



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC PETITION NO. 5 OF 2020

DAVY KIPROTICH KOECH.....PETITIONER

VERSUS

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

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

JUDGMENT

1. In his petition dated 30th August 2018, the petitioner challenges search warrants issued in the Kibera Chief Magistrate's Court on 26th January 2009 in Miscellaneous Criminal Application No. 54 of 2009. He alleges that the search warrants were unlawfully obtained and executed, and that as a result, several of his constitutional rights were violated.

2. The petition was initially filed in the Constitutional and Human Rights Division as Petition No. 299 of 2018. It had been filed together with a Chamber Summons application seeking various conservatory orders. When it was placed before the court on 30th August 2018, the court (Chacha Mwita J) directed that the parties file responses to the petition, noting that there was nothing urgent in the matter as the cases complained of had been in court since 2010. The matter was transferred to this Division on 17th February 2020.

The Pleadings

3. The petition is supported by an affidavit sworn by the petitioner on 30th August 2018 which is in essentially the same terms as the petition. The petitioner states in both pleadings that the 1st respondent, the Ethics and Anti-corruption Commission (EACC) and the Director of Public Prosecutions (DPP) have violated the national values and principles of governance in Article 10 and the values and principles of public service set out in Article 232(1) of the Constitution which they are bound by. This is on the basis that through Kibera Chief Magistrate's Court Miscellaneous Application No. 54 of 2009 filed by the EACC, they had obtained a search and seizure order on 26th January, 2009 from the said court, which the petitioner asserts lacked the jurisdiction to issue such order. On 27th January, 2009 and 2nd February, 2009, EACC had illegally, un-procedurally and unconstitutionally executed the impugned order and had thereby violated his privacy guaranteed under Articles 31 (a) and (b) of the Constitution.

4. The petitioner further asserts that through Constitutional Petition No. 648 of 2010, he had, on 30th November, 2010, obtained orders staying the orders issued in Kibera Chief Magistrate's Court Miscellaneous Application No. 54 of 2009 until the petition was heard and determined. However, despite the stay orders, the EACC and DPP have continued to prosecute the cases against him in total and deliberate violation of the court order.

5. The petitioner further states that on 30th March, 2012, he had obtained an order staying Anti-Corruption Case No.1 of 2010 until the matter was heard and determined. He asserts that despite this order, the respondents have also continued to prosecute the case against him in violation of the court order. He alleges that the court file for Constitutional Petition No. 648 of 2010 has gone missing and his efforts to locate it have been to no avail. The petitioner complains that the courts have also continued to entertain the respondents in open violation of the order and/or in contempt of orders of court. The respondents have proceeded with their impugned conduct with reckless abandon and in total disregard of the Constitution and the relevant laws governing their respective regimes and mandates.

6. In illustrating the alleged violations of the Constitution, the petitioner argues that the respondents have violated Article 31 in that they

conducted an illegal and unprocedural search on his properties namely L.R No. 3734/776 Maji Mazuri Road; LR No 3734/710 Mzima Springs Road; his office as the (then) Director of KEMRI and in a private residential home in Westland. He asserts that these searches were contrary to the directions and contents of the illegal search and seizure warrants. They also carried out an illegal and unprocedural search on his bank accounts based on the said search and seizure warrant.

7. The petitioner further contends that as a result of the seizing of his properties, he has been left unable to afford legal counsel or to have a decent living. He complains that the illegal search warrant was never returned to court to show that it had been completed, and it was executed in a manner that violated his rights under Article 32 (2) of the Constitution which guarantees to everyone freedom of religion. The basis of this contention is that the Investigating Officer, a Muslim, performed his prayers in the petitioner's Christian prayer room during the search and seizure. The petitioner further complains that the respondents, without any basis whatsoever, also conducted a search on properties belonging to his wife and children.

8. It is also the petitioner's averment that the respondents violated his intellectual property rights. He contends that while carrying out the search and seizure, the respondents caused him to lose valuable research work and intellectual property rights. Such loss was occasioned through confiscation of his computer containing sensitive scientific data which were later destroyed by the 1st respondent. The acts of the respondents in this regard were in violation of his rights under Article 40 of the Constitution.

9. The petitioner further contends that there was violation of his right to property guaranteed under Article 40 (1) of the Constitution as the respondents have sought to illegally, unlawfully, unprocedurally and unjustifiably deprive him of his real property.

10. He also alleges violation of his right to dignity and protection from cruel and degrading treatment guaranteed under Articles 28 and 29 of the Constitution. These violations occurred, according to the petitioner, as a result of the manner in which the illegal search and seizure warrant was executed. He alleges that he was forced to watch as his wives and children were terrified by gun totting police men acting on the instructions of the EACC. He contends that the respondents' agents had descended on his matrimonial home and treated him with excessive force despite the fact that he fully co-operated with the respondents' officers and he is not a dangerous criminal.

11. It is the petitioner's contention further that the respondents violated his rights to fair hearing and fair administrative action provided for under Article 50 and Article 47 of the Constitution respectively. The respondents had, in this regard, failed to follow the laid down procedure in conducting investigations, search and prosecution against him. They had also acted, on several occasions, in contempt of court orders and in breach of procedural requirements. It is his contention that such violations occurred also as a result of the respondents inviting and addressing local and international media before arresting him.

12. The petitioner asserts that consequent upon the alleged violation of his rights and the actions of the respondents which were in contempt of court, any evidence obtained as a result of the search and seizure warrant was and still is unconstitutional and should not be relied upon in the cases pending against him. These are Anti-Corruption Criminal Case No.22 of 2009; Anti-Corruption Criminal Case No.1 of 2010; Nairobi ACEC No.18 of 2016 (Formerly Nairobi High Court Civil Case No.280 of 2010) and Nairobi High Court Civil Case No.316 of 2010.

13. The petitioner also alleges violation of his right to fair trial. He contends that under Article 25 (c), this right cannot be limited. The respondents have, however, preferred charges against him which are malicious, in bad faith and are clearly intended to achieve extraneous ends not contemplated by the criminal justice process and amount to abuse of power. He contends that no investigations were carried out nor was a statement taken from him, and he has been charged even though he has not committed any offence. It is his case that subjecting him to a trial would be unjust, traumatic, unreasonably expensive and against the spirit and intentions of the administration of criminal law, justice, the Constitution of Kenya and the National Prosecution Policy. His prosecution does not also promote the objects and intention of the laws related to anti-corruption.

14. It is the petitioner's contention further that the trial courts have failed in their duties to be impartial arbiters and have chosen to collude with the respondents to harass and intimidate him in the proceedings before them. The charges against him, he contends, are without basis and are contrary to the public interest, the interests of administration of justice and the need to prevent abuse of the legal process in the exercise of prosecutorial powers. It is his case that the ongoing criminal and civil cases against him have in essence been a mistrial or unfair trial and would further prejudice his rights.

15. The petitioner further alleges that the respondents have acted in a manner that violates Article 73 of the Constitution. He contends that they have acted in a manner that is disrespectful and which does not bring honour and dignity to their offices or promote public confidence and integrity to their offices. He asserts that as a result of the respondents' actions, he will suffer grave and irreparable injury, loss and damage. Aside from the loss of his intellectual property, he also stands to suffer loss of various real properties, which he sets out in his affidavit, should the court not allow his petition. He therefore asks the court to allow his petition and grant him the following reliefs:

a. AN ORDER OF DECLARATION declaring that the search and seizure warrants obtained against the Petitioner is unconstitutional and therefore illegal and void;

b. AN ORDER OF DECLARATION declaring that the ongoing criminal trials in Anti-Corruption Criminal Case No.22 of 2009, Anti-Corruption Criminal Case No.1 of 2010, Nairobi ACEC No.18 of 2016 (formerly HCCC No.280 of 2010) and Nairobi High Court Civil Case No.316 of 2010 offends the principle of double jeopardy and amounts to violation of the Petitioner's constitutional rights, and be dismissed forthwith;

c. AN ORDER OF DECLARATION declaring that as a result of the unconstitutional acts of the Respondents, the ongoing criminal trials in Anti-Corruption Criminal Case No.22 of 2009, Anti-Corruption Criminal Case No.1 of 2010, Nairobi ACEC No.18 of 2016 (formerly HCCC No.280 of 2010) and Nairobi High Court Civil Case No.316 of 2010 amounts to mistrial and/or unfair trial and as a result of the breach on the part of the Respondents, and be dismissed forthwith;

d. AN ORDER OF DECLARATION declaring that any evidence adduced in connection to the aforementioned search and seizure warrants is unconstitutional, unfair and detrimental to the administration of justice and public interest and should be expunged from Anti-Corruption Criminal Case No.22 of 2009, Anti-Corruption Criminal Case No.1 of 2010, Nairobi ACEC No.18 of 2016 (formerly HCCC No.280 of 2010) and Nairobi High Court Civil Case No.316 of 2010 or in any other court pertaining to matters herein and the Petitioner;

e. AN ORDER OF DECLARATION declaring that the Respondents in exercising their authority granted to them as State Officers acted in an improper, disrespectful and in a manner that is incompatible with the principles of Integrity and Leadership as enshrined under Article 73 and Chapter 6 of the Constitution;

f. An order for compensation for breach of the Petitioner's Constitutional rights and any issue any such orders that would be in the interest of justice and would protect the Petitioner's rights;

g. Costs of the Petition; and

h. Any other orders that the Honourable Court may deem just and fit to grant as the justice of this case may permit.

The Response from EACC

16. In response to the petition, EACC filed grounds of opposition and an affidavit sworn on 27th March 2019 by Abdulhamid Farooque Low. The gist of the EACC case as it emerges from the grounds of opposition and the affidavit is that the petition is *res judicata*, the petitioner having filed several other matters raising the same issues and between the same parties as the present petition.

19. The grounds of opposition and the affidavit in opposition are in essentially the same terms. The deponent, Mr. Low, is a forensic investigator working with the EACC and is duly appointed an investigator under section 23 of the Anti-Corruption and Economic Crimes Act (ACECA), 2003. He was a member of a team of officers that conducted investigations into allegations that on diverse dates between 2000 and 2007, the petitioner, with others, embezzled or misappropriated public funds amounting to Kshs. 555,300,000 during his tenure as the Director, Kenya Medical Research Institute (hereafter KEMRI).

18. EACC avers that the petitioner had filed two other petitions, namely High Court Constitutional Petition No. 648 of 2010 and High Court Constitutional Petition No. 322 of 2012 (subsequently renumbered as High Court Misc. CR. Application No. 481 of 2012) in which he raised the same issues that he raises in this petition. In these petitions, the petitioner had challenged, among other things, the warrants to search his premises obtained in Kibera Misc. Criminal Application No. 54 of 2009 and the use of such evidence in any civil or criminal proceedings against him.

19. EACC notes that in the present petition, the petitioner is challenging the same warrants to search his premises and the subsequent use of the evidence obtained as the basis for his subsequent prosecution in ACC. No. 1 of 2010 and ACC No. 22 of 2009-Republic v Davy Koech as well as the asset recovery proceedings in NBI HCCC No. 280 of 2010 and NBI HCCC No. 316 of 2010, both instituted by the Kenya Anti-Corruption Commission (KACC), the predecessor of the EACC, against the petitioner. According to EACC, H.C. Const. Petition No. 648 of 2010 and H.C. Const. Petition No. 322 of 2012, which predated this petition, were dismissed on 24th July 2018 and 14th December 2017 respectively.

20. EACC argues that the petitioner, in claiming to be subjected to prolonged and traumatizing prosecution, is calling on the law to aid him in his wrong doing. This, in its view, is against the age-old legal doctrine of *commodum ex injuria sua nemo habere debet*- that a wrongdoer should not be enabled by law to take any advantage from his actions. EACC illustrates its contention by noting, first, that the petitioner, acting in concert with his two wives has, through a multiplicity of suits and interim applications filed in an alternating pattern, caused substantial delay in the prosecution of High Court ACEC No. 18 of 2016 (formerly HCCC No. 280 of 2010) and ACC. No. 1 of 2010 and ACC. No. 22 of 2009-Republic v Davy Koech and another. As a result, these are the oldest anti-corruption cases pending in court today.

21. EACC avers that in October 2010, the petitioner's second wife filed Children's Court Case No. 796 of 2010-Claudine Mwelu Ngei v Davy Kiprotich Koech seeking, among other orders, that the petitioner pays school fees for their two children. Basing his claims on the orders obtained by his second wife in the Children's Court case, the petitioner then filed H.C. Const. Pet. No. 648 of 2010 on 2nd November 2010 claiming that the investigation against him crippled his ability to pay school fees and meet basic needs for his children. He also sought orders of stay of ACC No. 22 of 2009, ACC No. 1 of 2010, HCCC No. 280 of 2010 and HCCC No. 316 of 2010 on the grounds that the said cases are premised on an unconstitutional search of his premises and seizure of his assets and his subsequent arrest. Once he was granted orders of stay, he did not prosecute the said petition any further.

22. EACC further avers that the petitioner thereafter filed Const. Petition No. 322 of 2012 which was subsequently transferred to the Criminal Division and renumbered as High Court Misc. CR. Application No. 481 of 2012. He sought in this petition the same orders as he was seeking in Const. Pet. No. 648 of 2010. After obtaining interim *ex parte* conservatory orders, he again did not pursue the petitioner any further.

23. EACC avers that the petitioner pursued a similar pattern in dealing with the civil suits filed for recovery of the funds that he was alleged to have embezzled. He filed a Notice of Motion application dated 23rd December 2010 challenging KACC's capacity to claim Kshs. 509,002,643.80 in Nairobi High Court Civil Case No 280 of 2010 (which had been transferred to this Division as ACEC No. 18 of 2016) and sought orders that the suit be struck out. In a ruling delivered by R.E Ougo J. on 15th September 2014, the court dismissed the application and upheld the suit.

24. Thereafter, Nancy Koech, claiming to be the petitioner's first wife, filed objection proceedings in HCCC No. 316 of 2010 by way of a

Notice of Motion application dated 31st March 2014. She asserted in the said application that all the assets attached pursuant to the decree issued in the suit were matrimonial properties and laid claim on each of them on the basis of spousal interest. She therefore challenged the attachment and intended sale of 8 parcels of land registered in the sole name of the petitioner, the judgment debtor in the said suit. EACC avers that the objection proceedings were dismissed by the court on 18th December 2014 as untenable in the execution of a court decree.

25. EACC further avers that having lost the objection proceedings, Nancy Koech proceeded to the Family Division of the High Court and on 5th March 2015 filed Civil Suit No. 10 of 2015-Nancy Koech v. Davy Koech and EACC- claiming that all the properties attached in execution of the partial decree issued in ACEC No. 18 of 2016 are matrimonial properties, and that she is entitled to a half-share. Her application for stay of execution, according to EACC, is still pending in the Family Division.

26. EACC further avers that by an application dated 10th May 2018 filed in ACEC No. 18 of 2016, the petitioner sought to stay the recovery proceedings on the same grounds as in this Petition namely, that this Court had, vide Const. Pet. No. 648 of 2010, stayed proceedings based on unconstitutionally obtained and executed warrants to search his premises and his subsequent arrest. The said application was dismissed on 28th May 2018 but not before causing an adjournment of the hearing of the suit.

27. EACC notes that the petitioner, in abuse of his right to representation by an advocate of his choice, has engaged new advocates shortly before any substantive step such as hearing of the pending matters is taken, most notably in ACEC 18 of 2016. This has resulted in adjournments and lengthy delays in determination of the said suit. EACC avers that in ACEC 18 of 2016 (formerly HCC No. 280 of 2010), the petitioner has changed advocates 6 times, and each of the Advocates has requested for time to receive the file from the former Advocates.

28. EACC asserts that the petitioner, acting in concert with his spouses, has abused the court process by taking advantage of the hierarchy as well as administrative divisions of the court to build up a confusing web of suits and interim applications. Such conduct has earned the petitioner lengthy delays in trial to the bewilderment of poor pensioners whose funds the petitioner misappropriated and enjoyed with his family while he served as the Director of KEMRI and as an ex-officio trustee of the KEMRI Staff Pension Fund.

29. EACC further states that the petitioner is guilty of material non-disclosure. He had not disclosed in his petition that orders were made on 14th December 2017 dismissing Const. Petition No. 322 of 2012 (High Court Misc. CR. Application No. 481 of 2012) which sought the same orders as in Const. Petition No. 648 of 2010 as well as the Notice of Motion dated 10th May 2018 filed in ACEC No. 18 of 2016 and the present petition. He had also failed to disclose that Const. Petition No. 648 of 2010 which sought the same orders as the present petition was dismissed on 24th July 2018.

30. According to EACC, the petitioner was deliberately misleading this court by pleading that there are conservatory orders still subsisting in Petition No. 648 of 2010. It is its case further that the petitioner did not disclose that his application dated 10th May 2018 filed in ACEC No. 18 of 2016 seeking to stay proceedings in the matter on the same grounds as in this petition was dismissed.

31. Finally, it is the case of EACC that the present petition has been overtaken by events or otherwise wholly compromised, and the orders it seeks are thus sought in vain. It avers, first, that in the absence of any orders for stay, the prosecution of ACC. No. 1 of 2010 and ACC No. 22 of 2009 against the petitioner has proceeded substantially. Secondly, civil suit number NBI HCCC No. 316 of 2010 was heard and judgment entered against the petitioner, and the petitioner has settled the entire decretal sum. Thirdly, in ACEC No. 18 of 2016 (NBI HCCC No. 280 of 2010), consent orders were recorded between the petitioner and EACC by which partial judgment in the sum of Kshs. 200 million was entered in favour of the EACC. The balance of the amount claimed in the suit is set, in terms of the consent, to go to trial.

32. It is the case of EACC therefore that there is no constitutional issue outstanding between the parties and prosecution of this petition would be an academic exercise and a waste of judicial time. Further, that the petitioner has not demonstrated any exceptional circumstances to warrant a stay of prosecution of the anti-corruption cases ACC No. 1 of 2010 and No. 22 of 2009. In addition, this court cannot stay proceedings of a case before another Division of the same court.

The Petitioner's averments in Response

33. In his affidavit in response to the averments by the EACC, the petitioner reiterates in large part his averments in support of the petition. He also goes into some detail with respect to his educational and professional qualifications which I observe had not been raised in the EACC response nor are they at issue. He avers that he is a distinguished scholar and researcher, has engineered many innovative research projects in the country, has had a distinguished public career over the years and has never indulged in misappropriation of public funds as alleged by the respondents. He reiterates his previous averments that the warrants issued against him were unlawful and were executed in a manner that violated his constitutional rights.

34. The petitioner asserts that the orders he seeks in the present petition are different from those he sought in High Court Constitutional Petition Number 648 of 2010. It is his averment further that the petitioners in the said petition were different in that he was the petitioner suing for and on behalf of his children named in the petition. Further, that the respondents were also different, and he lists the investigating officer of EACC, Abdulhamid Low, its predecessor, KACC, KEMRI, the Attorney General and some three individuals. It is his case that in any event, the actions of the respondents are continuing, hence his present petition.

35. The petitioner terms the averment by the EACC that he and his wives have filed a multiplicity of suits as scandalous and without any basis. His averment is that the suits were filed in different courts of various jurisdictions for specific orders. He states that in Anti-Corruption Criminal Case No.22 of 2009, he is wrongfully accused of misappropriating Kshs.18,500,000/= on the premise that the said sums are "public funds." He contends, however, that the funds are private grants that he negotiated on behalf of KEMRI and do not belong to the public, but that they were scrupulously utilised for their intended purpose.

36. The petitioner avers further that in Anti-Corruption Criminal Case No.1 of 2010, he was wrongfully accused of misappropriating Kshs.

555,300,000/=. The said allegations, he asserts, are without any proof as the EACC has not told the court what the public funds constituted and how they were misappropriated. He avers that all the pensioners were paid in accordance with the pension scheme and none were ever prejudiced. Further, that the EACC has not produced a list of pensioners who have not been paid their dues if the allegation that he embezzled public funds are true.

37. It is his case that in any event, ACC No.1 of 2010 and Nairobi ACEC No.18 of 2016 (formerly HCCC No.280 of 2010) relate to funds belonging to Kenya Medical Research Institute Retirement Benefits Scheme which was created by a private trust deed under the Retirement Benefits Act (RBA) No. 3 of 1997. That the RBA establishes the Retirement Benefits Authority under section 3 of which is established a dispute resolution mechanism. It is his averment that the funds governed thereby are not public funds but belong to individual employees who are private members of the Pension Scheme. He contends that under ACECA, EACC is empowered to deal with corruption issues relating to public bodies or properties and cannot therefore institute proceedings against him.

38. The petitioner alleges that there is a personal interest in the matter on the part of the Counsel for the EACC whom he contends colluded with third parties to deprive him of his properties. He further contends that in ACEC 18 of 2016, the court had, on 3rd September 2019, issued orders for maintenance of the *status quo* and thus proscribed any further dealings in the property pending further directions by the court. Despite these orders, the Counsel for the EACC had colluded with third parties to have the properties wrestled from him.

The Case of the DPP

39. The 2nd respondent, the Director of Public Prosecutions, filed grounds of opposition dated 30th October 2018. He argues that the prayers sought by the petitioner are unconstitutional as they seek to prevent his office from exercising its mandate as provided under Article 157 of the Constitution. If granted, the prayers would result in greater injustice in the criminal justice system and public interest.

40. The DPP further argues that the petitioner has not demonstrated how his office has acted without or in excess of powers conferred upon his office by law. The decision to charge and prosecute the petitioner was based on evidence placed before him by the investigating authority. It is also the DPP's contention that the petitioner must demonstrate that substantial injustice would otherwise result if the criminal proceedings against him, which are already at an advanced stage, proceed. In any event, according to the DPP, Article 50 of the Constitution provides for safeguards against any injustice.

41. The DPP argues that this petition is an afterthought lodged after the petitioner had been supplied with the prosecution's evidence and seeing the weight of evidence gathered in support of the charges against him. Further, that the petitioner is forum shopping as it is clear that he has still not taken steps to prosecute his application in High Court Petition No. 648 of 2010.

42. The DPP argues, finally, that the petitioner has failed to demonstrate how the rights he alleges breach of have been or will be infringed, violated and or threatened if the criminal proceedings continue. It is the DPP'S case that the petition is without merit, is an abuse of the court process and should be dismissed with cost to the respondents.

The Submissions

43. The petitioner and the EACC each filed two sets of submissions, together with lists of authorities, with the leave of the court. The DPP did not file any submissions. Both parties elected to rely on the written submissions without highlighting. I shall consider the respective submissions in the course of analyzing the issues that arise in this matter.

Issues for Determination

44. From the pleadings and submissions of the parties, I believe that the main issue that calls for determination in this matter is whether the present petition is *res judicata*, the issues that it raises having been previously raised in previous matters before courts of concurrent and competent jurisdiction. A corollary to the main issue is whether the petitioner is engaging in abuse of process by filing several suits and applications on the same matters and involving the same parties as pleaded by EACC.

46. Should this court find that this petition is *not res judicata*, then the second issue for determination is whether the respondents have violated the petitioner's constitutional rights, and accordingly, whether he is entitled to the orders that he seeks in his petition. A final issue for consideration is who should bear the costs of this petition.

Whether the Petition is Res Judicata

46. I start with the question whether this petition is *res judicata*, the first limb of the case for the EACC. In its submissions, EACC notes that the petitioner, upon failing to obtain conservatory orders in this matter and being directed to proceed with the petition, lost interest in prosecuting the petition. This, according to EACC, is a trend that is apparent in a number of other suits on the same subject matter, brought by the petitioner or persons claiming under him.

47. EACC submits that in accordance with its mandate, it had filed two suits to recover a sum of Kshs. 556,296,493.80 contended to have been fraudulently acquired or otherwise misappropriated by the petitioner when he was the Director of KEMRI, acts which were done in reckless abuse of his position of trust. In Nairobi HCCC No. 316 of 2010, EACC's predecessor, KACC, had sought to recover from the petitioner Kshs. 18,500,000 being the balance then outstanding out of Kshs 19,300,000 which he had embezzled from KEMRI's Centre for Vector Biology and Control Research in his capacity as Director of the said institute. The matter was heard and judgment entered against the petitioner as annexure AFL 9 in the affidavit of Mr. Low demonstrates.

48. In Nairobi HCCC. No 280 of 2010 (now ACEC No. 18 of 2016) KACC v Davy Koech and another, EACC was seeking to recover Kshs.

509,002,643.80. It submits that there is sufficient evidence to prove that this amount was fraudulently acquired by the petitioner and his colleague, one Dunstan Magu Ngumo, who were the trustees of the Kenya Medical Research Institute Retirement Benefits Fund. The petitioner had attempted to have the suit struck out, an attempt that was unsuccessful as the ruling of R.E Ougo J dated 15th September 2014 (annexure AFL4) demonstrated.

49. The petitioner had then approached EACC for negotiations which had resulted in a consent for partial judgment against him in the sum of Kshs. 200 million recorded in court on 18th January 2016 before Ombija J (as he then was). The balance was to be subjected to further negotiations failing which the matter would go to trial. EACC submits that prohibition orders were issued against the petitioner's parcels of land registered solely in his name. The petitioner had not honoured the decree the subject of the partial judgment. A notification of sale was issued by the Court on 24th January 2019 for the sale of the petitioner's six (6) properties, and a sale by public auction was conducted on 29th April 2019 in which 4 out of 6 of the properties advertised for sale were sold. EACC submits that the petitioner had sought stay orders from the Court of Appeal in Civil Appeal No. 92 of 2019 but the orders were declined in a ruling delivered on 16th May 2019.

50. EACC further submits that on 9th October 2019, in ACEC No. 18 of 2016, this court delivered a ruling dismissing an objection lodged by the petitioner's spouse which sought to object to the sale of the petitioner's properties by public auction on the basis that the property was matrimonial property. As there was no application challenging the propriety of the sale as envisaged by Order 22 Rules 74, 75 or 76 of the Civil Procedure Rules, the Deputy Registrar of the Court, by a ruling dated 19th August 2019, confirmed and declared the sale of the four properties absolute. On 12th September 2019, the Court issued certificates of sale in favour of the purchasers.

51. EACC further submits that the prosecution of ACC No. 1 of 2010 and ACC No. 22 of 2009 have proceeded substantially and the prosecution has closed its case in ACC No. 22 of 2009.

52. EACC cites section 7 of the **Civil Procedure Act** and the explanations contained therein with regard to the doctrine of *res judicata*. It submits that the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties, and had been determined by a court of competent jurisdiction. EACC cites the English case of **Henderson vs Henderson (1843-60) ALL E.R. 378** to support its submissions with respect to the application of the doctrine of *res judicata*.

53. It is its submission that a court will invoke the doctrine in instances where a party raises issues in a subsequent suit which he ought to have raised in the previous suit between the same parties. In the view of EACC, this matter falls squarely within the four corners of the doctrine of *res judicata*.

54. EACC further submits that the doctrine of *res judicata* operates in relation not just to suits but also to *issues that were directly and substantially in issue in a former suit between the same parties*. It is its case that the issues in the present petition are the very same ones that were substantially raised by the petitioner in two previous matters. First, that in Constitutional Petition No. 648 of 2010, the petitioner raised the same issues as in the present petition, including a challenge to the warrants to search his premises obtained in Kibera Misc. Criminal Application No. 54 of 2009. He had also challenged the use of such evidence in any civil or criminal proceedings against him in ACC No. 1 of 2010, ACC No. 22 of 2009 and the asset recovery proceedings against him. After obtaining interim stay orders in that petition, the petitioner did not prosecute it any further, and it was dismissed for want of prosecution on 24th July 2018.

55. EACC further submits that in Constitutional Petition No. 322 of 2012 (subsequently renumbered High Court Misc. Criminal Application No. 481 of 2012), the petitioner had sought the same orders as in Constitutional Petition No. 648 of 2010. He had obtained interim *ex parte* conservatory orders, but again had not pursued the petition any further. The petition was also dismissed for want of prosecution on 14th December 2017.

56. EACC refers the court to the case of **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** in which the Court of Appeal considered the application of the doctrine of *res judicata* to constitutional petitions. It submits that *the petitioner should not be allowed to re-litigate his challenge of the search warrants in different cases*.

57. In his submissions on this issue, the petitioner argues that this petition does not raise the same issues as High Court Constitutional Petition Number 648 of 2010, and that the parties are also different. In his supplementary submissions, he expounds further on the differences between this petition and Constitutional Petition No. 648 of 2010. In the latter petition, he was undergoing financial difficulties and had therefore sued his former employer, KEMRI and six other respondents as they had left him destitute and he could not provide for members of his family. He had therefore included members of his family as co-petitioners, which he has not done in this matter.

58. The petitioner submits that the cause of action in Constitutional Petition No. 648 of 2010 was that KEMRI had failed to place him on half-pay; that he has several wives and children who depend upon him to live; and that his children had been denied their basic rights to adequate education, medical treatment, clothing and food. Further, that an order had been obtained against him in Nairobi Children's Case No.796 of 2010 on 25th October 2010 requiring him to pay outstanding school fees, yet he had no source of income. He submits that the main reliefs sought in Constitutional Petition No. 648 of 2010 were stay of execution of orders issued in Nairobi Children's Case No.796 of 2010 as well as an order unfreezing all his accounts.

59. The petitioner further submits that though he is still offended by the impugned search and seizure, he is, in this petition, raising valid issues such as the failure by the respondents to follow the provisions of the RBA before preferring charges against him. He submits that the EACC does not appreciate, in raising the plea of *res judicata*, that since this is a constitutional petition, the strictures of the Civil Procedure Act and rules made thereunder should not strictly apply. He relies for this submission on the case of **Okiya Omtatah Okioti & another vs. Attorney General & 6 others [2014] eKLR** in which the court held that *res judicata* should be invoked in constitutional matters only in the clearest of cases.

60. The petitioner also refers to the case of **Wycliffe Gisebe Nyakina v Attorney General & another [2014] eKLR** in which the court found that the petition was not *res judicata* as the petitioners in the cases at issue were different and the sections of law under challenge were also different. He argues further that the impugned conduct of the respondents in Constitutional Petition No. 648 of 2010 happened in 2009 and were to be determined in the light of the former Constitution. In his view, should they arise in the present petition, they should not be rendered *res judicata* because they have to be determined within the framework of the current Constitution. Reliance for this submission is placed on **Juma Nyamawi Ndungo & 5 others vs. Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR** in which the court held that:

“The foregoing paragraphs show clearly that the issues placed in Petition No. 185 of 2008 are not the same issues which form part of this petition. In any event the said issues were to be determined in the light of the old constitution. Even if the same issues were to crop up in this petition, they shall not be rendered *res judicata* because they have to be determined within the framework of the current constitution.”

61. The petitioner further cites Article 48 of the Constitution on the right to access to justice and Rule 4 of the **Constitution of Kenya (Protection of Rights and fundamental freedoms) Practice and Procedure Rules, 2013** which require the court to facilitate the just, expeditious, proportionate and affordable resolution of all cases in exercising its jurisdiction.

62. The petitioner contends that he had made follow-ups on the disappearance of the court file in Constitutional Petition No.648 of 2010 and was perplexed to learn from the 1st respondent’s pleadings that the petition had been dismissed without his being given a notice to show cause as required by law.

63. I have considered the pleadings and submissions of the parties on this issue. Section 7 of the Civil Procedure Act titled ‘*res judicata*’ provides that:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

64. Section 7 further contains explanations with respect to the application of the doctrine of *res judicata*. Explanation (3) and (4) state that:

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

65. In the case of *Henderson vs Henderson (supra)*, it was observed as follows with respect to *res judicata*:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

(Emphasis added)

66. The petitioner has referred to the case of **Okiya Omtatah Okoiti & another vs. Attorney General & 6 others (supra)** in which the court held that:

“Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of *res judicata* can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.”

(Emphasis added)

67. In its decision in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others (supra)**, the Court of Appeal considered the application of the doctrine of *res judicata* to constitutional petitions and stated as follows:

“The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly

spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions." (Emphasis added)

68. I am duly guided by the sentiments of the court in the above matters and the principle that emerges therefrom. This is that the doctrine of *res judicata* is applicable to constitutional litigation. It should, however, be invoked in the clearest of cases, taking into account the facts and circumstances of each case.

69. I turn now to the facts and circumstances of this case. The present petition was filed on 30th August 2018. It challenges the issuance of warrants in Kibera Chief Magistrate's Court Misc. Crim. Appln. No. 54 of 2009. Prior to the filing of this petition, there were several other suits and petitions before the High Court in which the issue of the search warrants was raised, or could have been raised. These were Constitutional Petition No. 648 of 2010; HCCC No. 316 of 2010; Constitutional Petition No. 322 of 2012 (High Court Misc. Criminal Application No. 481 of 2012) and Nairobi ACEC No.18 of 2016 (formerly HCCC No.280 of 2010). In Constitutional Petition No. 648 of 2010, the petitioner had, on his own averment, obtained conservatory orders, but had not proceeded with it thereafter. EACC avers that the petition was dismissed for want of prosecution on 24th July 2018, about a week before the filing of the present petition.

70. The petitioner complains that the court file on the petition had gone missing, but he has not placed anything before the court to support his contention. The evidence before the court indicates that he had filed his petition in 2010 but took no steps to prosecute it. Instead, eight years later, he filed the present petition which raises the same issues that he raised, or could have raised, in his 2010 petition. It is my view, therefore, that the present petition is barred by the doctrine of *res judicata*.

71. If there was any doubt about this, however, one only has to consider the decision in HCCC No. 316 of 2010 and the consent order entered into between the petitioner and EACC in ACEC No. 18 of 2016, a suit that was also filed in 2010 as HCCC No.280 of 2010. The petitioner seeks orders in this petition to stop the use by the respondents in the two suits of evidence obtained pursuant to the searches executed on the basis of warrants issued in Kibera Chief Magistrate's Misc. Crim. Appln, No. 54 of 2009. Yet, in HCCC No. 316 of 2010, Rawal J (as she then was) entered summary judgment in favour of EACC in her considered ruling dated 13th April 2011. In ACEC No. 18 of 2016, the petitioner entered into a consent in which he admitted liability for a sum of Kshs 200,000,000 from the KEMRI Staff Pension Scheme. He had the opportunity in the two suits to raise the issues he now raises about the evidence relied on by the EACC having been obtained pursuant to an illegal search; or that the funds claimed were members' pensions funds and therefore subject to the RBA and the rules made thereunder. He did not do so, and he cannot now be permitted to raise the issues in yet another suit.

Abuse of Process

72. The fact that the petitioner chose to file yet another petition instead of dealing with or reviving the matters pending in court which he alleges were dismissed without notice to him leads to a consideration of the second limb of the EACC's case in this matter: whether the petitioner has engaged in abuse of court process and his petition should be dismissed on that basis. EACC submits that the abuse of process is manifest in three respects. These are by filing a multiplicity of suits over the same subject matter; by engaging in a combination of non-disclosure of material facts and deliberate concealment of facts, and by engaging different tiers of the court over the same subject matter concomitantly.

73. In illustration of its argument, EACC submits that the petitioner and his wives have litigated the same issues alternately but in a coordinated fashion. It notes that in October 2010 in Children's Court Case No. 796 of 2010- Claudine Mwelu Ngei v Davy Kiprotich Koech- the petitioner's second wife sought from the court orders that the petitioner pays school fees for their two children. Orders were made on 27th October 2010 directing the petitioner in this matter to pay school fees for his children. EACC submits that after a long time of inactivity, the file was marked as closed when the court observed that the children named in the suit were of majority age.

74. EACC observes, however, that the petitioner, basing his claims on the orders obtained by his second wife in the children's case, filed Constitutional Petition No.648 of 2010- Davy Kiprotich Koech v Kenya Anti-Corruption Commission and 6 Others on 2nd November 2010. The petitioner sought in that petition to stay the orders issued against him in the Children's Court in Children's Case No. 796 of 2010, but he also used the same orders to challenge the warrants of search and his suspension as the Director of KEMRI. He purported in the petition that the said acts amounted to a deprivation of sources of income for himself and his family, and alleged that the seizure of his documents amounted to a "freeze" on his bank accounts, making him unable to pay school fees for his children.

75. EACC further submits that during the pendency of Constitutional Petition No.648 of 2010, the petitioner filed, on 31st July 2012, Constitutional Petition No. 332 of 2012 in which he sought, among others, orders staying Miscellaneous Criminal Application No. 54 of 2009 in which the EACC had obtained search warrants, as well as stay of the criminal cases against him, being ACC No. 22 of 2009 and ACC No. 1 of 2010. He also sought stay of HCCC No. 280 of 2010 and HCC No. 316 of 2010 on the grounds that the said cases are founded on an unconstitutional search of premises, seizure of his assets and his subsequent arrest. The petitioner did not prosecute the petition either, and it was dismissed on 14th December 2017. Thereafter, on 30th August 2018, the petitioner filed the present petition in which he seeks the same orders as he had sought in the other petitions, *inter alia* orders of stay of execution and prosecution of the criminal cases based on the same grounds as the two earlier petitions.

76. EACC notes that the petitioner's wife, Nancy Koech, had filed objection proceedings dated 31st March 2014 in HCCC No. 316 of 2010 claiming to be the first wife of the petitioner and asserting that all the assets attached pursuant to the decree in the matter were matrimonial properties. Upon dismissal of the objection proceedings, she had filed a matrimonial cause, Civil Suit No. 10 of 2015, claiming half share of the same properties on the basis of a spousal interest. She further filed an application dated 4th August 2016 brought under certificate of urgency seeking to restrain the 1st respondent from selling the subject properties pursuant to the decree issued in the matter. EACC observes that in its ruling dated 9th October 2019 in ACEC No. 18 of 2016, the court had dismissed the objection lodged by the said Nancy Koech which sought to object to the aforementioned sale by public auction on the basis of the property being matrimonial property. The court had also upheld a preliminary objection raised by EACC and had declared the application an abuse of the process of Court.

77. EACC further submits that the petitioner, having lost an application for stay and enlargement of time in ACEC No. 18 of 2016, filed Civil Appeal No. 92 of 2019. In that appeal, by an application dated 22nd March 2019, the petitioner sought injunctive orders to restrain the EACC from selling the subject parcels of land in execution of the decree. The Court of Appeal had declined to grant any stay or orders of injunction.

78. It is also EACC's submission that the petitioner has failed to disclose material facts relating to the fact that two of his petitions raising the same issue as in the present case have been dismissed; that he has failed to disclose the numerous suits and applications he has filed in an attempt to prevent the respondents from carrying out their constitutional mandates; that he has engaged new advocates shortly before any substantive step (such as a hearing) is taken, notably in ACEC No. 18 of 2016 where he has changed advocates six times, all of which actions amount to concealment of facts.

79. In response to the arguments by EACC, the petitioner denies that he has engaged in abuse of the court process. He asserts that all he has done is vigorously defend his rights using the judicial system as he is fully aware of his rights. The petitioner cites the decisions in **Republic vs. Chairman District Alcoholic Drinks Regulation Committee & 4 others & 2 others Ex-parte Detlef Heier & another [2013] eKLR** and **Muchanga Investments Ltd vs. Safaris Unlimited (Africa) LTD & 2 others [2009] eKLR** in which the court cited Nigeria's Court of Appeal decision in **Sarak vs. Kotoye (1992) 9 NWLR 9pt 264) 156 at 188-189 (e)** on what amounts to abuse of process.

80. The petitioner submits that he has not abused the legal process as he did not originate the litigation in the cases cited, namely Children's Case No.796 of 2020 in which he was sued for upkeep and payment of school fees; High Court Family Division Civil Suit No.10 of 2015 in which one of his wives sought a declaration that his properties are matrimonial properties; High Court ACEC No.18 of 2016 which had been filed by the EACC against him and others; High Court Constitutional Petition No.648 of 2010 in which he and his family had sued KEMRI and others for violation of his constitutional rights; and Nairobi Court of Appeal Civil Application No.92 of 2019 in which he appealed against orders issued in High Court ACEC No.18 of 2016. He cannot, in his view, be said to be abusing the court process by participating in these matters as he has only sought to legally protect his rights by using the judicial process.

81. The petitioner argues that it is the respondents who have abused the legal process. They had procured illegal search warrants and seizure when there was no magistrate, on 26th January 2009, who was gazetted or authorised to issue such warrants in Kibera at the time the warrants were issued. EACC had therefore obtained a search and seizure warrant from a court that lacked jurisdiction. It had also filed suits using evidence obtained through an illegal search warrant.

82. The petitioner further complains that the EACC has introduced in its submissions matters that are not pleaded. He identifies these matters as, first, a submission that the prosecution has closed its case in Milimani Anti-Corruption Criminal Case No.22 of 2009 and Anti-Corruption Criminal Case No.1 of 2010. He further notes that the EACC had also not mentioned in its pleadings the proceedings in Court of Appeal Civil Application No.92 of 2019 yet EACC makes submissions with respect to the case and comments on the merits of the ruling therein. The petitioner submits that parties are required to restrict their submissions to matters which are already on record, reliance being placed on **In the Estate of Ndungu Mwaniki (Deceased) [2014] eKLR**. He asks the court to expunge the offending paragraphs from the submissions by EACC.

83. I agree with the petitioner that he has a right to vigorously use the judicial system to protect his rights. However, the use of the judicial system must conform to the rules set out in legislation. One of those rules is found in section 7 of the Civil Procedure Act. If a party has filed a suit in relation to a matter, he and all those claiming under him are required to bring their entire case before the court. It is an abuse of the court process to bring a multiplicity of suits on the same matter. In **Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 others (2009)eKLR**, the court cited the decision in **Beinosi v Wiley 1973 SA 721 [SCA]** in which the court set out the applicable legal principle with respect to abuse of process as follows:

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

84. The petitioner and his spouses have filed a number of suits and applications in this and other courts. The petitioner had filed constitutional Petition No. 648 of 2010, partly ostensibly as a reaction to Children's Case No. 796 of 2010 in which one of his wives had sought maintenance for their children. The petitioner has not controverted the averment by the EACC that the Children's Case was marked as abandoned after it was established that the children had reached the age of majority. Petition No. 648 of 2010 was dismissed for want of prosecution on 24th July 2018. The petitioner had also filed a constitutional petition, Petition No. 322 of 2012 which was subsequently transferred to the Criminal Division. This petition, which sought the same orders as the present petition, was also dismissed for want of prosecution on 14th December 2017. While the petitioner avers that he had obtained interim conservatory orders in these matters, which had been allegedly disobeyed by the respondents, there is no indication that he ever sought to pursue the respondents for alleged disobedience of the said orders. Coupled with the petitioner's frequent change of Advocates as alleged by the EACC, which he does not dispute, one would not be remiss in concluding that the purpose of filing the multiplicity of suits and applications was to delay the hearing and determination of the criminal prosecutions and civil suits against him. Further, as argued by the EACC, the petitioner and his spouses have, in the past decade,

engaged the Children Court, the Constitutional, Civil, Criminal, Anticorruption and Family Divisions of the High Court, as well as the Court of Appeal, in litigation on essentially the same issue.

85. The petitioner seeks in this petition to restrain the respondents from using evidence obtained pursuant to searches conducted following warrants issued in Misc. Crim. Application No. 54 of 2009 in HCCC No. 310 of 2016. He omits to mention, however, that summary judgment had been entered against him in the said matter, and that he had paid the entire decretal amount. The petitioner had also, in ACEC No. 18 of 2016, entered into a consent for the sum of Kshs 200 million with the EACC, and upon default in payment of the decretal sum, EACC had carried out sales of the subject properties.

86. The petitioner's first wife had filed objection proceedings in both HCCC No. 316 of 2016 and ACEC No. 18 of 2016 dated 31st March 2014 and 16th May 2019 respectively. Both objection proceedings were in relation to the same properties registered in the name of the petitioner. In HCCC No. 316 of 2016, the properties had been attached pursuant to the summary judgment entered by Rawal J on 13th April 2011. The application in ACEC 18 of 2016 was filed pursuant to execution carried out by EACC upon default by the petitioner in complying with the terms of the consent entered into between him and the EACC on 18th January 2016.

87. It seems to me that while the petitioner is entitled to use the judicial process to protect his rights, such use as has been made of the process by the petitioner and his spouses amounts to abuse of process. A party who brings a matter before court must bring his or her entire case before the court, must prosecute his or her matter expeditiously, and cannot be permitted to re-litigate the same matter by bringing other proceedings raising the same issues or using his proxies to re-litigate the same matter. I am in the circumstances constrained to agree with the EACC that the present petition is an abuse of the court process.

Violation of Rights

88. Having found that the present petition is *res judicata* and an abuse of the court process, I believe that I need not enter into an analysis of the question whether the petitioner's rights have been violated by the actions of the respondents. For the sake of completeness, however, I will make a few observations with respect to the parties' contentions in this regard.

89. The core of the petitioner's allegation is that the warrants of search obtained and executed against him in Kibera Misc. Criminal Application No. 54 of 2009 were unlawful. This, he argues, is because there was no Magistrate in Kibera gazetted or authorized to issue such warrants under his or her name at the said Station.

90. EACC submits that there is no constitutional issue outstanding between the parties, and the petitioner should be stopped from wasting precious judicial time. It submits that the warrants impugned by the petitioner in the various cases filed before the court were issued, as the petitioner has admitted several times, by the Kibera Chief Magistrates Court in Miscellaneous Application No. 54 of 2009. Its case is that it had obtained a search warrant prior to the search of the petitioner's home, the search warrant was issued by a judicial officer presiding over a court that had the requisite jurisdiction to issue it, the warrant identified the person to carry out the search, and the petitioner cannot be heard to argue that any of his constitutional rights were violated when EACC obtained the warrants through a valid and legal process provided for under the Criminal Procedure Code.

91. Reliance for this submission is placed on the case of **Omwanza Ombati t/a Nchogu Omwanza & Nyasimi Advocates vs. Directorate of Criminal investigations Department, Emmanuel Kanyungu & 3 Others (2017) eKLR**, the EACC arguing that in following the procedure under the Criminal Procedure Code, it was protecting the petitioner's rights.

92. The warrants impugned in this matter and all the other matters filed by the petitioner and his spouses were obtained, according to the EACC, in accordance with the Criminal Procedure Code. Section 118 thereof titled '**Power to issue search warrant**' provides that:

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

93. Section 118A titled '**Ex-parte application for search warrant**' provides that:

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

94. Even had I found that this petition was not barred by the doctrine of *res judicata*, I would have had no basis for faulting the warrants of search obtained and executed by the EACC in this matter. The provisions of section 118 and 118A provide for the warrants to be obtained *ex parte* from a magistrate. The search warrants were obtained from a magistrate in Kibera. The petitioner has not placed anything before the court that showed that the requirements of section 118 were not complied with. In his decision in **Omwanza Ombati t/a Nchogu Omwanza & Nyasimi Advocates vs. Directorate of Criminal investigations Department, Emmanuel Kanyungu & 3 Others** (supra), Mativo J observed that:

27. In the absence of evidence of abuse of power or a gross violation of the rights of a person to be searched, a court would be slow to find that a search warrant is unlawful on purely technical grounds.

28. The right to privacy is expressly guaranteed by Article 31 of the Constitution, while the statutory procedure for conducting search and seizure by the police has three inbuilt requirements to be met. Such requirements are that:- (a) prior

to the search and seizure the police should obtain a search warrant; (b) such warrant should be issued by a judicial officer; and (c) lastly there should be proof on oath that there is reasonable suspicion of commission of an offence. To me, the above inbuilt requirements are present in this case.

29. What is clear from the position of the law is first, that Police officers or other state agents therefore cannot without a search warrant, lawfully enter upon and search any premises, nor can they carry away any property without the authority of the Court. Second that from the provisions of the Criminal Procedure Code..., the onus is on the person seeking the search warrant to prove the necessity for such warrant. To me, the above requirements have not been proved to be absent in the proceedings leading to the issuance of the warrant. (Footnotes omitted)

95. In light of my analysis and findings on the issues identified in this matter, I find no merit in this petition. It is hereby dismissed with costs to the respondents.

Dated Delivered and Signed at Nairobi this 28th day of October 2020

MUMBI NGUGI

JUDGE