the 2016 Practice Directions were challenged as unconstitutional for requiring that all matters be filed in Nairobi. The parties in the said Petition entered the following consent:

- 1. THAT the Practice Directions dated 9th December, 2016 vide Gazette Notice No. 10263: Rule No. 2 of the said Practice Directions be amended to allow the Chief Justice to establish sub registries outside Nairobi.**
- 2. THAT upon such amendment being effected, the Petition herein be marked as settled.**
- 3. THAT there be no order as to costs.**

The 2016 Practice Directions were as such amended vide Kenya Gazette Notice No. 7262 of 2018 being the 2018 Practice Directions. Direction 3 thereof provides:

The Chief Justice may establish additional Sub-registries outside Nairobi.

It is important to note that Direction 4 of the Practice Directions lays down the overriding objective of the Practice Directions which is the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes. The intention of the Practice Directions to facilitate the efficient and timely disposal of such matters. It is important to note that in **Nairobi High Court Constitutional Petition No. 534 of 2016 Peter Wanyama Manyonge vs. Chief Justice of the Republic of Kenya & 5 others** the 2016 Practice directions were challenged as unconstitutional only for the requirement that all matters be filed in Nairobi. They were not declared unconstitutional.

Further in the case of **Ethics and Anti-Corruption Commission & another vs. William Baraka Mtengo & 4 others [2017] eKLR** the court had the occasion to consider the argument that the Practice Directions have taken away the jurisdiction of the High Court and observed as follows:

“The Respondent contends that the said Practice Directions have taken away the jurisdiction of this Court and that the Chief Justice has no power to take away jurisdiction from the High Court. I entirely agree with the Respondent that the Chief Justice has no authority whatsoever to take away jurisdiction from any court or to confer jurisdiction to any court.”

And again in the case of **Shakeel Ahmed Khan & another vs. Republic & 4 others [2019] eKLR** the Court in agreement with the **William Baraka Mtengo case (supra)** observed that:

“The Chief Justice as head of the Judiciary has power under Section 16 of the High Court (Organization and Administration) Act to establish sub-registries of the ACEC Division and indeed full ACEC divisions outside Nairobi. The failure to do so has in my view the net effect of stripping the High Court in stations outside Nairobi of the jurisdiction conferred upon it by the Constitution.”

I however hasten to add that I do not think the Practice Directions stripped this court and I concur with the decision of the Court in the case of **Ethics and Anti-Corruption Commission & another v William Baraka Mtengo & 4 others (supra)** where it stated that;

“Whereas the Constitution at Articles 48 requires that justice be accessible, the same Constitution at Article 159(2)(b) demands that justice shall not be delayed. The right to access justice ought to be balanced with the need to ensure that justice should not be delayed. As already noted the Practice Directions, were among other things, intended to aid the efficient and timely disposal of the matters identified therein. A special Division was, in my view, therefore necessary in order to attain those goals. A judge engaged in hearing kinds of cases may not have room for prioritizing the matters identified in the Practice Directions.”

I think the settled rules and practice directions expressly gazetted by the Chief Justice vide Kenya Gazette notices herein aforementioned are matters which favour administrative orderliness in the administration of justice and not to oust the Court's jurisdiction solely governed by

Article 165 (3) & (4) & (6) of the Constitution. It is here I find myself differing from the 1st respondent on the issue of jurisdiction guided by a list of authorities, with both constitutional and statutory provisions. Therefore, jurisdictional requirements and conditions were satisfied by the petitioners.

2. Whether this Court should grant interim conservatory orders as prayed

In its decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others eKLR** the Supreme Court stated as follows:

“Conservatory orders bear a more decided public law connotation. For these are orders to facilitate ordered functioning within public agencies as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private – party issues as the prospects of irreparable harm occurring during the pendency of a case; or high probability of success in the applicant’s case for orders of stay. Conservatory orders consequently should be on the inherent merits of the case, bearing in mind the public interest, the constitutional values and the proportionate magnitude and priority levels attributable to the relevant causes.”

Also in the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others v The Attorney General & Others Petition No. 16 of 2011 Musinga J** as he then was observed that:

“At the interlocutory stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.”

Consequently, the question is whether in this case, the petitioners have established a prima facie case as defined in the above cases. A party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. Unless a petitioner demonstrates that they are likely to suffer real prejudice, I do not believe that a court can properly restrain a state investigative entity from carrying out its constitutional and legal mandate.

Having enumerated as above and pronounced myself on the Jurisdiction of this court I shall now turn over to the Petition. It is not contested that the Ethics and Anti-Corruption Commission is mandated under Section 11(1)(d) of the EACC Act to investigate and recommend to the Office of the Director of Public Prosecution, the 3rd Respondent herein, the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to Chapter Six of the Constitution.

Article 259(1) of the Constitution provides as follows:

This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

The office of the 1st respondent is a creature of the constitution pursuant to Article 79 and 252 of the Constitution. Its mandate and more particularly investigative role on corruption and economic crime is clearly spelt out in section 11 of EACC Act and Section 23 and 35 of the ACECA. The Ethics and Anti-Corruption Commission Act (EACCA) at section 11(1)(d) provides:

“In addition to the functions of the commission under article 252 and chapter six of the Constitution, the commission shall:

(d) 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 the Chapter Six of the Constitution;

The Ethics and Anti-corruption commission, the 1st respondent herein by virtue of Article 252(1)(a)

“May conduct investigations on its own initiative or on a complaint made by a member of the public;”

The DPP’s mandate is also spelt out under Article 157 of the Constitution which provides that the DPP shall have powers to institute and take over proceedings or discontinue. I stand guided by the Court’s decision in the case of **Paul Ng’ang’a Nyaga vs. AG & 13 others eKLR** the court held that;

“This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence they acted in contravention of the constitution”. In the case of Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others [2013] eKLR Odunga J stated as follows:- “However before going to the merits of the instant

application it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well as civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.”

Further, under the provisions of Section 35 of ACECA as read with the provisions of Section 11(1) (d) of Ethics and Anti- Corruption Commission Act, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not, With that understanding in mind, it would in fact be for the benefit of the Petitioners if they stand trial and clear their names within known legal avenues. As I see it now, they have literally jumped the gun because they have basically presented what I see as possible defences of innocence not before the Trial Court but in this Court, a mistake on their part (**See Alfred N. Mutua v Ethics & Anti-Corruption Commission & 4 others {2016} eKLR**). What the Court stated in the case of *Tinyefuze v Attorney General of Uganda [1997] UGCC3* is a guiding pillar that:

“if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course.”

I am at the same time not convinced that the petitioners have indeed demonstrated that their Rights have been infringed or that they are threatened in anyway by complying with the EACC’s request to provide the required information. The petitioners had a duty to demonstrate to this court that the respondents acted outside their statutory mandate and that they abused the process. This has not been done. This court cannot therefore, bar the respondents from carrying out their mandate without sufficient evidence.

A state officer constitutional obligation to provide information in their custody is underpinned under the provisions of Article 35 (1) (a) of the Constitution 2010. The provisions of the Article provide as follows:

“ (a). Every citizen has the right of access to information held by the state

(b). Information held by the state and

(c). Information held by another person and required for the exercise or protection of any right or fundamental freedom.

The Court in **Trusted Society of Human Rights Alliance & 3 Others v Judicial Service {2016} eKLR**, while addressing itself on this aspect stated:

“[270] Article 35 (1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in The Public’s Right to know: Principles on Freedom of Information Legislation – Article 19 at page 2 that the principle of maximum disclosure establishes a presumption may be overcome only in very limited circumstances and that public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information.” Lastly in the Constitutional Court of South Africa in **President of Republic of South Africa v M & G Media CCT 03/11** where the Court stated that:

“[10]. The Constitutional guarantee of the right of access to information held by the state gives effect to “accountability, responsiveness and openness” as founding values of our Constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.”

I find it important to point out that Article **10 (1)** of the constitution provides that "The national values and principles of governance bind all State organs, State officers, public officers and all persons... and Sub-article **(2) (a)** and **(c)** provides that "The national values and principles of governance include— **(a)** patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; **(c)** good governance, integrity, transparency and accountability. (Emphasis my own) Article **10** expressly provides that transparency and accountability is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons.

The principles noted above, have the effect to influence the Courts decision to grant interim conservatory orders. In the present context comparative precedent in the case of **Attorney General of Manitoba v Metropolitan Stores Ltd {1987} 1SCR 110** the Court stated:

“On the grant of interim interlocutory relief in Constitutional claims the Court has to undertake a preliminary assessment as to (i). whether there is a serious question to be tried (ii). come to a determination as to whether the applicant would suffer irreparable harm if the application were refused and (iii). Assess which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

When considering the first line of inquiry, it’s the seriousness of the Constitutional infringement conduct by the respondents it entails asking

whether and to what extent in the totality of the circumstances the impugned letters served upon the petitioners in terms of Section 27 (3) of ACECA undermined the interests protected by the rights infringed.

Here, the Court has to weigh the Global Covid-19 pandemic and its effect on the Kilifi County's operations making it impracticable for the petitioners to provide the requested information by the 1st respondent. In this case, evidence discloses that way back in 2017 the 1st respondent set to investigate potential irregular payments of legal fees in relation to retainer of the firm of advocates offering professional legal services to the County Government. Section 27 and 62 of the Anti-corruption and Economic Crimes Act provides for the right to seek relevant information in the context of a legitimate investigations to accord the 1st respondent accounts of what occurred on the procurement and subsequent payments of legal fees in question. Thus on the face of it, this was not a shakedown or an instance of mere fishing expedition or an act of bad faith.

In the case at hand, the May 2020 letter was not the first instance of interaction and engagement for information between the petitioners and the 1st respondent. On the other hand, with the events and situational analysis of the evidence the Covid-19 pandemic set in motion it cannot be alluded to be a factor to overwhelm the petitioners to give a time frame to comply with Section 27 (3) of the Act in light of the fact that information had been earlier requested for by the 1st respondent.

In my view considering all the circumstances, the impact on the petitioners' constitutional rights is not so great to clearly override the competing interest considerations by the 1st respondent. The second line of inquiry on grant or denial of conservatory orders is to consider the public interest in the adjudication of the interlocutory application.

The public generally expects an allegation on corruption and economic crime to be investigated and if a person is found culpable to initiate a prosecution, according to the Law. The reliability of the evidence and its importance to the state case are factors to be considered by the 1st respondent. Here, the public interest in the investigations and subsequent adjudication of the case on its merits is exceedingly high. The reality that many Kenyan live under constant threat of corruption and plunder of public resources is not a merit consideration and pulls strongly in favor of the 1st respondent cause of carrying out a legitimate investigation to entitle them to determine whether the complaint amounts to an offence under the Anti-corruption and Economic Crimes Act.

Yet, another pointer in the same direction was the averments by the petitioners for the Court to consider exceptional circumstances brought about by Covid-19 pandemic which justify the delay to discharge their burden to supply the required information. The Court must determine on an objective basis what would be a reasonable time for the disposition of the demand by the 1st respondent like the one under review – that is how long a request of this nature should reasonably take.

The objective standard of reasonableness has three components:

(1). The petitioners delay and inherent time requirements of the investigations fairly attributable to the prevailing circumstances of the case.

Thirdly, the Court must determine whether the actual period of time from the date of the notice that fairly counts against the petitioners exceeds reasonable time more than can be justified on any acceptable basis.

In the instance case, there is particularly strong societal interest in the investigations or likely prosecution proceedings against any person, or state officer found culpable under the provisions of the Law. In accordance with the provisions under Section 27 (3) of the ACECA the context of the letters between the petitioners and the 1st respondent sets out the reasons and the framework to make the information available, with indication as to time within a period of nine (9) days.

Although, the petitioners contend that these notices issued by the 1st respondent were prejudicial and caused an injustice in view of the Covid – 19 pandemic no substantial evidence appears to be on record in the discharge of that public duty. The Court in **Diana Kethi Kilonzo v IEBC & 2 others Petition No. 359 of 2019** corroborated this position as follows:

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals it is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision making be shared by different bodies the decision of Kenyans must be respected, guarded and enforced. The Court should not cross-over to areas which Kenyans specifically reserved for other authorities.”

In particular, it is well established that the Ethics and Anti-Corruption Commission is conferred with the statutory power to investigate and make decisions affecting individuals alleged to have concerned corruption and economic crimes and other matters incidental to the offence.

In my view, Section 27 (3) of the Act on that statutory procedure prescribed its unlikely to cover every possibility of unfairness on whether the petitioners have been treated fairly. Closely akin to the subject at hand on the foregoing analysis is the question of the Court's discretion to grant or withhold a remedy for one reason or another. In the end therefore, I accept the overall justice requires that this Court declines grant of conservatory orders as prayed for by the petitioners.

The next question this Court was asked to determine is on grant of anticipatory bail is provided for in Article 49 of the Constitution of Kenya which provides as follows: -

“An arrested person has the right to be release on bond or bail, on reasonable conditions pending a charge or trial, unless there

are compelling reasons not to be released.”

The terms under which a person may be granted anticipatory bail is more or else settled in several cases that have been decided by various courts. In the case of **W’Njuguna vs Republic (2004) eKLR** where, the court therein stated as follows: - *“...when there are circumstances of serious breaches of a citizen’s rights by an organ of the state which is supposed to protect the same.”* Further, the case of **Mandiki Luyeye vs Republic [2015] eKLR**, Ngenye J held as follows:-

“Similar sentiments were observed in the case of Eric Mailu vs Republic and 2 others Nairobi Misc. Cr. Application No. 24 of 2013 in which it was emphasized that anticipatory bail would only issue when there was serious breach of a citizen’s rights by organs of state. Accordingly, it is salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental Constitutional rights in conformity with what the Constitution envisages constitutes protection of fundamental rights and freedoms of a citizen. It cannot issue where an Applicant labors under apprehension founded on unsubstantiated claims. The fear of breach to fundamental right must be real and demonstrable. An Applicant must demonstrate the breach by acts and facts constituting the alleged breach.”

In the case of **Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others (Supra)**, Odunga J held that anticipatory bail ought not to be granted to prohibit investigations, a position that this court wholly associates itself with. Indeed, despite having authority to grant anticipatory bail, courts must exercise great restraint not to interfere with the functions of other bodies and institutions that have been created by statute or the Constitution of Kenya and/or to prevent such bodies or institutions from carrying out their mandate.

In the case of **Richard Mahkanu vs Republic [2014] eKLR**, the court held the firm view that orders for anticipatory bail or bond must not be sought with the intention of pre-empting the outcome of investigations a position that was also held in the case of **Kevin Okore Otieno vs Republic (2013) eKLR** Investigators must feel and be free to do their work without fear of having their authority and/or mandate stifled by courts merely because courts have power and authority to grant anticipatory bail when sought. The fact that a person feels inconvenienced by investigations is not sufficient reason for him to be granted anticipatory bail. Such an order should only be granted in the clearest of situations that point to a violation, infringement or threat or contravention of a person’s right under Article 49 of the Constitution of Kenya.

Further In the case of **Hon. Martin Nyagah Wambora –Vs- Attorney General, Inspector General of Police and Director of Public Prosecution (DPP), Embu High Court Criminal Miscellaneous Application Case No.3 of 2015** the court observed that Article 23 gives wide discretion to the court to grant anticipatory bail and again in the case of **W’Njuguna versus Republic, Nairobi Misc. Cr. Case No. 710 of 2002, [2004] 1 KLR 520**, the Court held that anticipatory bail can be granted:-

“...when there are circumstances of serious breaches of a citizen’s rights by an organ of the state which is supposed to protect the same.”

Taking all matters in the case before me into consideration, I find myself persuaded by **Mwongo, J** in the case of **Martin Nyaga Wambora vs. Speaker of The CountyOf Assembly of Embu& 3 Others (Supra)**, where he expressed himself as follows:

“To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

An examination of the application must therefore bear in mind the above principles alongside the earlier contrast between Section 27 of the Act and the expression of circumstances manifested in the petitioners’ case. The more serious the allegation of infringement of the Constitution the higher the degree of probability to grant conservatory orders.

Disposition

Taking a holistic view of the facts of the case and the interim remedies sought by the petitioners and cross-objections raised by the respondents, I do not think it is just and equitable to sustain this part of the interlocutory application on conservatory orders. Further, under these circumstances the following orders are made:

That it is my opinion that the notices issued by the 1st respondent are fully compliant with Section 27 (3) of the Anti-corruption and Economic Crimes Act {2003} in considerations of all matters before this Court at the interim period pending the hearing and determination of the petition. These matters are still under inquiry and investigations and the outcome of it cannot be pre-empted. The 1st respondents’ application for an order of Transfer of this case file to the Anti-corruption and Economic Crimes Division of the High Court in Nairobi is hereby allowed. The Deputy Registrar Malindi High Court to dispatch Petition No. 11 of 2020 to that Division forthwith.

That both Counsels, Mr. Muliro for the petitioners and Mr. Mbaka for the 1st respondent have consented the file being mentioned on 26th August 2020 before the Presiding Judge or Duty Judge for taking directions and other incidentals to the petition. I would award no costs of this application.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF AUGUST 2020

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Muliro holding brief for Mr. Bwire for the Petitioners
2. Mr. Mbaka for the 1st respondent