REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC MISC. NO 24 OF 2019

INNOCENT MOMANYI OBIRI.....APPLICANT

VS

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

CHIEF MAGISTRATE'S COURT AT MILIMANI.....2ND RESPONDENT

(Being an application for revision of orders issued in Nairobi Criminal Misc. Application No 2336 of 2019)

RULING ON REVISION

1. This application raises questions regarding the manner in which state organs charged with investigations of offences should apply for and obtain search warrants under section 118 and 118A of the Criminal Procedure Code, the extent and coverage of such warrants, the manner of carrying out the searches and seizures authorised by the warrants and the manner of challenging the said warrants, and the grounds on which such warrants may be set aside for not conforming to the requirements of the law.

The application

2. The applicant, Innocent Momanyi Obiri, filed an application dated 7th June 2019 in which he seeks the following orders:

> ***1. (spent).***
>
> ***2. That this honourable court call for the court record in Nairobi Chief Magistrate Misc. Criminal Application No. 2336 of 2019 for examination for purposes of satisfying itself as to the correctness legality and propriety of the order issued on 3rd June 2019.***
>
> ***3. That this honourable court be pleased to grant the applicant an order for revision of the order of the learned magistrate for a blanket search and seizure in Nairobi Chief Magistrate Misc. Criminal Application No 2336 of 2019.***
>
> ***4. That pending hearing and determination of this application the order issued on 3rd of June 2019 in Nairobi Chief Magistrate Miscellaneous Criminal Application No 2336 of 2019, The Ethics and Anti Corruption Commission v Innocent Momanyi Obiri be set aside and discharged.***
>
> ***5. That the orders issued on 3rd June 2019 in Nairobi Chief Magistrate Miscellaneous Criminal Application No 2336 of 2019 The Ethic and Anti Corruption Commission v Innocent Momanyi Obiri be set aside and discharged.(sic)***
>
> ***6. That this Honorable court be pleased to grant an order prohibiting future searches and seizures by the 1st respondent herein that are prejudicial to the Applicant's rights as enshrined in the constitution.***
>
> ***7. That this Honorable court be pleased to grant an order for the 1st respondent to return all goods that were seized as a result of the order dated 3rd June 2019.***
>
> ***8. That this Honorable court grants nay other relief it may deem fit.***
>
> ***9. That the cost of this application be provided for.***

3. The application is supported by an affidavit sworn by the applicant on 7th June 2019 and is based on the grounds set out on the face of the application as follows:

> ***(a) That this honourable court is clothed with requisite jurisdiction under article 165(6) and (7) in the Constitution of Kenya to exercise supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function.***
>
> ***(b) That the Learned magistrate granted a blanket order for search of every part of the applicant's premises and residence, seize and take possession of all hard and electronic copy (sic) of documents and electronic machines relating to ongoing investigations in the above miscellaneous application and subsequent search of the same ex parte and without affording the applicant a chance to be heard.***
>
> ***(c) That the learned magistrate did not inquire as to which of documents and/or electronic gadgets or any other items that were directly involved in the transaction culminating to the investigations before granting these search warrant order.***
>
> ***(d) That the learned magistrate did not satisfy herself as to the correctness of the allegations in the enumerated application before granting the order to search.***
>
> ***(e) That the applicant is not aware and has not been informed of the investigations that are being conducted against him.***
>
> ***(f) That the applicant has and continues to suffer grave prejudice by the manner in which the learned magistrate issued orders to search their (sic) personal and business premises as the 1st respondent through his officers searched and seized assorted items from the applicant's residential and business premises including but not limited to mobile phones of wife, son, gateman, secretary and title deed of properties purchased over twenty years (20) which is tantamount to harassment, intimidation and abuse of powers.***
>
> ***(g) That in light of the above circumstance, the applicant have no further recourse but bring this matter to the attention of the High Court for revision of the said orders.***
>
> ***(h) That the orders sought in this application if granted the1st respondent will not be prejudiced or suffer any harm.***
>
> ***(i) That the application has been made without any unreasonable delay.***

4. In the affidavit sworn in support of the application, the applicant deposes that on 4th June 2019 at around 5.30 a.m., five officers attached to the 1st respondent stormed his residence at Mountain View Estate in Westlands. They were bearing an application and a blanket court order allowing them to search his residence and offices. They also proceeded to his office suites and ransacked all the rooms haphazardly and seized an assortment of items. He identifies the items seized as including his wife's, son and gateman's phone and laptop, title deeds of properties acquired in the 1990s and his and his wife's ATM cards. He avers that the 1st respondent is on a fishing expedition as it has not laid any charges against him, nor has it indicated what it is investigating or what evidence he might conceal to justify a search and seizure order.

5. The applicant asserts that the order issued by the magistrate's court is a blanket order contrary to the decision in **ACEC Misc. No 51 of 2018- Hassan Mohammed vs EACC & Another [2019] eKLR**. The applicant also sets out in his affidavit the decision in **Minister of Safety and Security v Van der Merwe & others 2011 (5) 61 (CC)** with regard to what a valid search warrant should contain.

6. It is his averment that the application on the basis of which the orders of search were granted were vague and lacked substance; that there was nothing to demonstrate that there were documents pertaining to an ongoing investigation; that there were no reasonable grounds for suspicion that he had committed a criminal offence, and that the affidavit in support of the application for the search warrants sworn by Charles Kiptanui consisted of general allegations and were inadequate to warrant the grant of the orders.

7. The applicant filed a further affidavit sworn on 28th June 2019 in response to the replying affidavit sworn by Charles Kiptanui on behalf of the 1st respondent. He avers that the facts contained in the replying affidavit were not placed before the magistrate at the time the search warrants were issued, and the annexures to the said affidavit were the documents seized in the search of his home and office.

8. He further avers that the issues raised in the affidavit of Kiptanui can only be addressed at a full trial and should therefore not be admitted before this court. He contends further that some of the documents seized may be defaced or lost; that the facts adduced in the affidavit of Kiptanui are an afterthought; and that the contract between his company, Quantech Consultant, the Quantity Surveyor in the Lake Basin Authority Development Project and Edermann Limited was a public-private partnership payment with respect to which was done by Edermann Property Limited.

9. The applicant also makes in his further affidavit detailed averments with regard to searches of his mother's home in Kisii, requests for access to his home in Kisii, return of some documents, legal opinions by the Attorney General and reports by the Auditor General which he states confirmed that the Lake Basin Authority Development Complex construction was 'as per agreement' and he asks the court to allow his application.

The response

10. The respondent opposed the application by way of an affidavit sworn on 27th June 2019 by Charles Kiptanui and a further affidavit also

sworn by Mr Kiptanui on 25th July 2019.

11. Mr. Kiptanui avers in his first affidavit that he has been investigating procurement and other irregularities related to the construction of a mall at the Lake Basin Authority Development land in Kanyakwar, Kisumu. The 1st respondent had received intelligence that certain persons had received financial and other inducements to facilitate the documented irregularities in favour of the main contractor, Edermann Properties Company Limited.

12. Mr. Kiptanui deposes that the 1st respondent had initiated financial investigations and had obtained warrants to investigate the bank accounts of Edermann Properties Limited. The warrants, annexed to his affidavit, were issued by the Chief Magistrate's Court in Kisumu in Miscellaneous Criminal Application No 102 of 2018 and are dated 9th May 2018.

13. According to Mr Kiptanui, their investigations had indicated that the present applicant received Kshs 2, 392, 241.40 from Edermann Properties into his personal account held with one Martha. The applicant was a person of interest as he was the Quantity Surveyor in the project and was responsible for managing aspects of the financial and cost aspect of the construction project. The cost of the construction in this case was varied by the Lake Basin Development Authority from Kshs 2.45 billion to Kshs 3.86 billion. However, the final account submitted by the applicant's firm, Quantech Consultancy, was Kshs 4.1 billion. The state Department of Public Works had thereafter, in March 2018, valued the work at Kshs 3,011,166,765.50, which indicated that there was an overstatement of Kshs 1,127,728,339.40.

14. The 1st respondent was therefore, in view of the Kshs 2,392,241.40 paid to the applicant's personal account investigating to establish whether the said monies constituted an inducement to the applicant's firm for the irregular management of the project cost. Mr. Kiptanui deposes that this constitutes reasonable suspicion in terms of section 118 of the Criminal Procedure Code, and it was pursuant to this that the 1st respondent had applied for the search warrants vide Miscellaneous Criminal Application No. 2336 of 2019 filed on 3rd June 2019. The warrant, according to Kiptanui, was executed in furtherance of an ongoing investigation and indicates that the 1st respondent is investigating, inter alia, bribery allegations in relation to the mall project.

15. In his further affidavit, Mr. Kiptanui denies the contentions in the applicant's affidavit of 27th June 2019 that the documents he relies on his affidavit in reply were obtained following the search of the applicant's home and office. He asserts that on the contrary, they were obtained from an earlier search of the bank accounts of Edermann Properties Limited which was conducted pursuant to a search warrant obtained by the 1st respondent well before the search of the applicant's premises. He annexes to his affidavit correspondence with the Lake Basin Development Authority, all of which pre-date by several months the search of the applicant's premises. He denies the applicant's allegations with respect to alleged searches of his mother's home in Kisii, stating that he is a stranger to the said allegations.

The submissions

16. In submissions on behalf of the applicant, his Learned Counsel, Mr. Katwa Kigen, relied on the applicant's affidavits the contents of which I have set out above, as well as a list of authorities filed on 23rd June 2019. His submission was that the orders of search and seizure issued on 3rd June 2019 are contrary to the law as the threshold for grant of such orders was not met. He contended that the orders granted are so wide as to amount to an illegality, and that the extension of the orders has been abused.

17. Mr. Kigen noted that the 1st respondent has filed affidavits seeking to explain the basis for applying for the orders. He asked the court to find that the affidavits have come too late, after the orders have been issued, and that the affidavits were filed before this court as opposed to the magistrate's court which did not have the benefit of the explanation.

18. It was further submitted on behalf of the applicant's submission further that he was not aware that any investigations against him were ongoing, nor that an order had been made to raid his home. This was an infringement of his rights and renders the search null and void. Counsel relied in this regard on the decision of the court in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR** which he submitted was to the effect that a party should be given advance notice to avail items, and it is only in the event of default that a warrant should be sought. Mr. Kigen submitted that the decision in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others**, being a decision of the Court of Appeal, is binding on this court.

19. Mr. Kigen drew the court's attention to annexure **1MO** in the applicant's affidavit which was the application for orders of search and seizure. He observed that the application does not state what it is they are investigating or that the applicant is a suspect or person of interest or what documents or items they propose to obtain from him or the premises they intend to visit. It was his submission that in the absence of details on those aspects, it was not open to the magistrate to grant the orders. He asked the court to be guided by the decision in **Manfred Walter Schmitt v Republic & Another [2013] eKLR** as to precision on the offence, location and documents.

20. Mr. Kigen further submitted that the magistrate did not also satisfy herself that there was an investigable issue, or that the applicant had been informed to supply the items sought and had refused, or that there was a correlation between what was being investigated and the documents. The application stated proceeds of crime, but there was no judicial decision that there were proceeds of crime, or that the applicant was a beneficiary of proceeds of crime.

21. It was further argued on behalf of the applicant that the magistrate did not also satisfy herself as to what would happen if the investigator were to destroy, distort or destroy the items collected, especially in the likelihood of a prosecution against the applicant. To the extent that the magistrate did not extract an undertaking from the investigator on how to deal with the items seized, the order was excessive.

22. Mr. Kigen further submitted that there was no undertaking on the return date on the warrant. Further, that the magistrate was wrong to place the rights of the applicant at the pleasure of the investigator as to the date and time of the raid, the judgment as to what constituted proceeds of crime illegally acquired and the determination of what was relevant. Reliance in this regard was placed on the decision in

Samura Engineering Ltd & 10 Others vs Kenya Revenue Authority (2012) eKLR where the court required a reasonable connection between the items being sought in the search and seizure warrants and what was being investigated.

23. It was also the applicant's case that the the magistrate gave aspects of the order that had not been sought. Mr. Kigen submitted that no request for use of force had been made, but the court allowed use of reasonable force. Further, that whereas the order was made to Charles Kiptanui, he did not participate in the search and seizure.

24. Mr Kigen submitted further that all the items collected from the applicant were from the bedroom; that the officers of the 1st respondent went at 5.00 am and completed at 6.15 am; that phones belonging to the watchman, wife and son were collected, as were pay slips of employees. He also submitted that they went to harass the applicant's grandmother in Kisii. The applicant asked the court to find that the search and seizure violated his right to privacy and right to hearing, and to find that the search and seizure are null and void and make an order for return of the items at the cost of the 1st respondent.

Submissions in response

25. The application was opposed by the 1st respondent in reliance on the affidavits sworn by Mr. Charles Kiptani whose contents are summarised above, and a bundle of authorities dated 22nd July 2019.

26. Ms. Ng'ethe for the 1st respondent submitted that the applicant had filed an application for revision of orders issued on 3rd June 2019, but was alleging breach of constitutional rights in the application. In her view, he was attempting to have constitutional issues determined through the back door, which is an abuse of process and the application should be dismissed. She relied on the decision in **Okiya Omtatah vs AG. (2018) eKLR** in which the court set out the grounds for revision. Her submission was that in the absence of abuse of power, a court should be slow to find that a warrant is unlawful on purely technical grounds.

27. According to Ms. Ng'ethe, the applicant had not shown that the warrants were not used in accordance with the law, reliance for this requirement being placed on the decision in **Francis Njau Njenga vs Insurance Regulatory Authority (2018) eKLR**. It was her submission that the court had issued the warrants in accordance with the law as provided in section 118 of the Criminal Procedure Code that guides the court on how to issue the orders. The grounds on which the 1st respondent approached the court were laid out in the application, the first of which was that the investigators were looking into issues of bribery with regard to the Lake Basin Development Authority Complex. Counsel cited the decision in **Omwanza Ombati t/a Nchogu, Omwanza & Nyasimi Advocates v Director of Criminal Investigations Department Emmanuel Kanyungu & 3 others [2017] eKLR** to submit that the applicant has not established that there was illegality, irrationality or unreasonableness in executing the warrants. He had also not shown that the respondents acted outside their statutory powers, reliance being placed for this proposition on **Wilson Baraka Mtengo vs Attorney General & 3 Others (2018) eKLR.**

28. As regards the issuance of warrants and the conditions for granting search warrants, Ms. Ng'ethe cited the case of **Minister of Safety and Security v Van der Merwe & others** (2011) (5) 61 (CC).

29. With regard to the contention by the applicant that the documents collected from him may be defaced or destroyed, her submission was that it was in the best interests of the 1st respondent that the evidence obtained be preserved, and it cannot therefore deface it as the intention is to verify the allegations against the applicant. Ms. Ng'ethe placed reliance on the decision in **Mape Engineering vs AG (2016) eKLR**, noting that the court cannot know the depth and route of the investigations, and cannot therefore purport to limit the investigator or dictate how long the investigations will take. As for the complaint by the applicant that the order was directed at Charles Kiptanui but he did not take part in the search, she submitted that order no 2 in the 1st applicant's application sought orders for Charles Kiptanui and any other officer to carry out the search. Her submission was that investigations are not carried out by one officer. In this case, investigations were carried out and signed by officers and the applicant had not shown that such officers were not duly appointed.

30. Regarding the present application, the 1st respondent's position was that the applicant is abusing the process of the court as he should have first moved the court that issued the warrants before moving this court for review, and she asked the court to dismiss the application.

31. In brief submissions in reply, Mr. Kigen argued that this court is properly seized of this application as it has jurisdiction under Article 165(6), and the arguments that the application was a disguised constitutional application is misplaced. He termed the submission by the 1st respondent that the court did not know the direction that the investigations would lead to an indication that the 1st respondent was engaged in a fishing expedition. It was his submission that the court should, on the authority of the case of **Manfred Walter Schmitt v Republic & Another** (supra), satisfy itself that there is reasonable suspicion to warrant the issuance of the search warrants. The grounds that the applicant had relied on in his application were not technical, a submission made in response to the argument by the 1st respondent that the court should be slow to stop search warrants on technical grounds, and he urged the court to allow the application, set aside the warrants, and direct that the items seized should be returned to the applicant at the expense of the 1st respondent.

Analysis and Determination

32. I have considered the pleadings and submissions of the parties in this matter, as well as the authorities that they have placed before the court.

33. The search warrant issued in this case has been challenged on various grounds: that it constituted blanket orders; that the application on the basis of which it was issued were vague and lacked substance; that the threshold for granting search warrants under section 118 was not met as there was nothing to show that the documents seized were part of an ongoing investigation. I understand the complaints against the warrant to be that it is too vague, lacked a proper foundation; that the threshold for its issuance was not met, and that the manner of its execution was not in accordance with the law.

34. It is useful to start with a consideration of the impugned application on the basis of which the warrant was issued, and the order pursuant thereto.

35. The application dated 3rd June which was filed before the Chief Magistrate's Court in Nairobi Misc Criminal Application No 2336 of 2019 was expressed to be brought under sections 118, 118A, 119, 120, 121 and 122 of the Criminal Procedure Code Cap. 75 and section 23 of the Anti Corruption and Economic Crimes Act 2003 and all other enabling provisions of law. It sought the following orders:

> **1. (*spent)***
>
> ***2. That the Honourable court do issue a search warrant to the applicant to enable Charles Kiptanui, an investigator with the Ethics and Anti-Corruption Commission, or any other Investigator duly appointed by the applicant, to have access and/or gain entry into the residential houses and offices of the respondent wherever they may be situated within the republic of Kenya and to obtain documents of ownership of property acquired through proceeds of crime, bank account documents, illegally acquired monies, company registration documents, procurement documents, contract documents, cheque books and counterfoils, payment vouchers, invoices and receipts and any item or document that is relevant to an ongoing criminal investigation.***
>
> ***3 That the applicant be permitted and/or allowed to seize any records, documents, computers, flash or hard disks, compact discs, electronic records or other documents relevant and necessary for the conduct of investigations into offences constituting corruption and economic crimes suspected to have been committed by the respondent.***
>
> ***4 That by the nature and urgency of the intended search operation, the warrant be executed at any hour and day which is appropriate and conducive to the investigations.***
>
> ***5 That there be no order as to costs.***

36. The application was supported by an affidavit sworn by Charles Kiptanui and was based on the grounds:

> ***(A) That the Commission is undertaking investigations pursuant to the provisions of section 11(1) (d) and (k) of the Ethics and Anti-Corruption Commission Act 2011, regarding allegations of irregular procurement, bribery and inflation of cost with regard to the Lake Basin Development Authority mall Complex project.***
>
> ***(B) That the applicant has endeavored to obtain several relevant original documents pertaining to the Lake Basin Development Authority mall without success.***
>
> ***(C) That information received by the applicant suggest that the respondent herein, who is the Managing Director of Quantech Consultancy, may be in possession of the said relevant documents.***
>
> ***(D) That to complete the investigations, it is necessary that a search be conducted at the premises of the respondent.***

37. In the affidavit in support of the application, Charles Kiptanui avers that he is in a team of investigators of the 1st respondent who are investigating allegations of irregular procurement, bribery and inflation of costs with regard to the Lake Basin Development Authority Mall Complex project. He states that the 1st respondent, the applicant before the magistrate's court, believes that the respondent, the present applicant, being the Managing Director of Quantech Consultancy that provided Quantity Surveying consultancy services for the mall project, has in his custody relevant documents that can assist in the conclusion of the ongoing investigations and it is therefore necessary to search his premises. He asks that they be allowed to conduct a search in the applicant's premises in any part within the republic of Kenya and at any hour and day conducive to the investigations.

38. The order issued by the court was in the following terms:

> **TO CHARLES KIPTANUI**
>
> **FORENSIC INVESTIGATOR**
>
> **ETHICS AND ANTI CORRUPTION COMMISSION**
>
> **KISUMU**
>
> **WHEREAS information has been laid before me and on due inquiry thereupon I have been led to believe that the residence and offices of the Respondent wherever they may be situated within the Republic of Kenya CONTAIN DOCUMENTS AND ELECTRONIC GADGETS AND OTHER THINGS THAT ARE NECESSARY FOR THE CONDUCT OF AN INVESTIGATION INTO AN OFFENCE. This is to authorize and require you to enter the said premises at any hour and day with such assistance as shall be required and to use if necessary reasonable force for that purpose and to search every part of the said premises and to seize and take possession of all hard and electronic copy of documents and electronic machines relating to the ongoing investigations and any other thing that can facilitate conclusion of the ongoing investigation and forthwith to bring before this court such of the said documents and devices that may be taken possession of when returning this warrant with an endorsement certifying what you have done under it immediately upon execution.**
>
> **GIVEN under my hand and the seal of the Court this 3rd day of June 2019."**

39. Sections 118, 118A, 119, 120 and 121 of the CPC under which the application was made and the orders issued provides as follows:

118. Power to issue search warrant

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

118A. Ex-parte application for search warrant

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

40. Section 119 contains the statutory provisions with regard to the execution of warrants and states that:

119. Execution of search warrants

A search warrant may be issued on any day (including Sunday), and may be executed on any day (including Sunday) between the hours of sunrise and sunset, but the court may, by the warrant, authorize the police officer or other person to whom it is addressed to execute it at any hour.

41. Section 120 requires that where the premises to be searched are closed, the person residing in or in charge of the premises shall give ingress and egress, while section 121 provides the manner in which the items seized pursuant to a warrant issued under section 118 and 118A are to be dealt with:

Detention of property seized

(1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

(2) If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.

(3) If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise.

42. The parties to this matter have both cited the decision of the **Constitutional Court of South Africa in Minister of Safety and Security v Van der Merwe & others 2011 (5) 61 (CC)** in which the Court stated as follows with respect to the search warrants:

(55) What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligible manner:

(a) states the statutory provision in terms of which it is issued;

(b) identifies the searcher;

(c) clearly mentions the authority it confers upon the searcher;

(d) identifies the person, container or premises to be searched;

(e) describes the article to be searched for and seized, with sufficient particularity; and

(f) specifies the offence which triggered the criminal investigation and names the suspected offender.

(56) In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:

(a) the person issuing the warrant must have authority and jurisdiction;

(b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;

(c) the terms of the warrant must be neither vague nor overbroad;

(d) a warrant must be reasonably intelligible to both the searcher and the searched person;

(e) the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and

(f) the terms of the warrant must be construed with reasonable strictness.

43. In its decision in **Okiya Omtatah v AG and 4 Others,** the court, after citing the words of the court in Der Merwe set out above, went on to observe as follows:

> ***"112. There are no allegations before us that the above ingredients are missing in the impugned warrants. The guidelines stated above include:- (a) the person issuing the warrant must have authority. We have no doubt that the magistrate had authority. Secondly, (b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts. There is no allegation to the contrary in this case. The terms of the warrants have not been said to be vague or overbroad. Further, there is no allegation that the warrants were not reasonably intelligible to both the searcher and the person to be searched.***
>
> ***113. We are aware that search warrants ought to be scrutinized with "sometimes technical rigour and exactitude."[84] This is because as the Supreme Court of Appeal of South Africa observed:-***
>
> ***"A search warrant is not some kind of mere, interdepartmental correspondence "or note." It is, as its very name suggests, a substantive weapon in the armoury of the State. It embodies awesome powers as well as formidable consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere, checklist approach. …***
>
> ***114. In the absence of evidence of abuse of power or a gross violation of the rights of a person to be searched, a court would be slow to find that a search warrant is unlawful on purely technical grounds.***
>
> ***115. The right to privacy is expressly guaranteed by Article 31 of the Constitution, while the statutory procedure for conducting search and seizure by the police has three inbuilt requirements to be met. Such requirements are that:- (a) prior to the search and seizure the police should obtain a search warrant; (b) such warrant should be issued by a judicial officer; and (c) lastly there should be proof on oath that there is reasonable suspicion of commission of an offence."***
>
> *(Emphasis added).*

44. Similarly, in its decision in **Omwanza Ombati t/a Nchogu, Omwanza & Nyasimi Advocates v Director of Criminal Investigations Department Emmanuel Kanyungu & 3 others [2017] eKLR**, the court when determining the validity of search warrants under challenge, observed as follows:

> ***"27. In the absence of evidence of abuse of power or a gross violation of the rights of a person to be searched, a court would be slow to find that a search warrant is unlawful on purely technical grounds.***
>
> ***28. The right to privacy is expressly guaranteed by Article 31 of the Constitution, while the statutory procedure for conducting search and seizure by the police has three inbuilt requirements to be met. Such requirements are that:- (a) prior to the search and seizure the police should obtain a search warrant; (b) such warrant should be issued by a judicial officer; and (c) lastly there should be proof on oath that there is reasonable suspicion of commission of an offence. To me, the above inbuilt requirements are present in this case."***

45. Having considered the reasoning of the court in the decisions set out above, I am persuaded that they capture well the approach that the court should take with respect to challenges mounted against search warrants in situations such as the one presently before me. The 1st respondent had obtained a search warrant prior to the search of the applicant's home and office. The warrant was issued by a judicial officer presiding over a court which had the requisite jurisdiction to issue the warrant. The warrant identified the person to carry out the search, and the places, day and times when the search should be conducted.

46. I further agree with the observation of the court in the cases above that, while search warrants should be scrutinised with *"sometimes technical rigour and exactitude,"*where no evidence of abuse of power or a gross violation of the rights of a person to be searched has been placed before the court, the court should be slow to find that a search warrant is unlawful on purely technical grounds.

47. The application and the grounds in support of the impugned application, as well as the affidavit in support, show that the 1st respondent was in the process of investigation of allegations of irregular procurement, bribery and inflation of cost with regard to the Lake Basin Development Authority Mall complex project. There was reasonable suspicion of commission of an offence by the applicant in this case, the offence being one of bribery and procurement irregularities, which would amount to offences under the Anti-corruption and Economic Crimes Act. This was on the basis that the applicant, a Quantity Surveyor who was a consultant for the Lake Basin Development Authority Mall Complex project, was suspected to be a beneficiary of the alleged offences.

48. Counsel for the applicant, Mr. Kigen, asked the court to be guided by the decision in **Manfred Walter Schmitt & Another v Republic & Another (supra).** In the Schmitt case, the applicants' bank accounts had been frozen yet the only allegation made was that there had been theft of treasury bonds with no attempt to link the theft of the bonds with the applicants or their bank accounts. In this case, the investigations in question relate to offences alleged to have been committed at the LBDA where the applicant had been the Quantity Surveyor on the project and was responsible for the financial issues and costs of the project, which turned out to be highly inflated, and a search of the accounts of the contractor showed deposit of funds into the applicant's account. I am satisfied therefore that there was a reasonable basis and suspicion, and a factual and legal foundation for the warrants, and the facts of the **Manfred Schmitt** case are distinguishable from the

present case.

49. The applicant raises the issue of alleged searches of his mother's house in Kisii. I note that this allegation is raised in his further affidavit in response to the affidavit of the 1st respondent in response to his application. I am not satisfied that there is veracity in this allegation, coming as it does late in the day. Neither I am satisfied that there is a basis for the challenge to the warrants on the basis that Charles Kiptanui did not participate in the search, noting that the orders authorised him and other officers of the 1st respondent to carry out the search.

50. The applicant has argued that the 1st respondent and the court did not comply with the directions of the court (Ong'udi J) in **Hassan Mohammed vs EACC & Another (supra)** in which the Learned Judge directed as follows:

> ***"Owing to many complaints arising from the ex parte issuance of search warrants by the Magistrate courts under section 118 and section 121(1) CPC and for proper management of the process, as a Division, we have decided to issue the following guidelines,***
>
> ***(i) Upon issuance of the orders under section 118 and 118A of the Criminal Procedure Code the Magistrate must state the duration within which the order shall remain in force.***
>
> ***(ii) The duration shall not exceed 14 days.***
>
> ***(iii) The court shall give a return to court date soon after the 14 days for the following purpose.***
>
> ***(a) For the investigation to appraise the court on what he and she has done.***
>
> ***(b) For the affected party to raise any issues it may it may have***
>
> ***(c) The Court could extend the search warrant by a maximum of 7 days if satisfied of the need to do so.***
>
> ***(d) The affected party must be served within 48 hours of the issuance of search warrants.***

51. I note that the warrants in this case directed that the documents and other items taken in the search would be brought before the court "forthwith" when returning the warrants and "immediately upon execution." I note further that the warrants were issued on 3rd June 2019, and the present application filed on 7th June 2019. It seems to me that though the warrants did not bear the matters set out in the directions issued in the **Hassan Mohammed vs EACC & Another** case, there is no prejudice that was suffered by the applicant in the circumstances of this case.

52. There is a complaint that the court authorized the use of force, which was not applied for. This is correct. However, I see no prejudice occasioned to the applicant noting that the CPC, at section 120, does allow the use of force if necessary.

53. The applicant has complained that he was not given a right to be heard prior to the issuance of the warrants, nor was he served with a notice prior to the application for a search warrant. He has sought support in the decision of the Court of Appeal in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others** (supra). He submits that the decision, which is binding on this court, is to the effect that before a search warrant can be applied for and issued, he should be given advance notice to avail items. Only in the event that he fails to avail the items requested should a warrant be sought from the court.

54. In his decision in **Mape Building & General Engineering v Attorney General & 3 others [2016] eKLR** in which the petitioner alleged violation of his constitutional rights, including the right to a fair hearing under Article 50, following the freezing of his bank accounts in the wake of investigation into alleged embezzlement of public funds from the National Youth Service, Onguto J observed as follows:

> ***68. My understanding and finding is that the 2nd Respondent was under a constitutional obligation to investigate the alleged criminal activities and conduct on the part of the Interested Party.***
>
> ***69. It ought to be acknowledged that investigation into criminal activities have no detailed limitations or boundaries. It may take the investigator to possible accomplices. It may also take the investigator to prospective witnesses. The depth of the investigation cannot be dictated or even predicted by the investigator let alone the court. Indeed, the Constitution at Article 245 (4) outlaws any purported directions to the police service as far as investigations into any crime is concerned.***
>
> ***70. However, in the course of such investigations the individual rights and freedoms of the persons in whose path the investigations cross must be protected and observed as dictated by Article 244 of the Constitution. Fidelity to both the law and the Constitution is basically mandatory.***
>
> ***...***
>
> ***73. The 2nd Respondent moved the court. Statute law under Section 118 of the Criminal Procedure Code and Section 180 of the Evidence Act allowed them to do so. <u>The application could be made ex parte for very obvious reasons. To hold otherwise would not be in the public interest. It would indeed destroy the very fabric of forensic investigations. No suspect or offender, knowing</u>***

that there existed evidence which if not destroyed or vanquished would lead to his guilt or liability, can be expected to sit back once notified of possible investigations. The suspect would rid the evidence out of sight and reach. Consequently, the investigator must where there is a foundational basis be allowed and be in a position to seize and secure the evidence.

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

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

(Emphasis added)

55. His sentiments were echoed by the court in **Okiya Omtatah vs AG (supra)** in which the court made the following observations:

"117. On whether the third petitioner ought to have been given notice prior to the issuance of the warrant, we are persuaded that the Criminal Procedure Code provides a simple yet effective mode of obtaining authority through the court. The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of the investigations. Section 118A of the Criminal Procedure Code provides that "An application for search warrant shall be made ex-parte before a Magistrate."

118. The order or warrant is never to be granted as a matter of course. To us, to give the notice to the person to be investigated can easily jeopardize the incriminating evidence. On this ground, we entirely agree with Onguto J. in the earlier cited decision in Mape Building & General Engineering vs A.G & 3 Others. Clearly, it is understandable why warrants or seizure orders are obtained ex parte when any matter is still at the investigation stage. The justification seems to fall within the provisions of Article 24 (1) of the Constitution, hence, we find that the allegation for breach of Article 50 fails.

119. Onguto J. put it bluntly in Mape Building & General Engineering vs Attorney General & 3 others…"

(Emphasis added)

56. After quoting the words of Onguto J in **Mape Building & General Engineering vs Attorney General & 3 others** which I have set out above, the court went on to observe as follows:

120. Counsel for the third Petitioner placed heavy reliance on Tom Ojienda, SC t/a Tom Ojienda & Associates Advocates vs Ethics and Anti-Corruption Commission & 6 others and Sanjay Shah Arunjain vs Republic. It is settled law that a case is only an authority for what it decides. This was correctly observed in State of Orissa vs. Sudhansu Sekhar Misra where it was held:-

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ..., that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides...." (Emphasis added)

121. The ratio of any decision must be understood in the background of the facts of the particular case.[96] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[97]Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.

(Emphasis added)

57. I am aware that the decision in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others** is a decision of the Court of Appeal, and that it is a precedent binding on the High Court and on subordinate courts. However, as a precedent, it is ***"only an authority for what it actually decides***". So what did that case decide?

58. The court identified the issues before it as being: whether Ojienda's fundamental rights under Article 27, 31, 40 and 50 of the Constitution were violated; whether the bank accounts amounted to confidential information under the advocate-client privilege; whether the actions of EACC were administrative and therefore under the ambit of Article 47 of the Constitution and whether EACC was required to issue a written notice to Ojienda prior to the application for the warrants.

59. In its decision, it dismissed both the appeal by the DPP and the EACC, as well as the cross- appeal Ojienda. With respect to the appeal by the EACC, the court first observed as follows:

"Turning now to the appeal proper, a fundamental issue to be determined is whether or not the action of EACC was administrative in nature. The learned Judge correctly pronounced himself on the issue as follows;

"It is indeed true therefore that an investigation is an administrative function of Ojienda notwithstanding that it sought and obtained, by a judicial process, warrants to search the Petitioner's accounts. Either way, the right to have due notice under Section 28 of ACECA as read with Article 47 of the Constitution was clearly violated and I so find."

We need only add that the requirement for issuance of notice in writing to a person in Ojienda's situation, which precludes the path chosen by EACC, is a duty imposed by section 27 (3) of ACECA as well, and EACC's action was improper and thus properly invalidated by the learned Judge."

60. The court then went on to conclude as follows with respect to the provisions of sections 27 and 28 of ACECA:

"In support for their reading of these provisions the DPP relied on KENYA ANTI-CORRUPTION COMMISSION V REPUBLIC & 4 OTHERS [2013] eKLR urging that this Court had considered and upheld the applicability of section 180 of the Evidence Act and section 23 of the ACECA as enabling provisions under which warrants to investigate accounts are issued. Having read that judgment which emanated from a decision of the High Court in exercise of its judicial review jurisdiction, we respectfully find it to be clearly distinguishable. The specific arguments made herein by Ojienda touching on sections 27 and 28 of ACECA which require the issuance of notice were not made nor decided upon in that matter. The argument made before us, is different and a more nuanced and takes us back to the primacy of sections 27 and 28 ACECA which, while having the same effect of enabling EACC to obtain information and documents, are nonetheless ring-fenced by specific safeguards requiring notice. Our interpretation of those provisions must necessarily devolve in favour of the citizen who takes umbrage and succour thereunder. It is logical, meet and proper that the specific provisions of ACECA, a special statute, do take precedence over the general provisions of the other statutes sought to be relied on by the investigators. (Emphasis added)

61. Section 26, 27 and 28 of ACECA contain specific provisions with respect to notice to provide a written statement with regard to any property specified by the Secretary in the notice. Section 27 relates to an associate of a suspected person to provide a written statement relating to the manner of acquisition of the property in question, while section 28 requires a person, whether suspected of an economic crime or not, to produce records pursuant to an order of the court.

62. In my view, the decision of the Court of Appeal was limited to the provisions of ACECA. It cannot be read and extended to the provisions of sections 118- 121 of the Criminal Procedure Code. To hold otherwise would be to deal a death blow to investigation of any offence, not just economic crimes, in Kenya. I am not persuaded that the Court of Appeal in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others** (supra) had this in contemplation when it made its decision. Accordingly, it is my finding and I so hold that the warrant in this case was proper and there was no requirement for notice to the applicant before the 1st respondent applied for the warrant.

63. The upshot of my findings and conclusions above is that the application before me is without merit and is hereby dismissed. No basis has been laid to revise the orders of the Magistrate's Court, and I decline to do so. The applicant is however at liberty to approach the court that issued the warrant as provided under the CPC.

Dated and Signed at Nairobi this 24th day of September 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Nairobi this 24th day of September 2019

JOHN ONYIEGO

JUDGE