



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

PETITION NO 1 OF 2019

BENSON MUTETI MASILA 1ST.....PETITIONER
ZIPPORAH MWONGELI MUTETI.....2ND PETITIONER
MUMBE JUNIOR ACADEMY.....3RD PETITIONER
MUMBE GIRLS HIGH SCHOOL.....4TH PETITIONER
MUMBE BOYS HIGH SCHOOL.....5TH PETITIONER
MUMBE HARDWARE & SUPPLIES LTD.....6TH PETITIONER

VERSUS

THE CHIEF MAGISTRATE
MILIMANI LAW COURTS..... 1ST RESPONDENT
ETHICS AND ANTI CORRUPTION
COMMISSION..... 2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS.....4TH RESPONDENT
HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

1. In their petition dated 3rd January 2019, the petitioners challenge the constitutionality of the search warrants issued on 18th December 2018 pursuant to an application of the same date filed by the 2nd respondent, the Ethics and Anti-Corruption Commission (EACC) in Nairobi Chief Magistrate's Court Misc. Criminal Case No. 4758 of 2018.

2. The petition is premised on rules 3, 4(1), 8 and 10 of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules)**. It is supported by three affidavits sworn on 3rd January 2019 by the 1st and 2nd petitioners and a further affidavit sworn by the 1st petitioner on 23rd January 2019. The petitioners seek the following orders:

a) THAT the Honourable Court be pleased to grant an order prohibiting the respondents from charging the 1st petitioner in court or taking his plea and/or prosecuting him and/or arraigning him in court in any other manner whatsoever as may be related to the search warrants obtained on 18th December 2018 pursuant to the notice of motion application dated 18th December 2018 filed by the 2nd respondent in Nairobi Chief Magistrate's Misc. Criminal Court Case No. 4758 of 2018.

b) THAT the Honourable Court be pleased to order the respondents to release cash totaling Kshs.3,039,570/= and 750 Ethiopian birr to the 1st, 2nd and 6th petitioners seized and confiscated by the 2nd respondent on 20th December 2018 from the 1st petitioner's residence in Kilifi (Kshs.2,250,070/=) and from the 2nd petitioner's handbag (Kshs.21,000/=) and from the 6th petitioner's business premises in Ruaraka, Nairobi (Kshs.83,500/=) and from the 2nd petitioner's residence in Imara Daima, Nairobi (Kshs.685,000/=).

c) THAT the Honourable Court be pleased to order the 2nd respondent to release to the 6th petitioner two (2) computers seized and collected from its business premises in Ruaraka, Nairobi and to further release to the 1st petitioner the three (3) computers and mobile phone number 07223xxxx (Samsung note 8) collected from him in his house in Kilifi together with ATM cards from Barclays Bank Account no. [xxxx] Bungoma branch, KCB bank account no. [xxxx], Wote branch, Cooperative bank account no. 0110014247800, Kilifi KCB account no. [xxxx], cheque book for the 3rd petitioner's bank account no.[xxxx] KCB Makindu and cheque book for the 1st petitioner's personal bank account no. [xxxx] KCB Makindu.

d) THAT the Honourable Court be pleased to grant a mandatory, judicial review order compelling the respondents herein, their agents and/or servants acting under their authority to immediately surrender and release all the petitioners' properties searched and seized, including all documents, computer accessories, mobile phone, anything and everything carted away by the 2nd respondent on 20th December 2018 as detailed in the schedule of inventories handwritten and listed by the 2nd respondent from the 2nd and 6th petitioner's business premises in Ruaraka, Nairobi, the 2nd petitioner's residence in Imara daima, Nairobi and the 1st petitioner's residence in Kilifi and the 1st and 2nd petitioners' Kilifi office and rural residence in Makindu, Makueni county respectively all marked as exhibits "BMM1", "BMM2", "BMM3", "BMM4" and "BMM5" in support of the petition herein.

e) THAT the Honourable Court be pleased to grant an order of permanent injunction restraining the respondents by themselves, their agents, servants, officers, employees from writing letters to tenants, occupants or patrons and from entering, inspecting, searching, seizing, confiscating and/or carrying away or undertaking any activity in the said premises and with the said properties, items and/or seeking to register any caveats, cautions, prohibitions, restrictions at the ministry of lands and/or any other registration offices on the following properties variously owned by the petitioner: (The 37 properties omitted)

f) The Honourable Court be pleased to issue a declaration that all the petitioners' properties were not acquired fraudulently and/or through corruption and/or through receipt of bribery or through the illegal acquisition of public funds.

g) The Honourable Court be pleased to issue a declaration that the respondents herein have violated articles 2,3,10, 20 (1) & (2), 21(1), 27, 28,29,31,47,48,50, & 260 of the constitution of Kenya 2010.

h) The Honourable Court be pleased to issue a declaration that the search warrant dated 18th December 2018 was defective, illegal and unconstitutional as it was obtained in violation of section 23 (4), 26,27,28 and 29 of ACECA and article 47 and 50 of the constitution of Kenya and was additionally obtained fraudulently by the swearing of a false, malicious affidavit by the 2nd respondent.

i) A declaration that the search warrant dated 20th December 2018 violated the 1st petitioner's right to privacy as stipulated under article 31 of the constitution.

j) A declaration that the search and seizure of the petitioners' properties was arbitrary, illegal, ultra vires and unconstitutional.

k) The Honourable Court be pleased to grant a Judicial review order of certiorari to bring into this honourable court and quash the search warrant dated 18th December 2018.

l) An order for full compensation for general damages quantified at Kshs.10,000,000/= for each of the petitioners herein.

m) THAT the Honourable Court be pleased to order the respondents to pay the costs of this petition

n) The Honourable Court be pleased to grant any other or further relief as this Honourable Court may deem fit.

The Petitioners' Case

3. The 1st petitioner is a resident of Kilifi where he works as the Regional Manager of the Kenya Rural Roads Authority (KeRRA), Kilifi and Mombasa region. The 2nd petitioner is his wife, while the 3rd, 4th, 5th and 6th petitioners are limited liability companies incorporated in the Republic of Kenya in which the 1st and 2nd petitioners are directors.

4. The petition is lodged against the Chief Magistrate, Milimani Law Court that issued the warrants impugned in this petition, the EACC, the Director of Public Prosecutions (DPP), the Director of Criminal Investigations (DCI) and the office of the Attorney General (AG).

5. In their affidavits in support of the petition, the 1st and 2nd petitioners set out, in terms similar to the contents of the petition, their case against the issuance of the warrants, the investigations against them and any prosecution arising from the said investigations.

6. The petitioners set out the various positions held by the 1st petitioner over the years until his current position as Regional Manager of

KeRRA in Kilifi and Mombasa. He was employed by the Ministry of Public Works immediately after graduation from the University of Nairobi with a Bachelor of Science degree in civil engineering in 1993. He rose through the ranks to his present position to which he was deployed from the Ministry of Public Works. He had been employed as an Assistant Engineer in 1993 and was posted to Thika. He was deployed in 1994 to oversee the Busia-Mumias road project which he supervised as the assistant engineer. Between 1995 and 1996, he worked in the design department in the Ministry of Roads and Public Works, and in 1996- 1999, he worked in the then Trans Nzoia District as a District Improvement and Maintenance Engineer.

7. He was thereafter transferred to Bungoma to be the District Roads Engineer, a position he held between 1999 to 2000. He worked as a District Roads Engineer/District Works Officer in Vihiga from 2001-2006; a District Works Officer in Kitui from 2006 to 2009; as the Kenya Rural Roads Authority (KERRA) Regional Manager for Makeni region from 2009- 2014; and thereafter as the KeRRA Regional Manager for Kilifi region and also the acting Regional Manager for Mombasa region since 2017.

8. The petitioners also state that the 1st petitioner is the Resident Engineer for Kilifi and Mtwapa town roads, Funzi causeway construction project, Mariakani-Bamba road, Kilifi-Kiwandani road project, Mkupe jet link road (SGR access road), Malindi-Kakoneni-Salagate road project and Marekebuni-Majengo-Marafa-Sosoni road among others.

9. For the 25 years that he has worked with the government, the 1st petitioner has only received commendations and accolades for excellent performance of his duties. He was recently given an award by KeRRA as the best performing Regional Manager for the year 2017/2018, as well as a presidential award for the excellent work undertaken on the Mariakani-Bamba road project. He had also received a KeRRA award and his region was acknowledged as the best performing region.

10. With regard to the facts directly giving rise to this petition, the 1st petitioner avers that on 20th December 2018 at around 5.45 a.m., while he was asleep and alone in his house in Kilifi, five officers from the EACC banged and knocked on his door very loudly. They had come with a search warrant from court but they did not disclose to him the purpose for the search. They seized a total of Kshs.2,250,070/= being Kshs.2,066,520/= for the Baricho bridge and approach roads project and his own Kshs.183,550/=. They also carried away a schedule of payment for staff, which schedule had the requisite administrative expenses to be undertaken with the said cash on the 20th December 2018.

11. It is their averment that the 1st petitioner is appointed by KeRRA to supervise and manage projects and the funds that go with the said supervision as the KERRA Regional Manager as provided for in the contracts KeRRA enters into with various contractors undertaking road projects from time to time.

12. EACC also seized all the other documents listed in the schedule annexed to the 1st petitioner's affidavit as exhibit "BMM4"; three (3) computers that are for official use by the 1st petitioner; as well as his mobile phone number 0722317257 Samsung Note 8. They also collected the Kilifi roads town file from the 1st petitioner's KeRRA office in Kilifi. Simultaneous raids also took place in the 6th petitioner's business premises at Ruaraka, Nairobi where the 2nd petitioner works; the 1st petitioner's house in Imara Daima, Nairobi and in his rural home in Makindu, Makeni. EACC also seized the 6th petitioner's tools of trade, including two computers and related accessories, an act that the petitioners aver crippled the 6th petitioner's business.

13. The petitioners aver that EACC collected Kshs.21,000/= in cash from the 2nd petitioner's handbag and Kshs Kshs.83,500/= from the drawer where she keeps money for sales by the 6th petitioner as they found her at the business premises at 6 a.m. EACC had also collected the items and documents set out in his affidavit as exhibit "BMM2".

14. The petitioners aver that at the 1st petitioner's residence in Imara Daima estate where they found the 1st and 2nd petitioner's children, EACC officers collected, in cash, Kshs.685,000/=. The petitioners state that this amount was in respect of sales for the previous day from the 6th petitioner's business which the 2nd petitioner had brought home prior to banking. EACC had also collected the 1st petitioner's Ethiopian Birr 750 kept from an official visit to Ethiopia in February 2017. They also collected several documents as set out in exhibit "BMM1".

15. It is the petitioners' case that the actions of the EACC shamed and embarrassed the 1st and 2nd petitioners in the eyes of their neighbours as the officers, while wielding guns, jumped over the fence and raided the petitioners' Makindu rural home and collected documents (exhibit "BMM3").

16. The petitioners aver that the EACC was targeting account number 1181223830 purportedly operated by the 1st petitioner in Kenya Commercial Bank, Kilifi Branch. This was on the basis that the 1st petitioner had purportedly received large sums of money as bribes from contractors looking for favours. The petitioners state that the EACC alleged that the 1st petitioner had, as a result, managed to accumulate wealth in excess of Kshs.1.5 billion. They aver, however, that the funds in the said account are legal and are pursuant to contractors' contractual obligations as set out in the agreement between individual contractors and KeRRA for the road projects being undertaken. It is their case that the money is used to pay staff comprising the 1st petitioner's supervision team and for general office administration for which the 1st petitioner is supervised by the KeRRA General Manager (Special Projects) who reports directly to the KeRRA Director General.

17. According to the petitioners, the monies in the subject account are paid into it by contractors in accordance with the contracts executed between them and KeRRA. The payments are made after the contractors have been issued site instructions by the 1st petitioner who is the Resident Engineer. They assert that the disbursements are normally made through the project administrator and are acknowledged and signed by all parties. The petitioners refer in this regard to exhibit "BMM 15" which comprises bank statements from the said account. They assert that the 1st petitioner started running the account in 2015 after he had acquired several of his properties.

18. The petitioners aver that the 1st petitioner's monthly salary at the level of Regional Manager totals Kshs.390,000/= . His project allowances as the Resident Engineer overseeing and supervising several designated projects total to no less than Kshs.750,000/= per month.

He therefore has a monthly income of at least Kshs. 1,140,000/=.

19. It is also their case that the 1st petitioner's family does business in the education sector through the Mumbe schools established by the 2nd petitioner on 6th July 2005, 4th July 2005 and 15th May 2015 respectively. The petitioners assert that they have bakery equipment, dairy farming and all other kinds of self-generating projects in the schools established specifically to supply the schools with uniforms, bread, cakes, vegetables, meat, eggs and all that is required in the schools. From the said business, the schools have expanded and developed houses for rentals such as Mumbe villas established in 2011 which have a monthly rentals of Kshs. 300,000/= and Mumbe Plaza established in 2013 with a monthly rental income of Kshs.350,000/=. It is from the developments in the said schools that the petitioners set up the 6th petitioner, established in 2009 but registered in 2013, to undertake supplies to the developments being undertaken in the schools and in the real estate business to enable them save on hardware supplies. The hardware business, established in Makindu, Makeni and Ruaraka, Nairobi, has been quite successful as its bank statements, exhibit "BMM11", illustrate.

20. According to the petitioners, the 2nd petitioner and her son, one Caleb Muli, run, on their own, Mumbe Construction. This company, they aver, has not, traded with the 1st petitioner in Kilifi or Mombasa or anywhere else where he has been the Regional Manager as this would amount to a serious conflict of interest. The 1st petitioner had also never participated in the day to day running of the businesses as he was fully engaged, even during weekends, with his work as the Regional Manager for KeRRA. It is the 2nd petitioner who is the Managing Director of the family companies whose daily operations she supervises from the premises of the 6th petitioner in Ruaraka. As a teacher by profession, she set up the Mumbe schools which have generated the real estate business.

21. The petitioners set out in a table a list of 35 properties that they have acquired over the years. They assert that the sources of the monies invested in the properties is documented in the bank statements from the hardware and the school businesses run by the petitioners in exhibits "BMM8" to "BMM14".

22. The petitioners contend that their rights to human dignity, privacy and to own property have been grossly breached by the EACC on the basis of malicious and unfounded allegations that the 1st petitioner has acquired in excess of Kenya shillings 1.5 billion through improper payments of bribes derived from his position as the Regional Manager of KeRRA. They assert that the account through which the alleged bribes were received, account no. 1181223830 KCB Kilifi, is not the 1st petitioner's personal account but an official account authorized by the KeRRA and designated for the supervision of government projects.

23. The petitioners aver that the 1st petitioner's family does separate fulltime business undertakings, mostly in the education sector and these businesses have never been in conflict with the 1st petitioner's government assignment as a Regional Manager and Resident Engineer for KeRRA. It is out of these family businesses that the petitioners have acquired most of their properties.

24. The petitioners contend that the 1st petitioner was never given notice by EACC before the *ex parte* orders were obtained on 18th December 2018. He was also not notified about the purpose of the enforcement of the said orders in the wee hours of 20th December 2018. He became aware of the purpose when he was shown the application in Chief Magistrate's Court Misc. Criminal Case No. 4758 of 2018. The petitioners therefore aver that the search warrant dated 18th December 2018 is unconstitutional, defective and illegal because orders were granted without proper apprehension of the likelihood of the 1st petitioner having committed a criminal offence. They contend that the warrant violates Articles 28, 29, 31, 40, 47 and 50 of the Constitution as its terms are vague and open ended and it has been abused by the EACC which has gone on a fishing expedition in a desperate bid to look for non-existent incriminating evidence against the petitioners. It is their case that the warrant was abused as the EACC confiscated the 1st petitioner's properties which he had acquired long before the period of investigation.

25. It is also the petitioners' contention that the warrant was obtained without following due procedure. This is because there was no notice in writing issued to the 1st petitioner asking him to give particulars of the properties he owns and when he acquired them as provided for under section 26 (1) (a) and (b) and 28 (1) and (8) of ACECA. This, according to the petitioners, is a violation of Article 40, 48 and 50 of the Constitution. They cite the case of **County Government of Meru v Ethics and Anti-Corruption Commission (2014) eKLR** and **Petition No. 122 of 2015 Tom Ojienda T/A Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 Others (2016) eKLR** which they aver held that it is mandatory for EACC to notify a party against whom a warrant is sought before moving the court for such warrant. They further argue that the EACC should not have applied for the warrants under section 118 of the Criminal Procedure Code (CPC) which they contend is inconsistent with section 28 of the Anti-corruption and Economic Crimes Act (ACECA).

26. The petitioners further contend that as there was no warrant to search the 2nd -6th petitioners, the EACC illegitimately clothed itself with non-existent powers by purporting to search and seize properties belonging to these petitioners when it went to search the 1st petitioner's premises. They aver that EACC fraudulently, illegally and without any factual basis purported to search and seize properties belonging to the 2nd -6th petitioners merely on the basis that they are associates of the 1st petitioner, thus violating their right to non-discrimination. It had also violated their right to dignity by searching their properties in the wee hours. They further allege violation of the right to privacy under Article 31 on the basis that the EACC obtained a search warrant that was vague, and not specific to enable EACC go on a fishing expedition against the 1st petitioner.

27. In her affidavit, the 2nd petitioner makes depositions regarding the acquisition of the petitioners' properties starting from when she and the 1st petitioner got married in 1993. She avers that she has undertaken legitimate business which she has been operating as the Managing Director. These businesses include the Mumbe Group of schools and the hardware business. She had also started Mumbe Construction in 2002 but has never undertaken any business with the 1st petitioner's office in the KeRRA regions which he heads as she was aware that this would be a conflict of interest.

28. In response to the averments by the EACC in the affidavit of Ms Feiza Abdi sworn on 21st January 2019, the 1st petitioner, in his further

affidavit, asserts that he is neither a director or in control of Mumba Construction Company Ltd. He reiterates that he has never undertaken any KeRRA business with the said company in the regions that he heads. His employment with KeRRA is not the beginning and end of his family's livelihood; his wife and children are adults who carry on their own businesses independently without his involvement or control, and he was a Regional Manager for KeRRA in Kilifi, not the Director General or in a senior position in the KeRRA head office from which he could influence what KeRRA does countrywide.

29. The 1st petitioner avers that he does not understand how carrying out business with the government becomes an offence especially in circumstances where no loss has been occasioned to the government. It is his averment that even if Mumba Construction Ltd undertook any business with the government, he does not understand what the problem is when EACC has not shown or alleged that the services for which Mumba Construction Ltd could have been enlisted were not offered or that any money was lost. It is his deposition that this is part of the malice and witch-hunt by the EACC.

The Petitioners' Oral Evidence

30. Pursuant to an application in that regard by their Counsel, the 1st and 2nd petitioners also gave oral evidence in support of their case in which they adopted their affidavits and were cross-examined thereon. The 1st petitioner testified that he was in court to oppose the seizure of his property by EACC because of false and malicious allegations that he has solicited bribes from contractors and put the bribes in his personal account at KCB No 1131223830. That it was also alleged that out of these monies he has amassed wealth of Kshs 1.5 billion while running the 7 projects for tarmacking the roads.

31. The 1st petitioner stated that he had explained each and every allegation, including the fact that the account at issue is an official account for running projects for KeRRA, and that the use of such an account by the resident engineer is the procedure country wide and worldwide. He had been appointed the engineer by the General Manager, and he had placed before the court all the letters of appointment and had detailed all the assets that he had acquired and how he had acquired them since 1994. His assets are worth Kshs 100 million and not Kshs 1.5 billion as alleged by EACC. His oral evidence was basically a reiteration of the averments in his affidavits.

32. It emerged in cross examination that the 1st petitioner had been suspended from work, but had not been charged. He further confirmed that the only thing that EACC had done so far was conduct investigations and searches at his home and place of work. He and the 2nd petitioner had been shown the search warrants. He was also called by EACC to record a statement in Mombasa. He also confirmed that the petitioners were still carrying on business and operating the accounts which were searched, and that some items such as computers had been returned to him. While the Kshs 2,250,000.70 taken from his premises belonged to KeRRA, he had not written to KeRRA requesting it to request for the money from EACC. The money deposited in the account which he opened as the resident engineer also belonged to KeRRA.

33. The 1st petitioner further asserted that he had explained in his affidavit how he acquired his property and did not wish to be subjected to criminal prosecution as he had done what was right and was declared the best engineer. He had not been charged as the matter was still under investigation. In re-examination, he stated that he had not committed any criminal offence, and only an allegation had been made against him.

34. The 2nd petitioner also gave oral evidence in which she adopted her affidavit sworn on 3rd January 2019 and was cross-examined thereon. She confirmed that she was shown the search warrant obtained by EACC and had been invited to record a statement by EACC, which she did. Her testimony was that the money she was found in possession of was from sales from previous days. She confirmed that a total of Kshs 750,000 was found in her house and business premises, as well as Kshs 83,800 and Kshs 21,000.

The Case of the EACC

35. EACC filed an affidavit sworn on 21st January 2019 by Feiza Abdi, an investigator with the EACC duly appointed under section 23 of ACECA. Ms. Abdi was part of the team that is investigating the matters raised in the petition.

36. According to EACC, it had, on 15th November 2018, received an intelligence report alleging that the 1st petitioner had fraudulently acquired public funds or illegally accumulated wealth while serving as a Regional Manager at KeRRA. It had accordingly commenced investigations into the matter in accordance with its mandate under Article 252 of the Constitution and section 11(d) of the Ethics and Anti-Corruption Commission Act, 2011 (EACC Act) to investigate corruption and economic crimes and to take appropriate action. It was investigating, among others, allegations that the 1st petitioner had amassed unexplained wealth in excess of Kshs. 1.5 billion, which is not commensurate with his known legitimate sources of income.

37. EACC was also investigating allegations that the 1st petitioner has been receiving bribes or kickbacks from road contractors. Further, that he was using his private company, Mumba Constructions Ltd., to trade with KeRRA, an allegation that EACC had confirmed was true. It relied on the tax returns for Mumba Construction Ltd for the months of July 2016, June 2017, March 2018 and September 2018 attached to the replying affidavit as exhibits 'FA 1', 'FA 2', 'FA 3' and 'FA 4' respectively.

38. EACC had therefore considered it necessary to search the 1st petitioner's residences, offices and business premises in order to establish the truth or otherwise of the allegations made against the 1st petitioner. It had therefore made an application dated 18th December 2018 in Milimani Misc. Criminal Application No. 4758 of 2018 for search warrants in respect of the 1st petitioner's premises at Makueni, Nairobi, Kilifi and Mombasa. It had disclosed in the application and in the affidavit in support sworn by Michael Kasilon on 18th December 2018 that it was investigating matters of corruption and economic crimes committed by the 1st petitioner in his capacity as a public officer.

39. EACC averred that it had also disclosed that it had reasonable and probable cause to believe that vital information and documents relating to the alleged illegal acquisition of public funds were in the 1st petitioner's premises. It is its averment that the threshold for the issuance of

the warrant had been met to the satisfaction of the court. Reference is made to exhibits 'FA 5' and 'FA 6', being copies of the application dated 18th December 2018 and the court order respectively. Following the issuance of the warrant, EACC officers had carried out the searches at the 1st petitioner's premises set out in the warrant.

40. EACC denies that it violated any of the petitioners' rights in the conduct of the searches. The searches were done professionally, without any malice, and within the law. It had informed the 1st and 2nd petitioners the reasons for the search and had presented to them the application disclosing such reasons as well as the orders of the court. The 1st petitioner had signed on the face of the documents as exhibit 'FA7' showed. In addition, the 1st and 2nd petitioners had recorded and signed statements on 20th December 2018 admitting that the searches were conducted in a professional and peaceful manner, and that all documents and electronic equipment taken were recorded in inventories. Their statements are exhibited as 'FA 8' and 'FA9' in the EACC affidavit. The 2nd petitioner had also signed a copy of the search warrant as exhibit 'FA 10' indicates.

41. It is therefore the EACC's case that the 1st petitioner has lied in his affidavit by stating that he was not shown the search warrant or informed of the reason for the search or the nature of the allegations against him.

42. The EACC further places before the court a statement ('FA 11') dated 20th December 2018 which was recorded by the 1st petitioner's niece, a Ms. Tracy Mumbua, who was present at the Imara Daima premises at the time of the search. Ms. Mumbua had also signed a copy of the search warrant ('FA 12').

43. EACC states that it had subsequently returned the cheque books, ATM Cards and electronic devices which the petitioners were seeking return of, and exhibit return forms duly signed by the petitioners acknowledging receipt were exhibited as 'FA 13'.

44. EACC asserts that it sought the search warrants *ex parte* in accordance with the law. No notice was required to be given to the 1st petitioner as the application was made under section 118 of the Criminal Procedure Code (CPC) which provides that an application for a search warrant under the said section shall be made *ex parte* to a Magistrate. It had established a reasonable basis for the search of the 1st petitioner's office, business and residential premises, and it had therefore obtained the search warrant lawfully. It avers that notifying a party before applying for a search warrant would jeopardize investigations as it may lead to deliberate concealment or destruction of documents or evidence.

45. It is its case further, that in exercising its mandate to investigate corruption and economic crime and institute proceedings in court for the recovery or protection of public property, it cannot be said to be infringing the constitutional rights of any person. The petitioners' right to privacy is not among the non-derogable rights under Article 25 of the Constitution and can be limited and qualified in the circumstances set out under Article 24(1) to safeguard the public interest in combating corruption and economic crime and ensuring the prudent management of public bodies and resources.

46. With regard to the petitioners' depositions on the manner of acquisition of their wealth, EACC avers that these are not matters that can be interrogated by the court at this stage and neither can the EACC respond sufficiently to them as the matter is pending investigation. In any event, the facts placed before the court by the petitioners are incomplete, riddled with inconsistencies and contradictions and cannot prove the matters that they seek to prove. In its view, the schedule of properties that the 1st petitioner avers that he owns lends credence to the allegation that he has unexplained wealth not commensurate with his known source of legitimate income. It is also its contention that the list of properties is not comprehensive, the properties have been grossly undervalued, and they are not supported by relevant documentation proving their value at acquisition.

47. EACC terms as false the 1st petitioner's contention that the KCB account number 1181223830 is an official account for conducting transactions with contractors as a resident engineer. It avers that the account is a personal account solely operated by the 1st petitioner as demonstrated by the account opening forms exhibited as annexure 'FA 14'. The said account is also only one of the matters the subject of its investigation as the application for the search warrant indicates.

48. EACC concedes that the 1st petitioner's net salary is Kshs. 390,000/= as he avers. It notes, however, that the 1st petitioner has conspicuously failed to annex proof of the alleged monthly allowances of approximately 750,000/=, a material omission that casts doubt on his claim that he receives such allowances monthly. It notes further that while the 1st petitioner alleges that he receives the said allowances of Kshs 750,000/=, he only declares an income of Kshs. 390,000/= as can be discerned from his tax returns for the years 2015 and 2016 respectively (exhibits 'FA 15' and 'FA 16').

49. EACC further questions the contention by the petitioners that the income from the group of schools, including Mumbe Girls High School, led to the purchase of Mumbe Villas and Mumbe Plaza in 2011 and 2013 respectively. It notes that from the documentation exhibited by the petitioners, Mumbe Girls High School was registered as a school on 15th January 2018. The contention that the petitioners had also operated a hardware business through Mumbe Hardware Limited for a period of four years from 2009 to 2013 is also challenged on the basis that the company only came into existence in 2013.

50. EACC asks the court not to grant the orders sought by the petitioners as this will amount to interference with its constitutional and statutory mandate to investigate allegations of corruption and economic crimes. Further, that in the absence of evidence of malice, illegality or irrationality on its part in exercising its mandate, which it has demonstrated that there is none, an order staying execution of the warrant cannot issue. In any event, the said warrant has been executed and a return made to the issuing court. It therefore prays that the petition be dismissed and it be allowed to proceed with its investigations.

51. The DPP filed grounds of opposition dated 18th of January 2019. His case is that the respondents were acting within the law as both the National Police Service and EACC are mandated to investigate all possible criminal offences and corruption and economic crimes. Any attempt to stop execution of their mandate would result in greater injustice in the criminal justice system. By dint of section 118 and 121 of the CPC, section 180 of the Evidence Act and section 23 of the ACECA, they have powers to apply for warrants to investigate accounts and to search premises and seize documents upon a warrant to investigate accounts or search premises being given after disclosure of reasonable suspicion.

52. The DPP argues further that the respondents are not acting under the control or direction of any person or authority, and the petitioners have not demonstrated that in executing their mandate, the respondents have acted without or in excess of the powers conferred by law or acted maliciously or infringed the petitioners' rights. According to the DPP, the Court of Appeal has held in **Kenya Anti-Corruption Commission v Republic and 4 others 2013 eKLR** that breach of natural justice does not arise in issuing *ex parte* search warrant as section 180 of the Evidence Act, section 121 of the CPC and section 23 (1) of the EACC Act permit such orders to be granted *ex parte*. There is therefore no room for the petitioners to be heard before the warrant at issue was issued. The DPP further argues that in any event notice under section 27 and 28 of the EACC Act does not apply to this matter as it only applies in civil recovery cases and in respect to a notice to an accomplice of a person under investigation.

53. It is also the DPP' case that once investigations are complete, he will independently analyze the evidence for sufficiency to charge the petitioners with the alleged offence with due regard to the law and evidence. His decision to charge will be made independently, based on sufficiency of evidence and the public interest underlying prosecution of criminal offences.

The Case of the AG

54. The AG relied on grounds of opposition dated 15th January, 2019. It is his case that the petition is intended to curtail the constitutional functions and mandatory duties of the respondents. In the event that the orders sought are granted, any further investigations will be impeded and any prosecution circumvented. In the AG's view, the petition also grossly offends section 6 of the Judicature Act Cap 8 Laws of Kenya, which insulates the court from civil actions for acts done or ordered by it in the discharge of its duty.

55. The AG further argues that under Article 252 (1) (a) of the Constitution, EACC has power to conduct investigations either on its own initiative or on a complaint made by a member of the public. These powers are in addition to the functions listed under section 11 of the EACC Act. It is, in particular, mandated to investigate cases of corruption and economic crimes. The search warrants in this case were issued by a court of competent jurisdiction and have not been reviewed or set aside by any court.

56. It is also the AG's case that the petitioners' rights are subject to constitutional limits under Article 24 of the Constitution in order to protect the public interest in the detection, prevention and prosecution of corruption and economic crimes. According to the AG, the application for search warrants does not require prior notice as the purpose of search warrants is to protect a person from an illegal search.

The Submissions

57. In their submissions, the petitioners reiterate that the orders issued on 18th December 2018 and the subsequent search and seizure were in breach of their constitutional rights. While they concede that the EACC and DPP have the constitutional mandate to investigate, approve of and prefer criminal charges against every citizen, the exercise of such powers has to be weighed against the rights of citizens and such powers exercised responsibly, reasonably and with restraint. Should the powers be abused, the court has power to intervene.

58. The petitioners submit that the jurisprudence with regard to matters such as this relating to the actions of the EACC and DPP is that, first, it has to be established that the investigation conducted and the charges preferred would return a realistic prospect of sustaining a conviction. If not, then the investigations would amount to an abuse of court process. Secondly, that there must be a legal or factual foundation for charges with a realistic prospect of a conviction. It is their submission that where an investigation or prosecution relies on false averments to obtain orders, the process cannot be fair and the court has a duty to interfere. The basis for this, they submit, is that each suspect has a right to fair administrative action under Article 47 of the Constitution.

59. The petitioners submit that the warrant issued against them was founded on false averments. Consequently, the right of the 1st and 2nd petitioner to dignity under Article 28 was violated. They were deprived of their freedoms arbitrarily without just cause and were treated and punished in a cruel, inhuman and degrading manner contrary to Article 29 (a) and (f) of the Constitution.

60. The petitioners further submit that the search warrant was unconstitutional, illegal, vague and open ended. Further, that it was in violation of Articles 28, 29, 31 and 40 of the Constitution. Due process was also not followed as no notice was issued asking the 1st petitioner to give particulars of properties that he has acquired as provided under section 26 (1) (a) and (b) and section 28 (1), (2) and (8) of ACECA. They cite section 29 of ACECA to submit that it is only when there is failure to comply that EACC would be entitled to apply for search warrants for what has not been produced. It is their submission that the failure by EACC to notify them that it obtained search warrants is a violation of their right to fair administrative action under Article 47 and fair hearing under Article 50.

61. The petitioners also allege that their right to privacy under Article 31 was violated. Their right to own property under Article 40 was also clearly breached as all their title documents were seized and their properties were raided and turned upside down in the pretext that the 1st petitioner had committed a criminal offence.

62. The petitioners submit that the EACC's Notice of Motion application dated 18th December 2018 filed in the Chief Magistrates' Miscellaneous Criminal Application No. 4758 of 2018 lays bare the malice on the part of the EACC. They note that in the said application, EACC had averred that it had received a report that the 1st petitioner had been receiving bribes from contractors as an inducement to grant them contracts at KeRRA; that its preliminary investigations has revealed that the 1st petitioner had been making huge cash deposits in his

personal account held at Kenya Commercial Bank; that the investigations had also revealed that the 1st petitioner received deposits from major contractors in his personal bank account which EACC believed to be favours or bribes from contractors; that he operates Mumbere Construction Company which trades with KeRRA; and that he has amassed unexplained wealth which is not commensurate to his known sources of income and the applicant estimates his current worth stands at Kshs.1.5 billion.

63. The petitioners submit that all this information is false as the EACC has never produced evidence in court to prove its veracity. With regard to the KCB account no. 1181223830, they submit that it is not the 1st petitioner's personal account. He is also not the one who withdraws money from it as the withdrawals are done by an administrator working under him.

64. The petitioners refer to the documents showing the appointment of the 1st petitioner as Resident Engineer for various projects and a contract with a contractor in support of their contention that the money in the account is not as a result of bribes but is money provided by contractors in the relevant contracts for facilitation of the overheads and operational costs of the Resident Engineer's supervisory team. They also enter into some details on the provisions of various clauses in the contract exhibited with respect to the obligations of contractors to the Resident Engineers staff. They submit that the money in the account is normally audited and is under the direct supervision of the KeRRA General Manager, Special Projects. The petitioners also reiterate their averments with respect to the purpose of the Kshs.2,066,520/= seized from the 1st petitioner on 20th December 2018.

65. The petitioners further submit that the averments by the EACC are grossly malicious. They submit that no evidence has been produced to suggest that the 1st petitioner is a Director of Mumbere Construction Company Ltd or that the said company trades with the 1st petitioner with KeRRA in the regions where he worked. They submit that a copy of a search from the Registrar of Companies annexed to their documents establishes that the 1st petitioner is neither a Director nor shareholder of the company. In any event, there is no allegation of loss of money or that services were not offered by the company but payments were made to it.

66. The petitioners submit that while EACC alleged in the application for the warrant that the 1st petitioner has acquired massive properties from public funds, it has yet, one year down the line, to produce evidence in this court or anywhere else to support its contention. Its allegation that he has acquired wealth worth Kshs 1.5 billion is also untrue. They contend that their assets as at the date of their acquisition were worth Kshs.66,735,000/= as tabulated in the 1st petitioner's affidavit in support of the petition. They deny that the said properties have been undervalued, noting that EACC has not provided an independent valuation of the property.

67. The petitioners further submit that the 1st petitioner had an exemplary performance in the public service as a diligent civil servant where he had served for 27 years. In the circumstances of such a sterling career, the investigations by the EACC are malicious and a witch hunt meant to soil the great work the 1st petitioner has done.

68. The petitioners further submit that the 1st petitioner was suspended soon after the raid at his premises and has been on suspension since. They contend that it is not understandable how the EACC can still be investigating him two years later without closure on the matter. In their view, his rights have been violated by the indefinite investigation by the EACC which has also instigated his suspension from employment. They also contend that his businesses are in jeopardy as all their title documents have been in the custody of EACC for more than one year and they cannot obtain any loan or overdraft facilities without title documents.

69. The petitioners submit that while they called oral evidence and were subjected to cross-examination, the respondents did not. In their view, this is because calling evidence would have opened the EACC to scrutiny and serious interrogation. It would have been difficult for it to prove its allegations about the bribes and kickbacks in the KCB account held by the 1st petitioner as no evidence has to date been filed in court to even remotely suggest the receipt of bribes or kickbacks from contractors by the 1st petitioner.

70. The petitioners urge the court to be guided by the decision of the Court of Appeal in **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR** and **Prof. Njuguna S. Ndungu v EACC & 3 others (2018) eKLR** and issue the orders that they seek.

71. They submit that the EACC has had sufficient time to scrutinize the documents for more than one year without coming up with anything to rebut their case yet they have produced all the documents clearing them of any and every allegation. To the extent that their documents have never been contested or rebutted by the respondents, there can be no chances of a realistic conviction of the 1st petitioner were anyone to prefer criminal charges against him.

Submissions by EACC

72. EACC submits that on 15th November 2018, it had received an intelligence report alleging that the 1st petitioner had fraudulently acquired public funds or illegally accumulated wealth while serving as a Regional Manager at KeRRA. The information was also that he had amassed unexplained wealth in excess of Kshs. 1.5 billion which is not commensurate to his known legitimate sources of income. He was also alleged to have received bribes or kickbacks from road contractors and had been using his private company, Mumbere Limited, to trade with KeRRA. It confirmed that this latter allegation was true from the tax returns of the company for the months of July 2016, June 2017, March 2018 and September 2018 annexed to the affidavit of Feiza Abdi (exhibits 'FA 1, 2, 3 and 4').

73. EACC had applied for the search warrant impugned in this petition and carried out the search on 20th December 2018. The petitioner had then filed the present petition on 7th January 2019 to stop it from carrying out further searches, investigations or prosecution. EACC had returned all the items that it had seized save for the cash found in the petitioners' houses which is crucial in its investigation. EACC submits that the High Court (Ongudi J) had ruled on the petitioners' application for conservatory orders on 12th February 2019, dismissing, *inter alia*, the prayers to stay the searches and finding that the search warrants were lawful. It also declined to issue orders for the surrender of the funds seized.

74. EACC notes that in cross-examination, the 1st petitioner had admitted that the only thing it has done is to engage in investigation; he had also confirmed that he had received the search warrants and application, as had the 2nd petitioner; that he has not been stopped from running his businesses or accessing his accounts; and that neither he nor KeRRA have written to it indicating that the money is for a project or requesting for the release of the money. It also submits that while the 2nd petitioner confirmed that while she kept documents of sales at the hardware store, she did not have any documents to show the Kshs. 685,000/= confiscated at her house was from the shop and meant to be banked as alleged.

75. EACC submits that the search warrant was obtained legally. Its investigators are empowered to apply for search warrants by section 23 of ACECA. It notes that under section 118A of the CPC, it is empowered to apply for warrants *ex parte* to a Magistrate. The logic for the *ex parte* application is that if notice is given to a party before the search, then the search would be rendered pointless as the party would conceal whatever evidence is sought, which would scuttle an investigation. The search warrant had also met the threshold under section 118 of the CPC for the grant of orders permitting search.

76. It is also its submission that contrary to the petitioners' contention, the application for the warrant was not vague. It is its submission that the application was clear in the allegations made against the 1st petitioner.

77. It is also EACC's submission that the search warrant was executed in observance of the law and the petitioners' rights. Contrary to the petitioners' contentions, they had been informed prior to the search of the purpose of the search. EACC submits that during his cross-examination, the 1st petitioner had confirmed receipt of the order and the application which disclosed the reason for the search. He had also confirmed in his statement ('FA 8'), recorded at the EACC offices, that the searches were conducted in a 'professional and peaceful manner'.

78. Regarding the petitioners' contention that their rights to privacy and property have been violated, EACC submits that these rights are not absolute and can be limited by the operation of the law. It is its submission that in exercising its constitutional and statutory mandate to investigate corruption and economic crime and institute proceedings for the recovery or protection of public property, it cannot be said to be infringing the constitutional rights of any person.

79. EACC submits that while the petitioners have narrowed down on account number 1181223830, its investigation was not precipitated solely by the transactions in this one account. It has established that the account is a personal account solely operated by the 1st petitioner as demonstrated by the account opening forms ('FA 14'.) Its investigations are diverse and cannot be nullified solely on the basis that the account is not a personal account. It submits, however, that if indeed the account is work related, it would have been opened in the name of KeRRA and operated by the 1st petitioner.

80. EACC notes that the petitioners have placed before the court the purported sources of wealth which they ask the court to interrogate and find that the investigation was unjustified. It submits that this implies that the petitioner does not expect that the investigation may also absolve him of wrong doing, hence his need to scuttle the investigation at the outset. It submits, however, that in an investigation of unexplained wealth, a suspect is granted two opportunities to be heard. The first is during the investigations while the second is during the actual hearing of the matter before a court of law should the suspect fail to sufficiently explain his wealth. EACC submits that these opportunities are presented under sections 26 and 55 of ACECA respectively. It is its case that it has issued a notice to the 1st petitioner dated 8th November 2019 requiring him to explain in writing the disproportion between his assets and income amounting to Kshs. 648,283,451.19.

81. EACC asks the court to ignore the submission that it has taken long in its investigations as the submissions are not based on the pleadings. It submits, however, that its investigations have progressed to the extent that it has issued notices to the petitioners under section 26 of ACECA. It is its case that it is permitted by section 55 (2) of ACECA to commence proceedings if, after an investigation, it is satisfied that a person has unexplained assets, it has afforded him a reasonable opportunity to explain the disproportion between the assets and his known legitimate sources of income, and it is not satisfied that an adequate explanation of the disproportion has been given.

82. EACC submits further that the 1st petitioner is guilty of falsehoods and or concealment of material facts. His net salary is Kshs. 390,000/= as he avers in his affidavit in support of the petition. While he alleges that he has allowances amounting to approximately Kshs. 750,000/=, he has not annexed proof of such allowances. This, in the EACC's view, is a material omission casting doubt on the veracity of the petitioners' claim, particularly in view of the fact that he only declares an income of Kshs. 390,000/= as his tax returns show.

83. EACC submits that grant of the orders sought in the petition will amount to interference with the respondents' mandate without good cause. The petitioners have not demonstrated any bad faith on its part in carrying out the searches, while it has demonstrated that it is pursuing allegations, some of which have been proved already, such as that the 1st petitioner has been trading with KeRRA using his own company while a Resident Manager. It is its case therefore that the petitioners have no case to warrant the grant of the orders that they seek. EACC relies on the case of **DPP vs. Crossley Holdings Limited & 2 others- Court of Appeal at Kisumu, Civil Appeal No. 1 of 2013** in which the Court of Appeal stated that:

'..Absent dishonesty, bad faith or some other exceptional circumstance, the decision of the Commission to investigate and recommend prosecution should not be amenable to judicial review in court'.

84. Reliance is also placed on **Republic vs. Chief Magistrate Milimani & Another ex parte Tusker Mattresses Ltd & 3 others [2013] eKLR** (As quoted in the case of **Republic v Inspector General of Police & another ex parte Patrick Macharia Nderitu [2015] eKLR**) in which the court stated:

"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 of a criminal offence ought to be interfered with.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...The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on.”

85. EACC further submits that its search of the petitioners’ premises does not amount to a violation of rights. They have also not demonstrated how their rights have been infringed. EACC relies on **Oscar Kipchumba Sudi v Ethics & Anti-Corruption Commission & 3 others [2017] eKLR** in which the court held that;

“21. It is not enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be demonstrated. Section 107 (1) of the Evidence Act CAP 80 Laws of Kenya is clear in this regard and provides as follows,

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

The letter and spirit of the above provision has been captured in several decisions of the superior Courts. The principles governing the precision with which a constitutional petition should be pleaded were well stated in Anarita Karimi Njeru –vs- Republic (supra).

22. The petitioner should specifically set out the provisions of the Constitution that are alleged to have been violated; provide the particulars of the alleged violation; and, how the respondent has violated those rights. This position was reiterated in Mumo Matemo –vs- Trusted Society of Human Rights Alliance and 5 Others, Court of Appeal, Nairobi Civil Appeal No. 296 of 2012 [2013] eKLR. Ancillary to the foregoing is the requirement that any prospective petitioner ought to set out his or her complaint with precision and clarity to enable the Court to ascertain whether or not a given right or fundamental freedom has been infringed.”

86. EACC urges the court to find that the orders sought by the petitioners are unmerited, that the petition is an attempt to stop its investigations, and to dismiss the petition.

Submissions by the DPP and DCI

87. The 3rd and 4th respondents submit that the application and execution of the warrants in this matter were done within the lawful limits of the EACC’s mandate. Under section 35 of the National Police Service Act, the DCI is mandated to undertake investigations on economic crimes among other functions. In exercise of this function, the DCI and the EACC have the power to apply for warrants to search premises and seize documents under section 118 of the CPC as read with section 23 and 29 of ACECA where there is reasonable suspicion as to the commission of criminal offences.

88. It is submitted for the DCI that the search warrants were lawfully obtained. The application was presented *ex parte* as provided for under section 118 (a) of the CPC, and the *ex parte* orders issued on 18th December 2018 did not breach or violate any rules of natural justice. They rely on the decision of the Court of Appeal in **Kenya Anti-Corruption Commission v Republic & 4 others** (supra) in which the court stated that there is no breach of natural justice principles in the issuance of *ex parte* search warrants under section 180 Evidence Act, 121 of the CPC and 23(1) of ACECA. The DCI agrees with the EACC that the execution of the search warrants was within the lawful limits as set out in section 119 of the CPC and did not in any way infringe upon the rights of the petitioners.

89. For the DPP, it is submitted that his office is mandated under Article 157 of the Constitution and section 6 of the Office of the Director of Public Prosecutions Act to institute and undertake criminal proceedings against any person before any court of law. That the DPP is an independent institution established under the Constitution and, accordingly, the court can only interfere with or interrogate his actions where there is contravention of the Constitution. Reliance for this submission is placed on the case of **Paul Ng’ang’a Nyaga v Attorney General & 3 others (2013) eKLR**.

90. It is the DPP’s submission that in fulfilling his constitutional mandate of instituting charges against the petitioner in accordance with the law, the court cannot interfere with his actions or stop the prosecution. It is also his case that in exercising his constitutional and statutory mandate, the DPP cannot be said to be infringing the constitutional rights of any person. Reliance for this submission is placed on the case of **Francis Anyango Juma v Director of Public Prosecutions & another [2012] eKLR** and **Hon. James Ondicho Gesami v The Attorney General & Others [2012]eKLR**.

91. The DPP submits that the petitioners have not demonstrated that in making a decision to charge him for economic crimes, the DPP will violate any provision of law or infringe his constitutional rights. The DPP cites the case of **Diamond Hasham Lalji & Another v Attorney General and 4 Others (2018) eKLR** where the court held that:

“The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidentiary burden shifts to the DPP to justify the prosecutorial decision.”

92. It is his submission that the petitioners have not proved that the decision to prosecute by the DPP was unconstitutional or it infringed on any of their rights. The DPP notes that the matters the subject of this petition are still at the investigative stage. His office comes in at the tail end of the whole exercise in the criminal justice system. His office has not played any role up to this point, and it has not been alleged that he has violated any of the petitioner’s rights. The DPP asks the court to find that the petition lacks merit as the petitioners have failed to prove

that their rights have been infringed by the actions of the 3rd and 4th respondents.

Petitioners' Submission in Response

93. The petitioners focus in these submissions on their earlier submissions that the investigations by the EACC have taken too long. They ask how long the investigations should ordinarily take, and whether the indefinite nature of the investigations should not be treated as a gross violation of their constitutional rights.

94. They reiterate that it has taken nearly two years since EACC initiated the investigations yet nothing has been concluded while the 1st petitioner's life is virtually crippled. The petitioners further revisit the argument that the 1st petitioner has not been using his private company to trade with KeRRA since he has never been its Director, a fact that EACC has deliberately refused to appreciate. They also reiterate their argument that no evidence has been produced by EACC that any public money has been lost or stolen which can be attributed to the said company.

Analysis and Determination

95. I have read and considered the pleadings of the parties in this matter which I have summarized above. I have also considered their respective written submissions. In their pleadings and submissions, the petitioners have gone into a lot of detail with regard to their businesses and how they acquired the properties which they have set out in the schedule in the petition and affidavits in support. They have sought to convince this court that the properties they own have been acquired lawfully, and not from any corrupt acts on the part of the 1st petitioner.

96. The petitioners have also sought to explain the genesis and operations of account number 1181223830 that was opened and purportedly operated by the 1st petitioner at the Kenya Commercial Bank, Kilifi. They assert that the account is not the 1st petitioner's personal account but is used to hold funds belonging to the 1st petitioner's employer, KeRRA. They have also submitted at length, though this had not been pleaded, about the length of time that the investigations of the 1st petitioner have taken, which they submit is a violation of their rights. Finally, they have pleaded and submitted on the character and antecedents of the 1st petitioner, who has been commended at his work place for rendering good service. These submissions, in my view, have their place, but in another forum, another matter.

97. The information and submissions relating to the acquisition of the petitioners' properties, as well as the operations of their businesses, are not germane to this petition. Neither is the issue relating to the operation of the KCB account, or the good character and antecedents of the 1st petitioner. At the core of this petition is the search warrant issued on 18th December 2018, whether it was lawfully issued and executed, or whether its execution resulted in a violation of their constitutional rights as alleged. A second issue that the court will need to consider is whether it should, as prayed by the petitioners, prohibit both the investigations by the EACC and DCI, as well as any prosecution that may be mounted by the DPP pursuant to such investigation.

98. The basis on which the petitioners seek such orders, as I understand it, is that they have fully explained the sources of their wealth; the 1st petitioner is an exemplary, hardworking public servant who has received commendations for his work; and there is therefore no basis for the respondents to investigate him. They therefore seek orders that would stop both the EACC and the DCI from investigating the 1st petitioner in relation to his conduct as the Regional Manager of KeRRA, Kilifi region, and whether he has unexplained assets that he holds or that are held by his relations and companies. The petitioners also seek orders to stop any prosecution by the DPP.

99. Thus, I am called upon to consider the circumstances in which this court, in exercise of its constitutional mandate under Article 165, can enter into an inquiry on the validity of, and interfere in, the exercise of the constitutional and statutory mandate of the investigative and prosecutorial bodies.

100. I will begin by considering the constitutional and statutory mandate of EACC. The Constitution provides at Article 79, found in Chapter VI of the Constitution which contains provisions on leadership and integrity, that:

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

101. Pursuant to this Article, Parliament enacted the Ethics and Anti-Corruption Act (The EACC Act), section 3 of which establishes the EACC. Under section 11 of the Act, EACC is granted investigative powers as follows:

(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall

(a)

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery 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;

....

(j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

102. As stipulated in Article 79, EACC is a commission whose general powers and functions, along with those of independent offices, are provided for under Article 252 of the Constitution as follows:

(1) Each commission, and each holder of an independent office—

(a) may conduct investigations on its own initiative or on a complaint made by a member of the public;

(b) ...

(c) ...

(d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

103. EACC is further granted powers with respect to corruption and economic crimes under section 23 and 55 of ACECA. Section 2 of ACECA defines 'the Commission' in which is vested investigative powers under ACECA as "...the Ethics and Anti-Corruption Commission established under section 3 of the Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011), pursuant to Article 79 of the Constitution". Section 23 (3) and (4) of ACECA provide that:

(3) For the purposes of an investigation, the Secretary and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Secretary or investigator has under this Part.

(4) The provisions of the Criminal Procedure Code (Cap. 75), the Evidence Act (Cap. 80), the Police Act (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator.

104. At section 55 of ACECA, EACC is empowered to investigate and institute proceedings to recover unexplained assets. The section provides as follows:

55. Forfeiture of unexplained assets

(1) In this section, "corrupt conduct" means—

(a) conduct that constitutes corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which—

(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

(2) The Commission may commence proceedings under this section against a person if—

(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and

(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

(3) Proceedings under this section shall be commenced in the High Court by way of originating summons.

(4) In proceedings under this section—

(a) the Commission shall adduce evidence that the person has unexplained assets; and

(b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require

the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

105. Thus the question of the manner of and the sources of funds for the acquisition of assets by the petitioners is a matter for consideration in a suit brought pursuant to the provisions of section 55 of ACECA, not in a petition challenging the validity of search warrants issued under section 118 of the CPC.

106. The petitioners have asked the court to stop the investigations being undertaken by EACC. They allege that the search warrant executed against them was not properly obtained or executed. They assert that they should have been given notice, and allege that there was no proper basis for the issuance of the warrant. The EACC's response is that there is no requirement for notice under the provisions of the CPC, and that the petitioners were shown the warrant and the application before the searches were conducted.

107. I have considered the provisions of section 118 and 118A of the CPC under which the warrant at issue was obtained. The sections provide as follows:

118. Power to issue search warrant

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

118A. Ex-parte application for search warrant

An application for a search warrant under section 118 shall be made ex-parte to a magistrate.

108. The court that issued the warrant impugned in this matter was satisfied, on the basis of the averments set out in the affidavit in support of the application, that the warrant was merited. The provisions of the CPC require that the application be made *ex parte*. There is no requirement that the subject of an investigation should be given notice in advance that a search warrant will be obtained with respect to him. Onguto J succinctly captured the reasoning behind the requirement for *ex parte* applications in **Mape Building & General Engineering v Attorney General & 3 others [2016] eKLR** when he stated:

“73. The 2nd Respondent moved the court. Statute law under Section 118 of the Criminal Procedure Code and Section 180 of the Evidence Act allowed them to do so. The application could be made ex parte for very obvious reasons. To hold otherwise would not be in the public interest. It would indeed destroy the very fabric of forensic investigations. No suspect or offender, knowing that there existed evidence which if not destroyed or vanquished would lead to his guilt or liability, can be expected to sit back once notified of possible investigations. The suspect would rid the evidence out of sight and reach. Consequently, the investigator must where there is a foundational basis be allowed and be in a position to seize and secure the evidence.

74. To avoid arbitrary infringement of a citizen's privacy or property through entries or searches or services, the Criminal Procedure Code provides a simple yet effective mode of obtaining authority through the court. The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of the investigations. The order or warrant is never to be granted as a matter of course.

75. It can thus be clearly understood why warrants or seizure orders are obtained ex parte when any matter is still at the investigation stage. The justification seems to fall within the provisions of Article 24 (1) of the Constitution.

76. In the circumstances of this case, the warrants and freezing orders were evidently necessary for the purposes of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations the 2nd Respondent was, in my view, justified in making the application for both the warrants and freezing order ex parte.”

109. The petitioners' case is hinged primarily on the issuance and execution of the warrant. I have found that under the provisions of the CPC pursuant to which the warrant was issued, there was no requirement for notice. From the evidence, the warrant was also executed in accordance with the law. This emerges from the statements of the 1st and 2nd petitioner recorded at the EACC, as well as that of their niece, one Tracy Mumbua, who was present at the Imara Daima residence when the warrant was executed. That being the case, there is no violation of rights demonstrated, and there is therefore no justification for restraining the EACC or any other investigative agency from proceeding with investigations in respect to the petitioners.

110. The petitioners also ask this court to stop any prosecution intended to be instituted against the 1st petitioner pursuant to the investigations undertaken by the EACC and DCI. They have cited the cases of **Diamond Hasham Lalji** and **Prof. Njuguna Ndungu** in support. As I observed at the beginning of this analysis, the gist of the petitioners' case is that they have explained in this petition the sources of their assets, that the 1st petitioner is a person of impeccable character, and that he does not receive bribes or kickbacks which he banks in the KCB account. To investigate him, therefore, or to prosecute him, would amount to violation of his constitutional rights.

111. Unhappily for the petitioners, it is not a man's perception of himself or of his situation that determines whether he is to be investigated, or prosecuted. The law has given investigative agencies the mandate to carry out investigations, and prosecutorial power has been vested in

the DPP. The jurisprudence that has emerged from our courts is that these bodies must be allowed to carry out their constitutional and legislative mandates. Only in the clearest of cases, where a party has established a violation of his rights under the Constitution, will the court intervene.

112. In **Republic v Commissioner of Police & another ex parte Michael Monari & another [2012] eKLR** the court stated as follows:

“The police have a duty to investigate on (sic) any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

113. This is also the position that I took in **Francis Anyango Juma vs The Director of Public Prosecutions and Another (supra)** in which I observed that:

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the Constitution, or violation of the Constitution itself.”

114. In **Hon. James Ondicho Gesami v The Attorney General & Others (supra), Petition No. 376 of 2011**, I also took the view that:

“...The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges... In my view, requiring that the petitioner subjects himself to the normal criminal prosecution process mandated by law where he has all the safeguards guaranteed by the Constitution does not in any way amount to an attack on his human dignity in violation of his constitutional rights.”

115. The petitioners seek to stop not only the investigations, but also any prosecution that may follow upon such investigations. Though they have joined the DPP to the proceedings, they have not, in their pleadings, shown that he has acted in any way that is in violation of their constitutional rights. They could not do this, I believe, for one simple reason: the DPP is yet to take any action in relation to them, nor is he seized of any information pertaining to them.

116. Section 35 of the ACECA requires the EACC, after carrying out its investigations, to submit a report to the DPP on the results of the investigation. It shall include in the report any recommendation that it may have that a person be prosecuted for corruption or economic crime. What the petitioners seek is to stop not only the investigations but, in the event that the EACC finds any evidence requiring the prosecution of the 1st petitioner, to pre-empt such prosecution by the DPP.

117. Article 157 of the Constitution vests State powers of prosecution in the Office of the Director of Public Prosecutions. This is an independent constitutional office whose powers are expressly set out in the said Article. Article 157(10) provides that:

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

118. The question whether the court should intervene and stop investigations or prosecution has been the subject of judicial determination in a number of decisions. In **Total Kenya Limited & 9 Others v Director of Criminal Investigations Department & 3 others (supra)**, Majanja J held that:

“I agree with the respondents that it is within the mandate of the police to investigate crime and where there is reasonable evidence to prosecute the offender.

20. The office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with the constitutional dictates. As I stated in Kenya Commercial Bank Ltd and 2 others v Commissioner of Police and Another, Nairobi Petition No. 218 of 2011,

“[25] The Office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.” ...

21. Although this court has inherent jurisdiction to stop abuse of its process by prohibiting criminal proceedings where the same are found to be oppressive or otherwise an abuse of its process, such power must be exercised ever so cautiously so as not to stifle what is otherwise the lawful discharge of constitutional mandate by the police service and the DPP. That is why in Kenya Commercial Bank Ltd case (supra), I stated that “[23] ... the High Court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be exercised sparingly as it is in public interest that crime is detected and those suspected of criminal conduct

are brought to face the consequences the law prescribes.”

119. It is true that the court may, in certain circumstances, interrogate the exercise of the DPP’s prosecutorial discretion. However, that discretion is to be exercised sparingly, and in the clearest of cases-see the **Diamond Hasham Lalji** and **Prof. Njuguna Ndungu** decisions. However, the court cannot stop the exercise of prosecutorial powers at the investigation stage, even before a report has been made to the DPP. Further, a party would need to establish a clear violation of constitutional rights and an absence of a factual foundation for the court to consider interfering with the intended prosecution-see **Diamond Hasham Lalji; Prof. Njuguna Ndungu; and Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR**.

120. To say that the petitioners in this case are jumping the gun in trying to stop a prosecution even before the investigations are complete is an understatement. EACC and DCI are yet to complete their investigations. They have not made their recommendations to the DPP under section 35 of ACECA. The DPP is yet to review the evidence, if any, that is to be presented to him, or to make a decision on whether or not to prosecute. One has cause to wonder what has made the petitioners so afraid that they want to nip everything in the bud, even before any prosecution has been contemplated.

121. The Constitution has guaranteed to its citizens the rights set out in Chapter Four of the Constitution. It has given the court the jurisdiction to intervene where a violation of these rights has been demonstrated. However, the same Constitution has given other constitutional bodies certain mandates, among them the investigation and prosecution of offences. It is in the public interest that these bodies are allowed to carry out their mandates without interference, and there must be very clear and cogent reasons for the court to interfere with the exercise of their powers.

122. In this case, I am not satisfied that there is any basis whatsoever for stopping the respondents from carrying out their constitutional or statutory mandates.

123. I accordingly find no merit in this petition, and it is hereby dismissed.

Dated Signed and Delivered at Nairobi this 30th day of September 2020

MUMBI NGUGI

JUDGE