



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**PETITION NO. 7 OF 2019**

JOASH OINDO..... 1<sup>ST</sup> PETITIONER

SALOME L MUNUBI.....2<sup>ND</sup> PETITIONER

VERSUS

THE ETHICS AND ANTI-CORRUPTION

COMMISSION.....1<sup>ST</sup> RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT

NATIONAL LAND COMMISSION..... INTERESTED PARTY

**RULING**

1. The petitioners, Joash Oindo and Salome L. Munubi, have filed the present petition dated 29<sup>th</sup> March 2019 challenging their investigation by the 1<sup>st</sup> respondent, the Ethics and Anti-Corruption Commission in connection with the compensation of land owners affected by the construction of the Standard Gauge Railways, Port/Reitz/ Moi International Airport Access Road and the Mombasa Southern By pass-Kipevu Road. They allege that the investigations amount to harassment and abuse of power and they seek various orders against the respondents. Among the orders sought are a declaration that the actions of the respondents are a violation of the petitioners' rights under Articles 2, 3, 19, 27, 29, 47, 48, 50, 67 and 236 of the Constitution. They also seek a declaration that the conduct of the respondents contravenes section 25 of the National Land Commission Act and undermine the independence and institutional autonomy of the National Land Commission.

2. Simultaneously with the petition, the petitioners filed an application by way of a Notice of Motion expressed to be brought under rules 4(1), 23 and 24 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules 2013 (The Mutunga Rules)** seeking the following orders:

a) Spent

b) Spent

c) Spent

d) ***THAT pending hearing and determination of this Petition this court be pleased to issue CONSERVATORY ORDERS suspending both the directive of the 1<sup>st</sup> Respondent to the National Land Commission recommending that the 1<sup>st</sup> Petitioner should be sent on compulsory leave and the compulsory leave itself.***

e) ***THAT Pending the hearing and determination of this Petition, this Honourable Court be pleased to issue CONSERVATORY ORDERS restraining the respondents either by themselves or their agents and/or staff or any person from issuing demands, threats, summons, subpoenas and notices to the Petitioners, their colleagues and family members or breaking into and taking or confiscating any property, files or documents or in any manner whatsoever interfering with the functioning of the Interested Party or its officers in the guise of conducting investigations.***

f) ***THAT this honourable court be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> respondents to supply the Petitioners and the Court with***

***CCTV footages of interviews between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents officers and the 1<sup>st</sup> Petitioner at the EACC Police Station for the purpose of confirming fatal non-compliance with the provisions of section 52 of the National Police Service Act.***

***g) THAT this Honourable Court be pleased to order that all the documents demanded and taken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents belong to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner or the Interested Party be returned to them.***

3. The application, which does not appear to have an affidavit in support, was based on the grounds set out on the face of the application. In summary, the applicants argued in these grounds that the respondents were presently undertaking criminal profiling, victimisation, intimidation and castigation of the petitioners and their families, as well as the National Land Commission, the interested party in this matter (hereafter referred to as “the Commission”). They were therefore depriving the Commission of its institutional autonomy and independence.

4. They further argued that the 1<sup>st</sup> respondent, the Ethics and Anti-Corruption Commission (hereafter “EACC”) has, without affording the 1<sup>st</sup> petitioner a hearing contrary to Article 236 of the Constitution, forced the Acting Chief Executive Officer of the Commission to send him on compulsory leave for alleged violation of Chapter 6 of the Constitution. The petitioners contend that this has prematurely triggering section 62 of the Anti-Corruption and Economic Crimes Act which requires that a public officer charged with an economic crime is suspended on half pay.

5. It is also their contention that the EACC, acting through the 2<sup>nd</sup> respondent has, in breach of Article 47 of the Constitution as read with section 52 of the National Police Service Act been harassing, victimising and intimidating the 1<sup>st</sup> petitioner in the name of investigating the acquisition and compensation paid for the Standard Gauge Railways, Port Reitz/Moi International Airport Access Road and for Mombasa Southern Bypass-Kipevu Road.

6. The petitioners contend that the confiscation of documents which they allege are integral to the functions and operations of the Commission by the EACC has led to the crippling of the Commission’s operations to the disadvantage of the many persons relying on its services as they are not able to fully realize the benefits they are intended to receive from the Commission, which has the constitutional duty to discharge its functions under Articles 67 and 40 of the Constitution. It is also their contention that the failure by the EACC to return confiscated documents that are integral to the functions and operations of the Commission will result in total and complete halt of the operations of the Commission and will expose it to hardship and litigation for breach of obligations.

7. The petitioners further allege that on 6<sup>th</sup> March 2019 at 8.30 p.m., the 1<sup>st</sup> petitioner was served with a requisition compelling his attendance at the EACC headquarters to record a statement at 8.00 a.m, the next morning. They argue that he was therefore not given an opportunity to consult his Advocate and ask that he accompanies him or to request that he attends at a different date that was more convenient for him in consideration of his work or to re-organise his schedule before complying with the EACC request. The 1<sup>st</sup> petitioner alleges that the request was served on him at 8:30 p.m., after sunset, thereby exposing him to psychological violence, distress and anguish contrary to Article 29 of the Constitution.

8. The petitioners further contend that the investigations by the respondents are being undertaken in complete non-observance of the provisions of section 52 of the National Police Service Act as not all the petitioners’ family members were called in writing, and the 1<sup>st</sup> petitioner was compelled to make statements and no caution was given about the possibility that the evidence gathered could be used against them in a court of law.

9. The respondents opposed the application and filed an affidavit in reply sworn on 5<sup>th</sup> April 2019 by Catherine Ngari, an investigator with the 1<sup>st</sup> respondent, as well as grounds of opposition. In her affidavit, Ms. Ngari avers that prior to filing this petition, the petitioners had been afforded an opportunity to explain the sources of the subject matter of the suit, being Kshs. 1,000,000/= and USD 168,900 collected during the search conducted at the 1<sup>st</sup> petitioner’s residence on 4<sup>th</sup> May 2017. She further avers that section 55 of the Anti-corruption and Economic Crimes Act (ACECA) places the burden of proving that the unexplained assets in question were acquired through legitimate means on the party said to be in possession of unexplained wealth. Upon giving his or her case, the burden then shifts to the EACC to establish the veracity of the explanation given, and it is entitled to investigate the evidence provided by the party under investigation in order to be able to rebut its evidence.

10. Ms. Ngari further avers that upon examining the 1<sup>st</sup> petitioner’s annexures (she refers to the 2<sup>nd</sup> defendant’s annexures) showing his business and income, they noted that a portion of his bank statements for A/c No. 01148110283500 Co-operative Bank was missing. She thereafter obtained warrants vide **CMCC Misc. Crim. Appl No. 4004 of 2017** to investigate the account and obtained statements for the period July-November 2017. Upon perusal of the bank statements, they noted that there had been deposits made to the Defendant’s (sic) account on 28<sup>th</sup> August 2017 and 9<sup>th</sup> November 2017 from Homeland Holdings Limited and C.W Chege Advocates.

11. On following the money trail, they established that the sources were compensations paid out to persons affected by acquisitions for the Southern Bypass-Kipevu Road Project and Port Reitz/Moi International Road Project. She notes that there are allegations that the 1<sup>st</sup> petitioner, being the Director of Valuation and Taxation of the Commission, received kickbacks in return for facilitation of irregular compensation for acquisition of land for the expansion of roads and in particular a sum of Kshs. 7,000,000/= was received by him through a company owned by his wife and son.

12. Ms. Ngari avers therefore that their findings disclosed offences of corruption and economic crime. It is therefore within their mandate to investigate the allocation, acquisition and compensation for the Southern By Pass-Kipevu Road Project and Port Reitz/ Moi International Road Project. The EACC asserts that it is acting within its mandate and the petitioners have not proved that the ongoing investigation are illegal, unreasonable, unprocedural, made in bad faith and for collateral purposes and not for the vindication of the criminal justice system or that they have acted *ultra vires* their mandate to warrant stopping the investigations.

13. Ms. Ngari further avers that the proper channel for challenging the raids, searches and seizures conducted pursuant to court orders by the Chief Magistrate would be the same court that issued search warrants which is why the inventory was duly filed in that court. She avers that section 27(3) of the ACECA allows them to issue a notice to any person suspected of corruption to provide, within a reasonable time specified in the notice, any information or documents in the person's possession that relate to a person suspected of corruption or economic crimes. The 1<sup>st</sup> petitioner had requested for more time to prepare himself for statement recording but they declined the said request.

14. It is her averment that the suspension of the 1<sup>st</sup> petitioner by the EACC and the Commission were taken pursuant to section 62 of the Anti-Corruption and Economic Crimes Act which makes it a statutory requirement to suspend the 1<sup>st</sup> petitioner who is facing charges before a court of law. She avers further that section 42(7) of the Leadership and Integrity Act, 2012 as read with the Leadership and Integrity Regulation No. 25 of 2015, provides for suspension of a person being investigated under the Act. It is her contention therefore that the actions by the EACC and the Commission were taken pursuant to the said section which makes it a statutory requirement to suspend the 1<sup>st</sup> petitioner.

15. Ms. Ngari avers that section 25 of the **National Land Commission Act** protects members of the Commission from actions or claims only when a matter or thing is done in good faith during execution of the functions or duties of the Commission, which is not the case in this matter as the petitioners have not demonstrated any good faith.

16. The 1<sup>st</sup> petitioner filed a further affidavit in reply to the averments by the EACC. In the affidavit sworn on 8<sup>th</sup> April 2019, he avers that this court cannot determine the validity or legality of allocations, acquisitions or compensation over the parcels forming part of these proceedings and being for the construction of Standard Gauge Railways, Port Reitz/Moi International Airport Access Road and for Mombasa Southern By pass Kipevu Road as these are questions that are subject to judicial proceedings in **Petition No. 5 of 2019** and **Petition No. 13 of 2019** pending determination before the Environment and Land Court at Mombasa. He also makes further averments in response to the affidavit of Ms. Ngari which, like Ms. Ngari's affidavit, relate to the substantive issues raised in the main petition which I need not go into at this stage.

17. In his submissions on behalf of the petitioners, Mr. Okubasu relied on the decision in **Centre for Rights Education and Awareness (CREAW) & 7 Others v The Attorney General & Others Petition No. 16 of 2011** (Hereafter referred to as "**the CREAW case**") on the criteria to be met for grant of conservatory orders, which is that a *prima facie* case has been made and prejudice will be caused if the conservatory orders are not granted. It was his submission that with respect to the *prima facie* case, the petition is about the motive and the manner in which the investigations have been carried out.

18. His submission was that the petitioners shall demonstrate that the proceedings against the petitioners have not been motivated by a desire to deal with economic crimes. It was his argument further that the petitioners had discerned from the reply of the EACC that the 1<sup>st</sup> petitioner was suspended on the basis that he was a state officer under section 42 of the Leadership and Integrity Act. His submission was that the petitioners would demonstrate that the 1<sup>st</sup> petitioner is a public officer, not a state officer, and that the Leadership and Integrity Act did not apply to him.

19. It was also Mr. Okubasu's submission that the petitioners would demonstrate that the investigations by the respondents were motivated by a desire to substitute a narrative in **ACECA No 16 of 2018- EACC v Dr. Salome Ludenyi Munubi & 2 Others** that the proceeds at issue in that case are proceeds of crime. The petitioners would further demonstrate that the respondents have singled out the 1<sup>st</sup> petitioner for investigation while leaving out other parties. His contention was that the crux of the 1<sup>st</sup> petitioner's case was that even if the investigations by the respondents were right, the manner of investigation is wrong.

20. Counsel for the petitioners further submitted that the respondents have violated the provisions of **section 52 of the National Police Service Act**. He referred the court to the case of **Ali Hassan Joho v Inspector General of Police & 3 others (2017)eKLR** on the attitude of courts towards the manner of investigation carried out in this case. He urged the court to order that the CCTV footage of the interview of the 1<sup>st</sup> petitioner by the EACC be brought to court to show the degree and extent of non-compliance with the said section of the National Police Service Act.

21. With respect to the prejudice to be suffered if the orders are not granted, Mr. Okubasu submitted that there is an ongoing profiling of the 1<sup>st</sup> petitioner, that the EACC is subjecting the petitioners to harassment, and he asked the court to stop the harassment by the respondents till the petition was heard. It was his submission that the respondents show, in paragraph 21 of the affidavit of Catherine Ngari, an intention to continue with the '*invasive and unlawful actions*, and that these actions result into '*inconveniences distress and harassment and embarrassment*' which should be stopped.

22. In submissions on behalf of the state, Ms. Murugi argued that the orders sought at prayer (d) of the application for lifting of the 1<sup>st</sup> petitioner's suspension should not be granted as the suspension was supported by the provisions of section 42 of the **Leadership and Integrity Act**. The EACC had given the reasons for the suspension in the letter to the Commission (annexure CN 2 in the affidavit of Catherine Ngari). To the contention that the section did not apply to the 1<sup>st</sup> petitioner, it was her submission that Article 260 defines a public officer to include a state officer, and the section therefore applied to the 1<sup>st</sup> petitioner. In her view, if the 1<sup>st</sup> petitioner had a problem with the provisions of section 42 of the Leadership and Integrity Act, he can ask for it to be declared unconstitutional. She argued further that in any event, the 1<sup>st</sup> petitioner's suspension was a temporary measure and he would be reinstated if he is found not liable.

23. The respondents cited the provisions of **section 42 (7) of the Leadership and Integrity Act** which states that:

***"Subject to the Constitution and any regulations for the enforcement of the Code made under this Act, a State officer may be suspended from office pending the investigation and determination of allegations made against that State officer where such suspension is considered necessary.***

24. Ms. Murugi also called in aid Regulation 25 of the **Leadership and Integrity Regulations** which provides that:

*“Subject to paragraph (2), an officer who is under investigations may—*

*(a) if the public entity conducting the investigation is the officer's employer, be suspended by that public entity; or*

*(b) if employed by a public entity other than the one conducting the investigation be suspended on the recommendation of that public entity; or*

*(c) if the Commission conducts the investigation, be suspended on the recommendation of the Commission.*

*(2) The provisions of paragraph (1) shall apply where the officer is likely to—*

*(a) conceal, alter, destroy, remove records, documents or evidence;*

*(b) intimidate, threaten or otherwise interfere with witnesses; or*

*(c) interfere with investigations in any other manner.*

*(3) An officer under suspension shall be on half pay pending investigations and determination of the allegations made against the officer.*

25. The purpose of section 42 of the Leadership and Integrity Act and the regulations, according to the respondents, was to prevent interference with witnesses and documents during an investigation.

26. The respondents further submitted that the 2<sup>nd</sup> petitioner was suspended pursuant to section 62(1) of the Anti-Corruption and Economic Crimes Act. She had thereafter been charged in Anti- Corruption Case No. 33 OF 2018 which is still ongoing.

27. The respondents submitted that the suspension of the petitioners (under section 42 of the Leadership and Integrity Act and section 62 of ACECA) must be read in the context of its purpose, the overall purpose of the Act and the spirit of **Chapter 6** of the Constitution.

28. The respondents referred the court to the case of **Republic vs Ethics & Anti-corruption commission and Hon. Attorney General exparte Patrick Gichunge Mwambia and Francis Atanasio Kithure, Meru JR No. 25 of 2016** in which Wendo J had expressed the following view in declining to grant an order staying suspension under section 62 of the ACECA:

*“Would the public have faith in such officer, that he will serve them faithfully when such allegations hang on his head? Granting a stay order in such a case would be sending the wrong message to the public, that even if you are indicted for corruption and economic crimes, you can still sit put in your office and transact business as usual even when things are not normal. The applicants should be cleared first. Grant of the order of stay is a discretionary one and can be denied even if deserved. In this case the order of stay would be against public interest.”*

29. The respondents further referred the court to the decisions in **Moses Muteithia & 5 others v Jacob Muthomi Kirera & 4 others [2017] eKLR** and **Joshua Muindi Maingi v National Police Service Commission & 2 others [2015] eKLR** in which decisions to suspend public officers had been upheld.

30. With respect to prayer (e) in which the petitioners were seeking orders to restrain the respondents from issuing demands, threats, summons and notices to the petitioners, their colleagues and family members, it was Ms. Murugi's submission that granting the prayer would limit the mandate of EACC given to it by the Constitution and section 23 of ACECA to investigate corruption. In her view, for an order to be issued restraining the EACC from carrying out investigations, the applicant must show that the EACC has exceeded its mandate or is interested in achieving a collateral purpose. It was her submission therefore that no *prima facie* case has been established to warrant the grant of conservatory orders.

31. With regard to the application for an order directing the EACC to supply CCTV footage of the 1<sup>st</sup> petitioner's interview, it was her submission that such an order was unjustified. That the allegation made by the petitioners was that the EACC was in breach of section 52 of the National Police Service Act. In her view, the section was clear on what happens if the section is not complied with. The statements obtained from the 1<sup>st</sup> petitioner had not yet been used, and it was therefore premature for the 1<sup>st</sup> petitioner to raise a complaint about them at this stage, the proper time to do so being at his trial.

32. The respondents also opposed the application for an order that the documents collected from the 1<sup>st</sup> and 2<sup>nd</sup> petitioner which belong to them or to the Commission be returned to them. It was their submission that this is not the right forum to make the application as the documents were collected pursuant to an order issued by the Chief Magistrate's Court and an inventory filed in that court. Counsel relied in this regard on the decision in **County Government of Meru v EACC Petition No. 177 of 2014** in which the court declined to issue orders for release of documents and directed that the petitioner could make an application before the subordinate court. In her view, no *prima facie* case has been made out, nor had any prejudice been established to warrant grant of conservatory orders. Further, the action sought to be stayed had already taken place.

33. Ms. Murugi further observed that a similar application had been made in **ACECA 16 of 2018** pending before Onyiego J but had been

withdrawn. She therefore urged the court to dismiss the application with costs to EACC.

34. In his submissions in reply, Mr. Okubasu confirmed that they had filed an application in **ACECA 16 of 2018** but had explained that the issues raised in the application could only be dealt with in a new petition, so they had withdrawn it. However, in his view, the filing and withdrawal of that application had no bearing on the present application.

35. Counsel maintained that the suspension of the 1<sup>st</sup> petitioner took place because he is a state officer but his position was that he was a public officer and is therefore not subject to section 42 of the Leadership and Integrity Act. It was his submission that the 1<sup>st</sup> petitioner's argument was not that the EACC should not carry out investigations but that they should do so within the confines of the law.

36. To the respondents' assertion that the application with respect to release of the CCTV footage was premature, the 1<sup>st</sup> petitioner's response was that section 52 of the National Police Service Act does not come into play only during a prosecution. In his view, it would be to condone flagrant breach of the law to accept the position advanced by EACC, and he urged the court to grant the prayers sought in order to protect the petitioners.

### **Analysis and Determination**

37. I have considered the application for conservatory orders made by the petitioners and the respective submissions of the parties. I have also considered their oral and written submissions. While the applications is expressed as though it applies to both petitioners, it is predominantly and in effect an application by the 1<sup>st</sup> petitioner, Joash Oindo, with respect to his suspension from office and his interview by the EACC which he alleges was conducted in breach of section 52 of the National Police Service Act.

38. The 1<sup>st</sup> petitioner has also made various arguments and sought orders in the application with respect to the institutional independence and functioning of the Commission. The 1<sup>st</sup> petitioner is described as the Director, Valuation, of the Commission, an independent constitutional commission. He has not placed anything before this court that qualifies him to act for the Commission or file an application seeking orders on its behalf. I will therefore not deal with the arguments and submissions made by the parties with respect to the Commission at this stage.

39. While the 1<sup>st</sup> petitioner terms the orders that he seeks '*conservatory orders*', he is effectively seeking orders that are mandatory and therefore final in nature. He seeks, first, that his suspension or compulsory leave should be lifted, so that he can resume duty at the Commission. He seeks, secondly, that CCTV footage of his interview with the EACC should be released. The third order he seeks relates to the release of documents that were taken from him and the 2<sup>nd</sup> petitioner by the respondents, which he alleges belong either to the petitioners or the Commission.

40. At this stage in the proceedings, the question that I need to address myself to is whether to grant *conservatory orders* as prayed by the petitioners. I pause here to consider judicial pronouncements with respect to the grant of conservatory orders.

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

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

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

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

43. The question is whether in this case, the 1<sup>st</sup> petitioner has established a *prima facie* case as defined in the above cases. I agree with the observation of Musinga J in the **CREAW** case that while the parties before me have made detailed arguments on their respective cases, the ***“arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a conservatory order.... I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”***

44. The petitioners submit that a perusal of the evidence in the affidavits filed reveals that the actions complained against are wanting in legality, propriety, good faith and deserve to be blocked at this stage. They submit that the 1<sup>st</sup> petitioner was suspended pursuant to the provisions of section 42 of the Leadership and Integrity Act, which applies to state officers, not public officers, such as the 1<sup>st</sup> petitioner. It is their case further that the requirements of section 42 were also not complied with in respect of the 1<sup>st</sup> petitioner. In my view, with these averments and submissions, the petitioners are asking the court to embark on an analysis of the evidence against the petitioners to determine whether it is wanting, and to address itself to the question whether a public officer is also a state officer.

45. This, however, is not an analysis that this court can enter into at this stage. The petitioners are required to show a *prima facie* case that they will suffer prejudice if the orders sought are not granted. I note from their submissions that they allege that the actions of the respondents result in “*inconveniences distress and harassment and embarrassment*”. It may well be the case that the petitioners will suffer ‘*inconvenience, distress and embarrassment*’ as a result of investigations by the respondents. They may also view the acts of the respondents as ‘*harassment*’. However, I do not believe that a court can properly restrain a state investigative entity from carrying out its constitutional and legal mandate only because it is causing ‘*inconvenience*’ or ‘*embarrassment*’ to the applicants. The applicants must demonstrate that they are likely to suffer real prejudice, and I have been unable to see a demonstration of such prejudice in this case.

46. With respect to the application for release of the CCTV footage, the court notes that the petitioners allege that the interview of the 1<sup>st</sup> petitioner was conducted in breach of section 52 of the National Police Service Act.

47. In support of the prayer for release of the CCTV footage on the basis that the respondents acted in breach of section 52 of the National Police Service Act, Mr. Okubasu submitted that there was no reference in the respondents’ reply to this prayer save for a mere denial under paragraph 22 of the replying affidavit by the EACC. He submitted that the 1<sup>st</sup> petitioner had claimed that he was harassed and forced to supply answers even to self-incriminating questions.

48. Section 52 of the National Police Service Act which is titled “**Power to compel attendance of witnesses at police station**” provides as follows:

***(1) A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.***

***(2) A person who without reasonable excuse fails to comply with a requisition under subsection (1), or who, having complied, refuses or fails to give his correct name and address and to answer truthfully all questions that may be lawfully put to him commits an offence.***

***(3) A person shall not be required to answer any question under this section if the question tends to expose the person to a criminal charge, penalty or forfeiture.***

***(4) A police officer shall record any statement made to him by any such person, whether the person is suspected of having committed an offence or not, but, before recording any statement from a person to whom a charge is to be preferred or who has been charged with committing an offence, the police officer shall warn the person that any statement which may be recorded may be used in evidence.***

***(5) A statement taken in accordance with this section shall be recorded and signed by the person making it after it has been read out to him in a language which the person understands and the person has been invited to make any correction he may wish.***

***(6) Notwithstanding the other provisions of this section, the powers conferred by this section shall be exercised in accordance with the Criminal Procedure Code (Cap. 75), the Witness Protection Act (Cap. 79) or any other written law.***

***(7) The failure by a police officer to comply with a requirement of this section in relation to the making of a statement shall render the statement inadmissible in any proceedings in which it is sought to have the statement admitted in evidence.*** (Emphasis added)

49. The petitioners submit that there was only a brief mention of their prayer for release of the CCTV footage in the respondents’ replying affidavit, and their prayer should therefore be deemed to be unopposed. However, the onus remains on the petitioners to show how the alleged non-compliance with section 52 occasions prejudice and establishes a *prima facie* case that will warrant the grant of an interlocutory order for the release of the footage at this stage in the proceedings. My understanding of the section is that any statement that is obtained in contravention of its provisions is not admissible in any proceedings in which the statement is sought to be admitted in evidence. This is expressly provided for in section 52(7) which I have highlighted above. That being the case, I agree with the submission of the respondents that this may not be the forum to determine that question, as it is not the court before which such evidence may be presented. Certainly, no basis has been laid for the order for release of the CCTV footage to be issued at this interlocutory stage.

50. The petitioners also submitted that their prayer for return of the documents confiscated were not addressed by the respondents. I note that in their submissions, the respondents argue that the documents in question belong to the Commission, which has not complained about their retention. They submit further that the documents were seized pursuant to an order obtained from the Magistrate’s Court pursuant to an application in that regard, and an inventory had been filed before that court in that case. At this stage, this court is unaware of the nature or contents of the documents alleged to have been seized, which the petitioners allege belong to them and/or the Commission. Accordingly, I am not able at this interlocutory stage to issue any orders with respect thereto. Further, I agree with the decision of Majanja J in **County Government of Meru v EACC** (supra) in which he stated:

***54. I have held that the subordinate court had jurisdiction to issue warrants under section 118 of the CPC upon an application by the Commission. The court did have reasons for issuing the warrants and in the absence of the court record, I am reluctant to intervene in what is within the jurisdiction of that court. The County is at liberty to move the subordinate court for appropriate orders.*** Emphasis added).

51. The upshot of my findings above is that no *prima facie* case has been made out by the petitioners to warrant the grant of the conservatory orders that they seek. I accordingly decline to grant any of the conservatory orders sought in the application. The issues that the petitioners raise, which I note have been addressed at some length in the submissions of the respondents, can only properly be addressed at the hearing

of the substantive petition. I therefore find no merit in the application dated 29<sup>th</sup> March 2019, and it is hereby dismissed with costs to the respondents.

**Dated Delivered and Signed at Nairobi this 30<sup>th</sup> day of April 2019**

**MUMBI NGUGI**

**JUDGE**