



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**PETITION NO. 3 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**IN THE MATTER OF ARTICLES 1, 2 (1), 3, 10, 19, 20, 21, 22, 23, 24, 79, 165 (3), 174, 175, 186, 201, 207, 227, 258 AND 259 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**THE COUNTY GOVERNMENT OF KITUI.....PETITIONER**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT**

**JUDGEMENT**

**Parties**

1. The petitioner herein, **The County Government of Kitui**, (hereinafter referred to as “the County Government”) is described in this petition as is a County Government duly so established in tandem with the provisions of Article 176 of the Constitution of Kenya, 2010; the **County Governments Act**, No. 17 of 2012; and the relevant provisions of the Law.

2. The Respondent, **Ethics and Anti-Corruption Commission**, (hereinafter referred to as “the Commission”) is described as a constitutional commission duly so established in tandem with the provisions of Article 79 of the Constitution of Kenya, 2010; the **Ethics and Anti-Corruption Act**, No. 22 of 2011; and the relevant provisions of the Law.

**The Petition**

3. According to the petitioner, in various public participation meetings within the County, livestock farmers and traders requested the County Government of Kitui to facilitate their trade by purchasing trucks for ferrying livestock to markets in order to preserve their weight and value. According to the petitioner, Kitui County is the 6<sup>th</sup> largest county in Kenya with a landmass of 30,570 sq. kms hence this makes it difficult for livestock farmers and traders to take their animals to different county markets.

4. On 18<sup>th</sup> November 2017 the leadership of the County Government held the first public participation meeting together with leaders of the livestock farmers and traders from various parts of the County in which it was resolved that the County Government should prioritise the purchase of trucks to ease movement of livestock to the markets, improve slaughterhouses, fence off the livestock yards among other things. As a result of the resolution of the public participation which was done pursuant to provisions of Section 115 of the **County Government Act 2012** and in accordance with the principles of the Constitution, the County Government embarked on procurement process for the five trucks for carrying livestock to markets. It was pleaded that the purchase of the livestock trucks was a public need that was not captured in the previous Government’s development plans and that a new Government that came to office in August 2017 had prioritized this program in its manifesto and had to align it to the budget.

5. Therefore, as allowed by Section 108 (2) as read together with Section 135 of the **Public Finance Management Act** (PFM Act), the County Government commenced the process of procuring the five farmers and traders livestock trucks and on 26<sup>th</sup> January 2018 the County Executive sent the Budget Estimates to the County Assembly seeking to rationalize the new programs including the farmers and traders livestock trucks which was under item code 1-07-071-701-1001-3110-700-00-000 of the Supplementary Budget II 2017/2018 Financial Year. According to the petitioner, under Section 135 (1), (7) of the **PFM Act**, the County Government is allowed to spend 10% of its total budget on programs that had not been budgeted for and Kitui County Government has an annual budget of Kshs 11 billion and ten percent of the said budget amounts to Kshs 1.1 Billion. Therefore, the expenditure in question, which is Kshs 59,750,000 Million is way below the

above threshold allowed by the law.

6. It was further pleaded that following the County Assembly's approval of the Second Supplementary Budget Estimates on 22<sup>nd</sup> February 2018 allowing the County Government to utilize the funds for programs including purchase of the livestock framers and traders trucks, the County Government opted to use the prequalified list of suppliers by the National Government through Supply Branch as allowed by provisions of Section 56 (1) of the **Public Procurement and Assets Disposal Act of 2015**. Accordingly, the County Government started the procurement process on 10<sup>th</sup> January 2018 where five companies were invited to bid out of which two companies responded to the bid and Thika Motor Dealers, having gone through the technical and financial evaluation process, was found to be the most responsive bidder and issued with an LPO on 7<sup>th</sup> February 2018.

7. It was averred that despite having followed all the above outlined procedures, budgetary provisions, the law guiding procurement processes and awarding to the successful bidder, the County Government immediately received a letter from EACC Ref. EACC.MCKS.6/15/2/(44) dated 9<sup>th</sup> February, 2018 from the Regional Manager of the Lower Eastern Regional Office directing it to provide documents related to the transaction of the trucks. The said letter also directed that payments for the trucks be suspended and all payment documents be furnished to EACC. According to the petitioner, it duly complied and submitted all the relevant documents requested even though neither delivery of the trucks nor payments for the same had been made. In its view, this directive from EACC was not only confusing but contradictory as the County Government was being asked to suspend payments it had not made and to provide documents to prove a non-existent transaction.

8. It was pleaded that on three different occasions vide letters of 21<sup>st</sup> March, 6<sup>th</sup> April and 12<sup>th</sup> June 2018 the County Government requested EACC for updates on the progress made in the investigations. Vide a letter dated 18<sup>th</sup> June, 2018 Ref. EACC.MCKS/6/15/2/(58) from the EACC, the County Government was allowed to continue with procurement and to make payment for the five trucks "*as long as it was done in conformity with the relevant provisions of the law*". As a result of this, the County Government instructed TMD to complete the assembly of the trucks and deliver them so that the procurement process could be completed.

9. On 15<sup>th</sup> November 2018 the County Government sent a team of Technical officers to inspect the trucks at Thika Motor Dealers and immediately after the inspection, the County Government received yet another letter from EACC Ref. EACC.MCKS.6/15/2/(77) dated on the same day of 15<sup>th</sup> November, 2018, from the Regional Manager of the Lower Eastern Regional Office in which EACC asked for documents related to delivery and payment for the said trucks. This prompted a telephone conversation between the Regional Manager and the Governor in which it became apparent that the EACC was alluding to the fact that the procurement was done without an approved budget and a procurement plan. However, as indicated earlier and on the contrary, the budget was presented to the County Assembly on 26<sup>th</sup> January 2018, acknowledged by the County Assembly letter Ref CAK/5/1/Vol.XVI (9) of 12<sup>th</sup> February, 2018, debated upon and approved on 22<sup>nd</sup> February 2018. The procurement plan was subsequently aligned to the approved budget and captured in the IFMIS Plan No. 8672 item/service code M000000450, item/description pennant car. The Governor endeavoured to explain this to the Regional Manager of EACC that all these documents had been given to her office. In addition, the County replied vide letter Ref CG/KTI/EACC/Vol.3/161 dated 16<sup>th</sup> November 2018 to confirm that the said trucks had not been delivered and therefore no payment had been made.

10. It was pleaded that in the Corruption Risk Assessment (CRA) launch meeting for Kitui County held on 22<sup>nd</sup> October, 2018 at Agricultural Training Centre - Kitui County Headquarter, the EACC team led by Commissioner **Dr Dabar Abdi Maalim** in the presence of the Regional Manager for Lower Eastern Regional Office, advised the Petitioner that they would consult with all relevant Government institutions in order to prevent loss of public funds. Despite this, the EACC did not clear the Petitioner to make payment for delivery of the trucks and it is almost 1 year since the Petitioner started engaging EACC on this matter and to date the County Government has no clear guidance on how to proceed. This has led to a delay in the service that was to be delivered to the livestock farmers and traders who are waiting for these trucks to facilitate service delivery.

11. In the Petitioner's view, it has followed the law in the procurement of these trucks but is still unable to proceed with the actual procurement and payment for the trucks despite persistent letters of reminder to the EACC on the issue, to which the EACC failed and/or refused to give a way forward on the matter. The Petitioner therefore disclosed that it was facing the risk court litigation over the procurement of the five trucks having already issued a Local Purchase Order in respect to the acquisition of the five trucks. It averred that it engaged the Counsel to follow up on the matter and on December 10, 2018, Counsel wrote to the EACC, the Office of the Director of Public Prosecution, the Public Procurement Oversight Authority and Directorate of Criminal Investigation forwarding all the relevant documentation on the matter and the EACC responded and requested for further documents, which had already been supplied to them earlier on. The Petitioner, however, supplied the documentation as requested afresh on February 1, 2019. However, the EACC has been unresponsive on the way forward since receipt of the last letter on February 1, 2019, has failed to advise on the matter of the procurement of the five trucks by the Petitioner in complete disregard of their mandate as per Section 11 (1) of the **Ethics and Anti-Corruption Commission Act**, No. 22 of 2011, Laws of Kenya.

12. The Petitioner lamented that the EACC has been receiving various letters from the Petitioner seeking advice on how to proceed, and the EACC, has failed and/or neglected to issue the guidance so requested or issue a way forward. The EACC instead has opted to resort to delaying tactics through requesting the same documents over and over again despite having received the same on several earlier instances.

13. It was the Petitioner's case that the EACC is mandated to advise any person on a matter under its purview in order to safe guard the misuse of public funds.

14. The Petitioner therefore contended that it is entitled to institute court proceedings, claiming that the rights under the Constitution are threatened with contravention and is entitled to act in the interests of the public to ensure the protection of the rights of the public and to facilitate the delivery of services as per its mandate. It is view, the residents of Kitui County are entitled to efficient and timely delivery of services as per the Fourth Schedule of the Constitution of Kenya, 2010. On the other hand, the EACC and the DCI are mandated to exercise their investigative powers in a manner that is to protect public funds and facilitate the efficient delivery of services at both levels of government. The EACC is mandated to advise, on its own initiative, any person matter within its function and subject to Article 31 of the

Constitution, to monitor the practices and procedures of public bodies, to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices.

15. The Petitioner averred that it is entitled to approach this Court to determine the question as to whether a right or a fundamental freedom has been or risks being denied, violated, infringed or threatened and to act within its powers as provided for under Part II of the Fourth Schedule of the Constitution of Kenya, 2010, and the provisions of **County Governments Act**, No. 17 of 2018, to ensure the rights enjoyed by the residents of Kitui County are upheld, promoted and respected. Further, it is mandated to approach this Honourable Court to determine the extent of the exercise of the powers of the EACC.

16. In a rejoinder to the reply by the EACC, the Petitioner deposed that the Respondent has misunderstood the nature of this petition and the prayers sought thereunder. According to the Petitioner, it has approached this Honourable Court for, among other prayers, an interpretation of the Constitution of Kenya, 2010, including the determination of the question, whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; and any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government. In determining this petition, it was contended that this Court would provide, *inter alia*, guidance on whether or not the Respondent should provide advice on the procurement process undertaken by the Petitioner and other County governments. The Petitioner denied that the restricted tendering was marred with procurement irregularities, is false and intended to bring disrepute to the Petitioner and contended that it is upon this Honourable Court to determine whether or not the restricted tender No.: CGO/KTI/118/2017 – 2018 for the supply and delivery of 5 trucks suitable for livestock transportation was marred with procurement irregularities, and not the Respondent.

17. According to the Petitioner, the Respondent is mandated under Section 11(g) of the **Ethics and Anti-Corruption Act, 2011**, to “advise, on its own initiative, any person on any matter within its functions.” Further to the above, the Respondent is mandated under Section 11(i) thereof “subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices.” In its view, the Respondent has failed in its mandate by failing to advise on the procurement process, a function under its mandate, of the restricted tender No.: CGO/KTI/118/2017 – 2018 for the supply and delivery of 5 trucks suitable for livestock transportation.

18. While the Petitioner reiterated that it had complied with all the relevant laws on procurement when undertaking the execution of the restricted tender No.: CGO/KTI/118/2017 – 2018 for the supply and delivery of 5 trucks suitable for livestock transportation (“the Tender”), on February 9, 2018, the Respondent issued the Petitioner with a letter requesting for documents in relation to the tender in which the EACC instructed the Petitioner to *suspend payment of KES 59, 750, 000.00 to the successful bidder*. Subsequently, and in response to the Petitioner’s letter dated June 12, 2018, the Respondent on June 18, 2018, did a letter on a **without prejudice** basis advising that the County should complete the procurement process. The Petitioner complained that on various other occasions, the Respondent failed to give the way forward instead choosing to request for further documentation on the matter. Specifically: -

a) On February 9, 2018, the Respondent requested for the supply of the original procurement documents in relation to the tender and all the original payment documents. The Petitioner provided the documents to the Respondent’s officials who came to collect them and followed up with a letter dated February 9, 2018. The Respondent’s officials confirmed having received the following documents:

- i. Requisition from Ag. Chief Officer Trade, Co-operative & Investment;
- ii. Original tender documents for Kenya Coach Industries tender sum KES 59, 000, 000 and Thika Motor Dealers Ltd (TMD) tender sum KES 59, 750, 000.00;
- iii. Certified copy of tender opening register;
- iv. Original Evaluation Committee Report;
- v. Original professional opinion from the head of supply chain;
- vi. Original letters of notification/debriefing letter dated 22/1/2018;
- vii. Acceptance letter from TMD Kenya Ltd dated 24/01/2018;
- viii. Local purchase order no. 2508148 dated 5/2/2018 (in triplicate)
- ix. Original contract agreement dated 02/02/2018;
- x. Technical specifications from Ministry of Public works dated 12/01/2018;
- xi. Copy of procurement plan for the year 2017-2018
- xii. Tender register.

b) The documents above were handed over to the Respondent’s officials who acknowledged receipt of the documents.

c) The Respondent acknowledged receipt of the documents in their letter dated February 13, 2018, but further requested to record

the statements of all officers who took part in the tender and the Petitioner complied with all the directives of the Respondent.

d) On March 21, 2018, the Petitioner wrote to the Respondent requesting for a way forward concerning the investigations on the tender and a reminder to the Respondent on April 6, 2018 but there was no response from the Respondent.

e) On June 4, 2018, the Respondent requested for the procurement plans for the year 2017/2018; the approved budget and the public participation documents on the tender which the Petitioner provided.

f) On June 18, 2018, the Respondent went ahead and issued a letter on a **without prejudice** basis advising the Petitioner to complete the procurement process, a letter which the Petitioner appreciated is of little evidentiary value, save for demonstrating the fact that the letter was actually sent;

g) On November 15, 2018, the Respondent requested for the documents on delivery and payment for the five trucks;

h) On December 5, 2018, the Petitioner wrote a letter to the Respondent and availed all the relevant documents requested by the Respondent.

i) On January 23, 2019; the Respondent requested for, the approved procurement plan for the financial year 2017/2018, letters sent to the four bidders inviting them to bid, the prequalified list of suppliers for Financial year 2017/2018, appointment letters for opening and evaluation committee membership and complete notification letter sent to the successful bidder. The letter further stated that they may not advise whether the County Government should make any payment or not in respect of this matter.

j) The Petitioner responded by February 1, 2019, resupplying all the documents related to the tender.

19. It was the Petitioner's position that from the conduct of the Respondent as demonstrated by its incessant failure to give the way forward and constantly requesting for documents already supplied, the Respondent has failed to discharge its obligations as per the Constitution of Kenya and the **Ethics and Anti-Corruption Commission Act**, No. 22 of 2011. Further, it has not been proven in a court of law that the restricted tender no.:CGO/KTI/118/2017-2018 for the supply and delivery of 5 trucks suitable for livestock transportation was marred with procurement irregularities yet it is upon the Respondent and the relevant state organs to prove in a court of law that the said process was marred with procurement irregularities.

20. The Petitioner insisted that the Respondent has refused and/or failed to advise the Petitioner with regards to the restricted tender no.:CGO/KTI/118/2017-2018 for the supply and delivery of 5 trucks suitable for livestock transportation. It is upon the Respondent to attach evidence demonstrating that they have actually advised the Petitioner on the said matter. The Petitioner contended that the responses received from the Respondent, were merely letters on a "**without prejudice**" basis which documents cannot be relied upon in court to prove their content, rather, to prove that the letter was actually sent based on the decision in **Mumias Sugar Co. Ltd & Another vs. Beatrice Akinyi Omondi High Court of Kenya Civil Appeal No. 38 of 2015**. It was further deposed that the latest letter from the Respondent, the Respondent reiterated its previous position that it may not advise on whether the County Government should make payment or not in respect of the matter. It was however contended that the Respondent is mandated to execute more obligations than merely recommending charges to the Office of the Director of Public Prosecutions under Section 35 of the **Anti-Corruption and Economic Crimes Act**. Further, the Respondent is mandated to advise on matters within its functions, which includes advising the Petitioner on whether or not it should make payment and proceed with the restricted tender no.:CGO/KTI/118/2017-2018 for the supply and delivery of 5 trucks suitable for livestock transportation.

21. The Petitioner denied that it is seeking to block the commission from recommending charges, rather, the petitioner is seeking a determination as to whether or not the exercise of the investigative powers of the Respondent over the restricted tender, is in conformity with the provisions of the Constitution and the applicable laws operationalizing the Constitution. While not opposed to the Respondent conducting investigations in the restricted tender no.:CGO/KTI/118/2017-2018 for the supply and delivery of 5 trucks suitable for livestock transportation, rather, the Petitioner is concerned with the length of time that the investigations have been undertaken.

22. In the Petitioner's view, the matter of the procurement of the five trucks is not a matter of a criminal nature nor have there been charges preferred against the officials of the Petitioner's officials that were involved in the tender. In its view, the prayer by the Petitioner that, "A declaration that the County Government of Kitui, in the acquisition of the five trucks to support livestock farmers and traders in Kitui County, has complied with Chapter 12 of the Constitution of Kenya, 2010; the **Public Finance Management Act**, No. 18 of 2012; and the **Public Procurement and Asset Disposal Act**, No. 33 of 2015; and the relevant regulations," is intended to have this Honourable Court make a determination on whether the Petitioner violated the provisions of the Constitution in acquiring the five trucks. The Petitioner, in acquiring the five trucks, was exercising a power granted upon it by the Constitution of Kenya, 2010. It was reiterated that this Court has the power under Article 165(3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. This Court may then determine whether or not the procurement of the five trucks by the Petitioner, which was said to be done under the authority of the Constitution of Kenya, 2010, is inconsistent with, or in contravention of, the Constitution of Kenya, 2010. The petitioner contended that the issuance of a declaration by this Honourable Court would not, in any manner, transform this Honourable Court into a trial court of a matter of a criminal nature since no charges have been preferred so far, rather, it will be a proper determination of the nature and the extent of the powers exercised by the Petitioner in the acquisition of the five trucks; and coincidentally the extent of the powers of the Respondent with regards to halting the procurement process of county governments.

23. The Petitioner therefore distinguished this petition from that of **Michael Monari and Another vs. the Commissioner of Police and 3 Others Misc. Application No. 68 of 2011**, where the Applicants approached the Court to determine whether the Respondents have abused their constitutional and statutory powers in any manner to warrant the intervention of the Court when they were charging the Applicant. The current matter herein, however, there have been no charges preferred against the Petitioner yet. The Respondent is holding the Petitioner at ransom as they are not making a decision on the way forward, instead opting to engage in predatory behaviour intended to frustrate the Petitioner. It was further explained that the purpose of approaching this Honourable Court is to determine whether or not the delay that the

Respondent has occasioned in the execution of the tender, under the guise of discharging its mandate, is actually in accordance with the constitution and the national legislation.

24. The Petitioner insisted that it is not opposed to the Respondent carrying out its duties, or recommending to the DPP for the prosecution of any alleged act of corruption. Instead, the Petitioner avers that:-

- a) The Respondent is a constitutional body that has issued instructions to the Petitioner not to make payment for the acquisition of five trucks for the transportation of livestock in Kitui County;
- b) The Respondent has been investigating this matter since February 9, 2018;
- c) The Respondent's advice not to pay has been of a continuous nature, as demonstrated through the series of letters issued by the Respondent to the Petitioner.
- d) The Respondent has requested for documents relating to the acquisition of the five trucks, which the Petitioner has provided, time and time again;
- e) The Respondent is unwilling to give a way forward regarding whether or not the Petitioner can proceed with the acquisition of the five trucks for the transportation of livestock in Kitui County;
- f) The Respondent has refused and/or neglected to make a decision or issue advice on the procurement process to be undertaken by the Petitioner;
- g) Through issuing letters on a, "without prejudice" basis, the Respondent is merely precluding itself from making a decision which can be held against them.

25. According to the Petitioner, it is interested in having the nature and extent of the powers of the Respondent determined in respect to the procurement of goods and services. Specifically, that where County Governments seek guidance on procurement, the EACC has a duty to furnish the requested guidance within a reasonable time as not to impede the procurement process. It was its position that it is seeking for this Honourable Court to make a declaration on the nature and extent of the exercise of powers of the Respondent and the specific conduct for which the Respondent has engaged in, which this Honourable Court should determine their constitutionality, have been precisely set out and provisions of the constitution applicable in this matter have been set out with precision. The Petitioner has specifically stated that it is incurring demurrage charges due to the decision by the Respondent instructing it to suspend payment. The right to earn a livelihood by the residents of Kitui County has been stated as the constitutional right which is being threatened, as the Petitioner is unable to discharge its obligations. It was averred that what the Petitioner is seeking is for the Respondent to either make a decision advising whether or not to make payment, and/or to give written reasons where they advise against making payment. It insisted that it wishes to complete the procurement process but is unable to proceed as the Respondent has declined to issue advise on the process of procurement, in complete contravention of Section 11 of the **Ethics and Anti-Corruption Commission Act**, No. 22 of 2011, Laws of Kenya.

26. It was submitted on behalf of the Petition by **Mr Makau** that this Court has within its jurisdiction to make a determination on whether or not the Petitioner complied with the law when procuring the five trucks to support livestock farmers and traders. The Petitioner asserted that it is a devolved government that is established pursuant to Article 176 of the Constitution of Kenya, 2010, and the **County Governments Act**, No. 17 of 2012.

27. In discharging its obligations under Part 2 of the Fourth Schedule, the Petitioner's functions and powers include agriculture, including crop and animal husbandry; livestock sale yards; county abattoirs; plant and animal disease control; and fisheries. The Petitioner is mandated to exercise its powers as granted by the Constitution in accordance with the relevant laws. On this basis solely, this Honourable Court can issue a determination on whether or not the Petitioner has complied with the law in the procurement of the livestock trucks, as it is within the powers of the Petitioner to do so.

28. The Petitioner also submitted that in discharging its obligation on agriculture, the Petitioner evidently has to comply with the provisions of the Constitution and the relevant laws including, but not limited to, Chapter Twelve of the Constitution on public finance, specifically, Article 227 of the Constitution of Kenya, 2010; Section 115 of the **County Government Act, 2012**; Sections 108(2) and 135 of the **Public Finance Management Act**; and Section 56(1) of the **Public Procurement and Assets Disposal Act, 2015**.

29. In exercising its powers, and in order not to engage in *mala fides*, or exercise powers beyond what they are granted by the Constitution, the Petitioner may approach this Honourable Court to make a determination on whether or not the acts it is engaging in, as per the Constitution and the relevant laws are consistent with the Constitution.

30. Specifically, this Court is granted the power to make such a determination as per Article 165 (3)(d)(ii). It was submitted that as per the provisions quoted above, this Court has the requisite authority and jurisdiction to determine whether the Petitioner's actions on the restricted tender for the procurement of five (5) trucks suitable for livestock transportation tender no.: CGO/KTI/118/2017 – 2018 complied with the Constitution and the Law. In this regard the petitioner relied on **The County Government of Kiambu & Another vs. The Senate & Others High Court of Kenya Constitutional Petition No. 229 of 2015**, at Nairobi.

31. On that premise, this Court was urged to exercise its judicial function to determine the legality and constitutionality of the decision of the Petitioner in the restricted tendering for procurement of five (5) trucks suitable for livestock transportation tender no.: CGO/KTI/118/2017 - 2018. According to it, since in the matter before this Court, the Respondent has alleged that the procurement process was marred with illegalities without availing any evidence that has led to the suspicion, the court would not be interfering with the mandate of the Respondent through considering the matter before it, that is, whether or not the Petitioner complied with the law and the constitution in the restricted

tendering. To the petitioner, the Court can pronounce itself on matter of whether or not the Petitioner adhered to the proper procedure on procurement as it is the fundamental duty of this Honourable Court to uphold the law, this includes investigating the constitutionality and legality of any such process to satisfy itself that the Petitioner did not expose itself to the charges of illegality, irrationality or procedural impropriety. The petitioner therefore relied on **Republic vs. Public Procurement Administrative Review Board & 2 Others Ex Parte Coast Water Services Board & Another [2016] eKLR.**

32. To the petitioner, in that case the court examined the constitutionality and legality of the procurement process, thereby applying its jurisdiction as conferred upon the Court by the provisions of Article 165 (3)(d)(ii). It is therefore upon this Honourable Court to examine the restricted tendering process as undertaken by the Petitioner and make a determination as to the constitutionality of the process.

33. As regards the issue whether this Honourable Court can make a determination on the nature and extent of the exercise of the investigative powers of the Respondent in respect of the Petitioner, county governments and their procurement of goods and services, it was contended that this Court has the requisite jurisdiction to determine the nature and extent of the exercise of the investigative powers of the Respondent in respect of the Petitioner, county governments and their procurement of goods and services based on Article 165(3)(d)(iii) of the Constitution.

34. According to the petitioner, the EACC being a state organ as defined under Article 260 of the Constitution, it falls squarely under the jurisdiction of this Honourable court to determine its constitutional power in respect of county governments under the provisions of Articles 79 and 252 of the Constitution and as operationalized under Section 11 of the ***Ethics and Anti-Corruption Commission Act***, No. 22 of 2011 and Section 11(i) of the ***Ethics and Anti-Corruption Commission Act***, No. 22 of 2011.

35. The petitioner's case is that the Respondent is mandated to ensure that they advise, on its own initiative, any person on any matter within its function and that where a matter falls under the purview of the Respondent, in relation to the mandate of the Petitioner, or any such devolved government, then the Respondent is to act diligently and expeditiously on advising on revision of methods that are conducive to corrupt practices, especially with regards to procurement processes.

36. According to the petitioner, where the Respondent issues directions to a devolved government not to effect payment for goods or services that have been procured, since the said procurement is under investigation, as is the current case, it should not suspend the procurement indefinitely. This is so because where the Respondent exercises its powers in such a manner, and fails to give a way forward, then it would be interfering with the functioning of the devolved government, effectively defeating the objects of devolution and infringing on the rights of the citizens who expect service delivery. It was in this respect that the petitioner argued that it is upon this Honourable Court to determine the extent of the investigative powers of the Respondent with regards to county governments, to ensure that the Respondent does not choke the objects of devolution or threaten the rights of the citizens. It was reiterated that whereas the investigations on procurement processes can be conducted indefinitely as one never knows how deep the rabbit hole goes, however, where the Respondent issues directions to a county government to suspend the payment of goods or services procured in light of ongoing investigations, then the Respondent is mandated to advise on the best procedures to be adhered to during the procurement process; to allow the county government to implement the advice and to complete the procurement process. This should be done within a reasonable time as delays in the procurement of goods and services have a domino effect of exposing the county governments to litigation over unpaid goods and services, and failure to avail essential goods and services to the County residents leading to turmoil and hardship.

37. According to the petitioner, the definition of what amounts to reasonable time is to be considered in light of the prevailing circumstances of the matter. The concept of reasonableness is to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing. In this particular instance, the procurement was undertaken under the Supplementary Budget II 2017/2018 financial year, yet Petitioner has neither taken delivery of the five trucks nor has it made payment. This, it was contended amounts to unreasonable delay. In this regard the petitioner relied on **Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others [2013] eKLR.**

38. The petitioner clarified that it is not seeking a shield against criminal culpability, rather, it seeks to establish the best way forward regarding the question of reasonable time to make payment where the procurement of either goods or services has been undertaken. As it currently stands, the risk of being exposed to criminal charges and being dragged through the entire criminal trial hangs like a sword of Damocles over the officials of the county governments due to the directive of the Respondent not to effect payment for goods and services offered. This constant state of existence over the threats and anxieties that accompany holding a position of power at the Petitioner is a subjecting them to psychological torture in complete disregard to the provisions of Article 29 of the Constitution.

39. As to whether this Court can issue an order of certiorari quashing the decision by the EACC to halt payment being made by the Petitioner over the acquisition of the five trucks to support livestock farmers and traders in Kitui County, it was submitted that this court is clothed with the such powers. In this regard the petitioner cited Article 23(3) of the Constitution which provides that this Honourable Court may grant appropriate relief, including an order of judicial review. It can therefore issue an order of certiorari once it is satisfied that there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law. It was the petitioner's view that it had complied with the above requirements for the issuance of an order for certiorari, both procedurally and substantively and relied on **Masai Mara (SOPA) Limited vs. Narok County Government Petition No. 336 of 2015.**

40. According to the petitioner, the decision of the Respondent to halt the payment for the five trucks by the Petitioner has resulted in an unreasonable delay and therefore falls under the purview of Section 7(2)(j) of the ***Fair Administrative Action Act***, No. 4 of 2015 and submitted that the order of certiorari ought to issue in these circumstances.

41. According to the petitioner, the Respondent's averment in the replying affidavit to the effect that it has advised the County Government of Kitui that any payments it makes must be in conformity with relevant provisions of the law relating to management of public funds, being an averment made under oath is an admission that the Respondent do not oppose the prayer one in the Petition despite the fact that the letters that the Respondent referred to were made on a without prejudice basis. This fact, on first instance renders the said admissions made in the letters, fall under the provisions of Section 23 of the ***Evidence Act***, where such letters would lack evidentiary value, save to demonstrate that they communication was made. Reference was also made to **Lordship Africa Limited vs. Public Procurement Administrative Review**

## **Board & 2 Others [2018] eKLR.**

42. In light of the said determination, it was submitted that the information sought from the Respondent was for the protection of the tax payers' money and the promotion of the stipulation in article 227(1) of the Constitution that the system used in public procurements should be fair, equitable, transparent, competitive and cost effective. It was also meant to protect the public interest. Consequently, the letters made by the Respondent cannot qualify to be under the without prejudice principle.

43. Therefore, in light of the above, the Court was urged to grant the orders as prayed for in the petition dated February 26, 2019, and filed on February 27, 2019. These were:

**i. A DECLARATION that the County Government of Kitui, in the acquisition of the five trucks to support livestock farmers and traders in Kitui County, has complied with Chapter 12 of the Constitution of Kenya, 2010; the Public Finance Management Act, No. 18 of 2012; and the Public Procurement and Asset Disposal Act, No. 33 of 2015; and the relevant regulations;**

**ii. A DECLARATION that where County Governments seek guidance on procurement, the EACC has a duty to furnish the requested guidance within a reasonable time as not to impede the procurement process;**

**iii. A DECLARATION on the nature and extent of the exercise of the investigative powers of the Ethics and Anti-Corruption Commission (EACC) in respect of county governments and their procurement of goods and services;**

**iv. A DECLARATION that the investigative powers of the Ethics and Anti-Corruption Commission (EACC) in respect of county governments and their procurement of goods and services should not impede the procurement process;**

**v. THAT a mandatory injunction does issue estopping the Ethics and Anti-Corruption Commission (EACC) from preferring any charges relating to the acquisition of the five trucks to support livestock farmers and traders in Kitui County;**

**vi. THAT an order of certiorari does issue quashing the decision by the EACC to halt payment being made by the Petitioner over the acquisition of the five trucks to support livestock farmers and traders in Kitui County;**

**vii. Any other order this Honourable Court deems fit and just in the circumstances including an order for compensation as a result of the actions of the Respondent.**

## **The Respondent's Case**

44. The Respondent opposed the petition and in doing so averred that it is a constitutional Commission established pursuant to Article 79 of the Constitution, with the status and powers of a commission under Chapter Fifteen of the Constitution, for purposes of ensuring compliance with, and enforcement of, the provisions of Chapter Six of the Constitution. Its general powers as an Independent Commission are outlined under Article 252 of the Constitution while the Commission is established by Section 3 of *The Ethics and Anti-Corruption Commission Act* and its functions outlines in Section 11 of *The Ethics and Anti-Corruption Act, 2011*.

45. The Respondent disclosed that the commission in investigating the veracity of the allegations received about the procurement of the trucks is carrying out its Constitutional and statutory mandate. It was disclosed that the County Government of Kitui had written to the Commission indicating that it be allowed to make payments for the delivery of 5 trucks Isuzu FVZ 23S Livestock Carrier Trucks from Thika Motor Dealers. However, the Commission advised the County Government of Kitui that any payments it makes must in conformity with relevant provisions of the law relating to management of public funds.

46. The Respondent averred that it has powers to recommend charges to the Office of the Director of Prosecutions under Section 35 of *The Anti-Corruption and Economic Crimes Act* if it finds an offence was committed in procurement of the said trucks and that the state's prosecutorial powers are vested in the office of the Office of the Director of Public Prosecutions as provided for in Article 157 of the Constitution and further pursuant to Article 157(10) the decision to institute criminal proceedings by the DPP while discretionary is also not subject to the direction or control of any authority.

47. It was therefore deposed that issuing orders to block the Commission from recommending charges would be blocking the Commission from executing its mandate under section 35 of *The Anti-Corruption and Economic Crimes Act*. It was deposed that the investigations of the matter are at an advanced stage and the Commission should be allowed to carry out its mandate as provided thereunder.

48. According to the Commission, a declaration of the County Government of Kitui, complied with relevant laws in the acquisition of five trucks would be transforming this court into a trial court of a matter of a criminal nature. In so arguing the Respondent relied on **Michael Monari and another vs. The Commissioner of Police and 3 Others Misc. Application No.68 of 2011.**

49. The Court was therefore urged to be careful in ensuring that it does not in the process muzzle the other organs established by and under the Constitution and reliance was placed on the holding in **Constitutional Petition Number 359 of 2013 - Diana Kethi Kilonzo vs. IEBC and 2 Others.**

50. According to the Respondent, it is in the interest of the public to have complaints lodged and investigated and if sufficient evidence is gathered, to recommend to the DPP for the prosecution the alleged act of corruption. It therefore contended that the Petitioner is jumping the gun by stopping the Respondent from preferring any charges as investigations are still on going.

51. The Respondent further averred that it is important for a person seeking redress from the High Court or an order which invokes a reference to the Constitution, to set out with reasonable degree of precision, what he complains of, the provisions of the Constitution infringed, and the manner in which they are alleged to be infringed. Thus an applicant in an application alleging violation of constitutional rights is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him/her, and the manner in which he believes they have been infringed. This petition, it averred makes allegations lacking clarity and specificity on how the Petitioner's rights have been violated.

52. The Respondent however insisted that it is within the mandate of the Commission to investigate complaints regarding County Governments and their procurement of goods and services.

### **Determinations**

53. I have considered the petition, the affidavits in support and in opposition thereto and the submissions filed as well as the authorities relied upon in support thereof.

54. In summary, the petitioner's case is that following requests from the residents of its county and pursuant to a resolution arrived at as a result of the engagement of the public carried out pursuant to provisions of Section 115 of the **County Government Act 2012** and in accordance with the principles of the Constitution, it resolved, to prioritise the purchase of trucks to ease movement of livestock to the markets, improve slaughterhouses, fence off the livestock yards among other things. Accordingly, the County Government embarked on procurement process for the five trucks for carrying livestock to markets.

55. Though the purchase of the livestock trucks was not captured in the previous Government's development plans, the petitioner contended that it was within its powers pursuant to Section 108 (2) as read together with Section 135 of the **Public Finance Management Act (PFM Act)**. According to the petitioner, the said provisions permit it to spend 10% of its total budget on programs that had not been budgeted for and that since Kitui County Government has an annual budget of Kshs 11 billion, the said ten percent amounts to Kshs 1.1 Billion. Therefore, the expenditure in question, which is Kshs 59,750,000 Million is way below the above threshold allowed by the law.

56. On 26<sup>th</sup> January 2018 the County Executive sent the Budget Estimates to the County Assembly seeking to rationalize the new programs including the farmers and traders livestock trucks which was under item code 1-07-071-701-1001-3110-700-00-000 of the Supplementary Budget II 2017/2018 Financial Year. Following the County Assembly's approval of the Second Supplementary Budget Estimates on 22<sup>nd</sup> February 2018 allowing the County Government to utilize the funds for programs including purchase of the livestock framers and traders trucks, the County Government opted to use the prequalified list of suppliers by the National Government through Supply Branch as allowed by provisions of Section 56 (1) of the **Public Procurement and Assets Disposal Act of 2015**. Accordingly, the County Government started the procurement process on 10<sup>th</sup> January 2018 where five companies were invited to bid out of which two companies responded to the bid and Thika Motor Dealers, having gone through the technical and financial evaluation process, was found to be the most responsive bidder and issued with an LPO on 7<sup>th</sup> February 2018.

57. It was averred that despite having followed all the above outlined procedures, budgetary provisions, the law guiding procurement processes and awarding to the successful bidder, the County Government immediately received a letter from EACC Ref. EACC.MCKS.6/15/2/(44) dated 9<sup>th</sup> February, 2018 from the Regional Manager of the Lower Eastern Regional Office directing it to provide documents related to the transaction of the trucks and directing that payments for the trucks be suspended and all payment documents be furnished to EACC. According to the petitioner, it duly complied and submitted all the relevant documents requested even though neither delivery of the trucks nor payments for the same had been made.

58. It was pleaded that on three different occasions vide letters of 21<sup>st</sup> March, 6<sup>th</sup> April and 12<sup>th</sup> June 2018 the County Government requested EACC for updates on the progress made in the investigations. Vide a letter dated 18<sup>th</sup> June, 2018 Ref. EACC.MCKS.6/15/2/(58) from the EACC, the County Government was allowed to continue with procurement and to make payment for the five trucks "*as long as it was done in conformity with the relevant provisions of the law*". As a result of this, the County Government instructed TMD to complete the assembly of the trucks and deliver them so that the procurement process could be completed.

59. On 15<sup>th</sup> November 2018 the County Government sent a team of Technical officers to inspect the trucks at Thika Motor Dealers and immediately after the inspection, the County Government received yet another letter from EACC Ref. EACC.MCKS.6/15/2/(77) dated on the same day of 15<sup>th</sup> November, 2018, from the Regional Manager of the Lower Eastern Regional Office in which EACC asked for documents related to delivery and payment for the said trucks. This prompted a telephone conversation between the Regional Manager and the Governor in which it became apparent that the EACC was alluding to the fact that the procurement was done without an approved budget and a procurement plan. However, as indicated earlier and on the contrary, the budget was presented to the County Assembly on 26<sup>th</sup> January 2018, acknowledged by the County Assembly letter Ref CAK/5/1/Vol.XVI (9) of 12<sup>th</sup> February, 2018, debated upon and approved on 22<sup>nd</sup> February 2018. The procurement plan was subsequently aligned to the approved budget and captured in the IFMIS Plan No. 8672 item/service code M000000450, item/description pennant car. The Governor endeavoured to explain this to the Regional Manager of EACC that all these documents had been given to her office. In addition, the County replied vide letter Ref CG/KTI/EACC/Vol.3/161 dated 16<sup>th</sup> November 2018 to confirm that the said trucks had not been delivered and therefore no payment had been made.

60. It was pleaded that in the Corruption Risk Assessment (CRA) launch meeting for Kitui County held on 22<sup>nd</sup> October, 2018 at Agricultural Training Centre - Kitui County Headquarter, the EACC team led by Commissioner **Dr Dabar Abdi Maalim** in the presence of the Regional Manager for Lower Eastern Regional Office, advised the Petitioner that they would consult with all relevant Government institutions in order to prevent loss of public funds. Despite this, the EACC did not clear the Petitioner to make payment for delivery of the trucks and it is almost 1 year since the Petitioner started engaging EACC on this matter and to date the County Government has no clear guidance on how to proceed. This has led to a delay in the service that was to be delivered to the livestock farmers and traders who are waiting for these trucks to facilitate service delivery.

61. In the Petitioner's view, it has followed the law in the procurement of these trucks but is still unable to proceed with the actual procurement and payment for the trucks despite persistent letters of reminder to the EACC on the issue, to which the EACC failed and/or refused to give a way forward on the matter. The Petitioner therefore disclosed that it was facing the risk court litigation over the procurement of the five trucks having already issued a Local Purchase Order in respect to the acquisition of the five trucks. It averred that it engaged the Counsel to follow up on the matter and on December 10, 2018, Counsel wrote to the EACC, the Office of the Director of Public Prosecution, the Public Procurement Oversight Authority and Directorate of Criminal Investigation forwarding all the relevant documentation on the matter and the EACC responded and requested for further documents, which had already been supplied to them earlier on. The Petitioner, however, supplied the documentation as requested afresh on February 1, 2019. However, the EACC has been unresponsive on the way forward since receipt of the last letter on February 1, 2019, has failed to advise on the matter of the procurement of the five trucks by the Petitioner in complete disregard of their mandate as per Section 11 (1) of the **Ethics and Anti-Corruption Commission Act**, No. 22 of 2011, Laws of Kenya.

62. The Petitioner lamented that the EACC has been receiving various letters from the Petitioner seeking advice on how to proceed, and the EACC, has failed and/or neglected to issue the guidance so requested or issue a way forward. The EACC instead has opted to resort to delaying tactics through requesting the same documents over and over again despite having received the same on several earlier instances.

63. It was the Petitioner's case that the EACC is mandated to advise any person on a matter under its purview in order to safe guard the misuse of public funds.

64. The Petitioner therefore contended that it is entitled to institute court proceedings, claiming that the rights under the Constitution are threatened with contravention and is entitled to act in the interests of the public to ensure the protection of the rights of the public and to facilitate the delivery of services as per its mandate. It is view, the residents of Kitui County are entitled to efficient and timely delivery of services as per the Fourth Schedule of the Constitution of Kenya, 2010. On the other hand, the EACC and the DCI are mandated to exercise their investigative powers in a manner that is to protect public funds and facilitate the efficient delivery of services at both levels of government. The EACC is mandated to advise, on its own initiative, any person matter within its function and subject to Article 31 of the Constitution, to monitor the practices and procedures of public bodies, to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices.

65. In effect the petitioner's case is that the Respondent's failure to expeditiously finalise its investigations into the matter has crippled the petitioner's ability and resolution to render much needed services to the people of Kitui County.

66. A look at the replying affidavit shows that the Respondent does not seriously challenge the factual averments by the petitioner. The Respondent's concern is simply that it is still investigating the issue and therefore this Court cannot in effect give the petitioner a clean bill of health before the investigations are completed. However, it looks like it has given the petitioner the go ahead to proceed with the procurement process "*as long as it was done in conformity with the relevant provisions of the law*".

67. Article 22(1) and (2) of the Constitution provides that:

***(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***

***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

***(a) a person acting on behalf of another person who cannot act in their own name;***

***(b) a person acting as a member of, or in the interest of, a group or class of persons;***

***(c) a person acting in the public interest; or***

***(d) an association acting in the interest of one or more of its members.***

68. Article 258 of the Constitution which provides as follows:

***a. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***

***b. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

***i. a person acting on behalf of another person who cannot act in their own name;***

***ii. a person acting as a member of, or in the interest of, a group or class of persons;***

***iii. a person acting in the public interest; or***

***iv. an association acting in the interest of one or more of its members.***

69. Article 260 of the Constitution provides that "person" includes a company, association or other body of persons whether incorporated or unincorporated. In my view state organs such as the petitioner herein are clearly "persons" and therefore can in appropriate situations move

the court under the aforesaid articles. It is true that under Article 165 (3)(d)(ii), of the Constitution this Court has the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done thereunder or any law is inconsistent with, or in contravention of, the Constitution. I therefore agree with the decision in **The County Government of Kiambu & Another vs. The Senate & Others High Court of Kenya Constitutional Petition No. 229 of 2015**, where the Court stated as follows:

**“The other issue raised by the Respondents for this Court to satisfy itself is the question of jurisdiction. Article 165 (3)(d) (i)&(ii) of the Constitution provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of this constitution or of any law is inconsistent with, or in contravention of, this constitution. I have no doubt in my mind that this matter is properly before the court and that this court by dint of the above provisions has the requisite jurisdiction to examine and determine the constitutionality or otherwise of the actions complained of, namely, whether the Senate has powers to scrutinize the process and legality of county legislation and or to determine the constitutional mandate of the Senate over the counties. Judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality or constitutionality of decisions or actions or purported decisions brought before the court.”**

70. It is clear that Article 165(3)(d)(iii) of the Constitution which establishes the High Court gives this court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government.

71. It is however my view that the jurisdiction conferred upon this court by Article 165 ought not to be invoked in order to deal with abstract issues. Before the Court can properly be seised of a matter, there must be a dispute that has been properly brought before it. I therefore associate myself with the position adopted in **Sololo Outlets & 3 Others vs. National Social Security Fund & Others Civil Application No. Nai. 181 of 1994** that though the Court can make a declaration, it ought to refrain from declaring the law generally or giving opinion but in doing so should be confined to contested legal rights subsisting or future of the parties before it. In other words, the court would for example frown upon a party who seeks a declaration that he or she is innocent unless proven guilty. While that declaration may be made, it should only be made in the context of Article 22(1) of the Constitution where a person claims that his or her right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

72. In this petition, if I understand the petitioner correctly its allegation is that its right and those of the residents of Kitui County to fair administrative action that is expeditious under Article 47 of the Constitution to has been denied, violated or infringed, or is threatened. Article 47 of the Constitution provides:

*(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

*(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

73. The position is re-enacted in section 4(1) and (2) of the **Fair Administrative Action Act, 2015**.

74. The said Article has now been the subject of judicial pronouncements in this country. In **Judicial Service Commission vs. Mbalu Mutava [2015] eKLR at para 23, Githinji, JA** pronouncement himself as follows:

**“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed.”**

75. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR**, it was held that:

**“Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including ‘(c) responsive, prompt, effective, impartial and equitable provision of services’ and ‘(f) transparency and provision to the public of timely, accurate information’... Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken.”**

76. **Mbs HC Misc Appl. No.82 of 2010, Republic and Kenya Revenue Authority ex-parte L.A.B. International Kenya Limited** where it was held that:

**“The common law, in its evolution, has defined the rules of conduct for a public authority taking a public decision, entrusting the overall control-jurisdiction in the hands of the Courts of law, but for Kenya, such a general competence of the Courts is now no longer confined to the terms of statute law and subsidiary legislation, but has a fresh underwriting in the Constitution of Kenya, 2010, Article 47, which imposes a duty of fair administrative action, and [Art.10(2) (c) demands “good governance, integrity, transparency and accountability.**

77. That was the position adopted **Majanja, J** in **Dry Associates Ltd vs. Capital Markets Authority and Another – Petition No. 328 of 2011** where he held that:

**“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law...but is to be measured against the standards established by the Constitution.”**

78. This position is not unique to this country. In **South African Revenue Service vs. Commission for Conciliation, Mediation and Arbitration [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) at para 40**, the Constitutional Court of South Africa held that:

**“[T]he requirement that an administrative action be reasonable is a constitutional requirement. In challenging the reasonableness of the reinstatement, SARS is in effect questioning whether the award meets the constitutional requirements that an administrative action must be reasonable. And that is a constitutional issue.”**

79. It is therefore clear that the right to fair administrative action which encompasses expedition and efficiency in decision making is now a constitutional right as opposed to merely an administrative one. Who then is an administrator? Pursuant to Article 47, Parliament enacted the ***Fair Administrative Action Act, 2015***. Section 2 thereof defines “administrative action” to include:

***(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***

***(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;***

80. The same section defines ‘administrator’ as “a person who takes administrative action or who makes an administrative decision.” Section 3 on the other hand provides:

***(1) This Act applies to all state and non-state agencies, including any person***

***(a) exercising administrative authority;***

***(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or***

***(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.***

81. A reading of the foregoing provisions clearly places the Respondent herein in the position of an administrator since the Respondent in undertaking its functions quite often affects the legal rights or interests of persons to whom its action relates. This is clear from its general powers as an Independent Commission outlined under Article 252 of the Constitution under which they:

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

***(b) .....***

***(c).....***

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

82. The Respondent Commission is however established by Section 3 of ***The Ethics and Anti-Corruption Commission Act*** which states that:

***In addition to the powers of the Commission under Article 253 of the Constitution, the Commission shall have the power to—***

***(a).....***

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

83. Section 11 of ***The Ethics and Anti-Corruption Act, 2011*** outlines additional functions of the commission which include to:

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

***ii. advise, on its own initiative, any person on any matter within its functions;***

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

84. It is therefore my view and I so hold that pursuant to the provisions of Article 47 as read with the provisions of the *Fair Administrative Action Act, 2015*, judicial review orders may, where appropriate, issue against the decisions of the Respondent herein. I derive support for this position from the decision of **Onguto, J** in **Kenya Human Rights Commission vs. Non-Governmental Organizations Co-Ordination Board [2016] eKLR** in which the learned Judge expressed himself *inter alia* as follows:

**As to what constitutes fair administrative action, the court in *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1*, stated thus:**

**“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...” [Emphasis supplied]**

Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the Constitution. Generally, one expects that all the precepts of natural justice are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The Fair Administrative Action Act, 2015 must be viewed in that light.

The Petitioner also alleges violation of its right to fair hearing. Article 50(1) of the Constitution makes provision for fair hearing. The Article is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The right to fair hearing is evidently closely intertwined with fair administrative action. The oft cited case of *Ridge v Baldwin [1964] AC 40* restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put it as a ‘duty lying upon everyone who decides anything’ that may adversely affect legal rights.

Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states that:

**“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”**

I would state that it now appears that the court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of “reasonable” action under Article 47, but also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50(1) of the Constitution. The court proceeding under Article 47 of the Constitution is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner. The traditional common law principles of judicial review are, in other words, not the only decisive factor. It may sound like stretching the precincts of traditional judicial review, but clearly by the Constitution providing for a “reasonable” administrative action and also enjoining decision makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review.”

85. In this case, the Respondent had admitted that it is yet to decide on the legality of the resolution by the Petitioner to buy trucks meant to alleviate the problems facing the petitioner’s residents. Section 11(i) of the *Ethics and Anti-Corruption Commission Act*, No. 22 of 2011, however provides as follows:

**In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall, subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices.**

86. It is therefore clear that the functions of the Respondent are not restricted to situations where the body concerned has acted unlawfully but it is also tasked with detecting and preventing crimes before they take place and in so doing give such directions as are geared towards the prevention of corrupt practices.

87. It has however advised the petitioner that in so doing the petitioner should follow the law. The Respondent has, for more than a year not completed its investigations into the matter. In other words, the Respondent is yet to make a decision whether the said action of the petitioner is lawful or not. That can be the only conclusion one can arrive at with respect to the advice given to the petitioner by the Respondent to proceed but in accordance with the law. However, the Respondent decided to give that advice on a without prejudice basis. As the petitioner rightly points out the said decision can be relied upon to show that the letter was written. However, in Geoloy Investments Ltd vs. Behal T/A Krishan Behal & Sons [2002] 2 KLR 447, Justice Mwera referring to the case of Co-Operative Bank of Kenya Ltd vs. Shiraz Sayani Mba HCCC No. 23 OF 1999; National Industrial Credit Bank Ltd vs. Yandal Enterprises Ltd & 2 Others HCCC (MIL) NO. 213 of 1999 and Sakar on Evidence 14<sup>th</sup> Ed Page 3591, stated thus:

**“The rubric “without prejudice” has been used over ages particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlements of dispute. Until such time as there is a definite agreement on the issues at hand, such correspondence cannot be used as evidence against any of the parties. The rubric simply means “I make you an offer, if you do not accept it, this letter is not to be used against me. Or I make you an offer which you may accept or not, as you like, but if you do not accept it, my having made it is to have no effect at all”. It is a privilege that is jealously guarded by the courts otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out of court settlements...The rule, however is strictly confined to cases where there is a dispute or negotiation, and suggestions are made for settlement thereof. Where this is not the case the sender of the letter cannot impose on the recipient any condition as to the mode in which it may be used by marking it “without prejudice”.**

88. In other words, a person cannot out of the blue, as it were purport to communicate on “without prejudice” basis when there is no dispute or negotiation, and where there are no suggestions made for settlement thereof. In my view where a person is under obligation to furnish information to another either by the Constitution or statute, he cannot go round that edict by purporting to furnish the same on a “without prejudice” basis. That is my understanding of the decision in Lordship Africa Limited vs. Public Procurement Administrative Review Board & 2 Others [2018] eKLR in which it was stated as follows:

**“without prejudice communication from a public state office which is not made in litigation or pre litigation for purposes of negotiating a settlement of the claim out of court is a violation of one’s right to information which is at the core of the exercise and enjoyment of all other rights by citizens. There are certain rights which cannot be enjoyed if information is denied or given on a without prejudice basis by public or state officers.”**

89. Section 11 of the *Ethics and Anti-Corruption Act, 2011* empowers the Respondent to advise, on its own initiative, any person on any matter within its functions. One of its constitutional functions is to conduct investigations on its own initiative or on a complaint made by a member of the public. In this case, it is clear that the Respondent was conducting an investigation on whether the petitioner’s intended purchase of the trucks was proper. It is my view that in carrying out its mandate, particularly where the investigation in questions is in respect of an action that affects services to Kenyans the Respondent ought to proceed speedily. The importance of devolved system of government was appreciated by the Supreme Court in Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR where Mutunga, CJ expressed himself as follows:

**“The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state...”**

90. The learned President of the Supreme Court continued:

**“Given Kenya’s history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the “constitutional commitment to protect”; and it acknowledges an inherent need to assure sufficient resources for the devolved units... Article 96 of the Constitution represents the *raison d’être* of the Senate as “to protect” devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court’s inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities...National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya’s social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act*.”**

91. It is therefore my view that the twin values and principles of sharing and devolution of power and public participation being an integral

part of the foundation of our Republic, they cannot be treated as lofty aspirations. To paraphrase the decision in **Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others Petition No. 229 of 2012**, Kenyans were very clear in their intentions when they entrenched Article 10 in the Constitution. In my view, they were singularly desirous of cleaning up our politics and governance structures by insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article 10 be enforced in the spirit in which they included it in the Constitution. The people of Kenya did not intend that these provisions be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the said provisions should have substantive bite and that they will be enforced and implemented. They desired these values and principles be put into practice. It follows, therefore, that all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions must defer to Article 10 of the Constitution.

92. Where therefore a Constitutional Commission tasked with undertaking investigations into the actions of a state organ flip-flops as the Respondent herein was doing, fails to expeditiously finalise its investigations in order for the petitioner to make a decision whether to proceed or not, this court must remind the Respondent of its constitutional mandate. Such a reminder cannot be deemed to be an interference with the mandate of the Respondent. As was appreciated by **Waki, J** (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** uncertainties as to whether public officers and authorities should safely proceed with their actions ought to be avoided particularly when such uncertainties are caused by busybodies, cranks and other mischief-makers in the name of complaints.

93. It is therefore my view that in matters affecting services to the public, the Respondent ought not by omission cripple the rendition of such services under the guise of undertaking investigations. With due respect, to purport to undertake investigations in such matters indefinitely or for an unreasonably inordinate period reeks of incompetence in an institution modelled on efficiency. The Petitioner being a State organ is bound by Article 232 of the Constitution which include efficient, effective and economic use of resources and responsive, prompt, effective, impartial and equitable provision of services. One of the objects of constitutional commissions such as the Respondent herein under Article 249(1) Of the Constitution is to promote constitutionalism. It cannot be said to be promoting constitutionalism when it fails to take actions which are geared towards the realisation of the objects of the Constitution by the County Governments such as responsive, prompt, effective, impartial and equitable provision of services.

94. In this case it is my view and I find that the failure by the Respondent to complete its investigations into the petitioner's decision to purchase the subject trucks has impeded the petitioner in its mandate to responsively, promptly and effectively render services to the people of Kitui County. Whereas there is no specific timeline within which the Respondent is expected to complete its investigations, such investigations ought to be considered in light of Article 259(8) of the Constitution which provides that if a particular time is not prescribed by the Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. More than one year in completing investigations regarding the decision by a County Government to render services to its people considering that the life cycle of the executive in the counties in 5 years is in my view *prima facie* unreasonable. As was held in **Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others [2013] eKLR**:

**“What is clear from the decision is that what constitutes ‘unreasonable delay’ is not a matter capable of mathematical definition but one dependent on the facts and circumstances of the particular case.”**

95. That notwithstanding, this Court cannot make a decision whose effect would be to exonerate the petitioner from any wrongdoing that it might do in the process of procuring the said trucks. I agree in principle with the decision in **Thuku Kirori & 4 Others vs. County Government of Murang'a [2014] eKLR** where the court held that:

**“Moreover, where a statute or constitution, for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs, state or otherwise, this court will be hesitant to intervene and curtail these organs' efforts to execute their statutory or constitutional mandates”**

96. I also agree with the general legal postulate in **Diana Kethi Kilonzo & Another vs. Independent Electoral & Boundaries Commission & 10 Others [2013] eKLR** that:

**‘...the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities...An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.**

97. However, where the inaction in questions affects the public, the court cannot sit back and watch a constitutional commission take its sweet time at the expense of the public. In that case the Court must bring it back on track and in so doing must uphold the public interest. The public interest consideration has aptly been expounded by **Francois Bennion** in **Statutory Interpretation 3rd Edition at page 606**, in the following terms:-

**“it is the basic principles of legal policy that law should serve the public interest. The court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which is in any way adverse to the public interest.”**

98. Though this Court may not necessarily issue the orders in the exact manner proposed by the petitioner, Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1977] ZACC 6:**

**“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”**

99. In **Hoffmann vs. South African Airways [2000] ZACC 17; 2001 (1) SA 1; [2000] 12 BLLR 1365 (CC) at paras 42-3**, the Constitutional Court of South Africa held that:

**“In the context of our Constitution, ‘appropriate relief’ must be construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make ‘any order that is just and equitable’. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked, in the context of a comparable provision in the interim Constitution, ‘[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant’s needs did not suffer from this defect, be classified as appropriate’. Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness. Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration. In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination.”**

100. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. First the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of 'poorest of the poor,' who must make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Structural interdicts also provide significant advantages for the political branches. The very process of formulating and presenting a plan to the courts can improve government accountability, helping officials identify which organ or department of the State is responsible for providing particular services or for ensuring access to specific rights. In addition, structural interdicts have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst also assisting the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties. The “check in” hearings that follow the initial interdict facilitate information sharing between qualified experts and government officials grappling with critical policy decisions and may clarify the content the rights at stake. In addition, structural interdicts may help authorities comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically powerful interest groups opposed to certain rights. Finally, structural interdicts may provide a more fundamentally fair outcome than other remedies in Economic and Social Rights litigation. By requiring the responsible government officials to formulate a plan designed to operationalise the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class, whether or not any given individual has the resources to litigate his or her own case. As such, structural interdicts do not privilege those who can afford to litigate over those who cannot, and can prevent “queue jumping” in access to Economic and Social Rights. See **Structural interdicts/Law Teacher** <http://www.lawteacher.net/human-rights/essays/structural-interdicts>.

## **Order**

101. Having considered the issues raised in this petition, I hereby issue the following orders:

- i. A DECLARATION that where County Governments seek guidance on procurement, the EACC has a duty to furnish the requested guidance within a reasonable time so as not to impede the procurement process.**
- ii. A DECLARATION that the investigative powers of the Ethics and Anti-Corruption Commission (EACC) in respect of county governments and their procurement of goods and services should not impede the procurement process.**

iii. **THAT** an injunction does issue restraining the Ethics and Anti-Corruption Commission (EACC) from preferring any charges relating to the acquisition of the five trucks to support livestock farmers and traders in Kitui County until it renders its opinion on the petitioner's intention to acquire the said trucks.

iv. **THAT** an order compelling the Respondent to render its opinion as regards the petitioner's intention to acquire the said trucks as regards the steps taken by the petitioner in that regard to date; the said opinion to be rendered within 30 days from the date of delivery of this judgement.

v. In event of the failure by the Respondent to comply with (iv) above, an order of certiorari shall issue quashing the decision by the EACC to halt payment being made by the Petitioner over the acquisition of the five trucks to support livestock farmers and traders in Kitui County.

102. As regards costs, although this Court directed the parties to furnish it with soft copies of the pleadings and submissions in word format, only the petitioner complied. Section 1A(3) of the *Civil Procedure Act* provides as hereunder:

*A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

103. One of the overriding objectives of the *Civil Procedure Act* is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. In fact, in such circumstances, the court may well invoke its powers under section 56 of the *Advocates Act* and penalise advocates in costs personally. Such an order may be issued notwithstanding the fact that the matter is a public interest litigation since PIL does not exonerate advocates, as officers of the court from complying with the directions of the court.

104. As there is no evidence that the counsel for the Respondents are in the habit of not complying with the court's directions I will this time round not impose such sanctions against them.

105. Accordingly, there will be no order as to the costs of this petition.

106. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 30<sup>th</sup> day of May, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Makau for the Petitioner**

**Miss Jemutai for Miss Ndinda for the Respondent**

**CA Geoffrey**