REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC MISC. CRIMINAL APPLICATION NO 29 OF 2019

GEORGE ONYANGO OLOO.....APPLICANT

VERSUS

EACC.....1ST RESPONDENT

NAIROBI CHIEF MAGISTRATE'S COURT.....2ND RESPONDENT

(Being an application for revision of the orders made in Nairobi

Chief Magistrate's Misc. Criminal Application No. 2272 of 2019)

RULING ON REVISION

1. This application raises important questions relating to the manner of obtaining 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.

2. In the application dated 26th June 2019 and expressed to be brought under the provisions of Article 165(6) and (7) of the Constitution of Kenya and sections 362 and 364 of the Criminal Procedure Code and all other enabling provisions of the law, the applicant, George Onyango Oloo, seeks the following orders:

(1)(spent)

(2) THAT this Honourable Court calls for the record of the Nairobi Chief Magistrate Court (Milimani) in Chief Magistrate Misc. Criminal Application No. 2272 of 2019 for examination for purposes of satisfying itself and determination as to the legality, propriety and correctness of the order issued on 29th May 2019.

(3) THAT the orders issued on 29th May 2019 in Nairobi Chief Magistrate Misc. Criminal Application No. 2272 of 2019: Ethics and Anti-Corruption Commission vs George Onyango Oloo be set aside and discharged.

(4) THAT this Honourable Court suppresses and/or severs any evidence collected by the Respondent as a result of an unconstitutional overbroad and unreasonable search and seizure order made by the subordinate court on 29th May 2019.

(5) THAT this Honourable Court prohibits the institution of any prosecution against the Applicant based on the orders of search and seizure made by the subordinate court on 29th May 2019 and/or on the basis of recommendations of the 1st Respondent to the Director of Public Prosecutions and in any event prior to the return of the warrants.

(6) THAT this Honourable Court be pleased to grant an order prohibiting future searches and seizures by the 1st Respondent without orders granted by the court and without hearing the Applicant.

(7) THAT this Honourable Court be pleased to grant an order requiring the 1st Respondent to return all documents, including cheque books, log books, reports, title documents and other items including materials, equipment, firearms and ammunition and various articles seized by the 1st Respondent from the Applicant's residences in Syokimau, Machakos County and Mamboleo in Kisumu County on the 4th June 2019.

(8) THAT this Honourable Court be pleased to grant any other or further order or relief it may deem fit and just in the circumstances.

(9) THAT the costs of this application be provided for.

3. The 1st respondent opposes the application and has filed an affidavit in opposition sworn on 28th June 2019 by Charles Kiptanui. The applicant's case was presented by his Learned Counsel, Mr. Orengo, while Ms. Ng'ethe appeared for the 1st respondent. There was no appearance for the 2nd respondent.

The applicant's case

4. The applicant is aggrieved by orders issued by the 2nd respondent permitting the 1st respondent to carry out a search of his premises. In his affidavit sworn in support of the application, the applicant states that he is a resident of Kisumu and Machakos Counties and the Speaker of Kisumu County Assembly.

5. With respect to the matters in contention in this application, he avers that on 4th June 2019, the 1st respondent through its officers raided his residence in Syokimau in Machakos County at 5 a.m. in the morning and carried out an extensive search in the house and compound. They seized several documents including title deeds and log books, cheque books, certificate of incorporation and memorandum and articles of association, firearms and ammunition and other things enumerated in an inventory annexed to his affidavit ("GOO 1"). The inventory was signed by his son and a cousin, as well as the 1st respondent's officers.

6. On the same day at about the same time, the 1st respondent's officers raided his home in Mamboleo, Kisumu County and seized several documents including title documents. The officers prepared an inventory ("GOO 2"), which the applicant signed, as did the 1st respondent's officer He further deposes that officers of the 1st respondent also raided his official residence in Milimani area of Kisumu City and searched and ransacked the house but did not seize anything at the end of the exercise.

7. He avers, further, that the 1st respondent's officers went to his parents' residence in Manyatta, Kisumu City in Kisumu County and searched his mother's house but did not seize anything at the end of the exercise. He contends that the search of his parents' home and his mother's house was not authorised by the court and therefore was unconstitutional, illegal and unjustified. It is his averment that the search and seizure exercise in his residences and the arbitrary search carried out in his parents' home went beyond midday on 4th June 2019. He asserts that the 1st respondent was on a fishing expedition; that it carried out an intrusive and invasive exploratory search, rummaging through his personal belongings; that it indiscriminately and arbitrarily seized his belongings and documents that had no bearing on the investigations and the purpose of the search and seizure orders such as those that related to the firm of advocates he had previously ran, his wife's and children's belongings, as well as properties like firearms and title documents.

8. The basis of the search, according to the applicant, was a warrant issued by the Chief Magistrate in Milimani Chief Magistrate's Court Miscellaneous Criminal Application No. 2272 of 2019 on 29th May 2019. That the warrant had been issued pursuant to an application dated 27th May 2019 and filed in court on 28th May 2019. The application ("GOO 3") was supported by an affidavit sworn by one Charles Kiptanui, a forensic investigator with the 1st respondent.

9. The applicant makes various averments with respect to the pleadings and the warrant issued by the court. He avers that he had discerned substantial conflicts between the object of the search and seizure and the things to be seized. He avers that the warrant does not state the specific offences and crimes the 1st respondent is investigating in order to create a nexus between the items or articles seized and the offence or crime purported to have been committed. He maintains that the 1st respondent was on a fishing expedition and had therefore sought a blanket warrant which lacked sufficiency and particularity and did not specify the limit and scope of the search.

10. It is his case that the search and seizure had therefore gone beyond the limitations of the rights to privacy protected under Article 31 of the Constitution; that the warrant was defective and invalid as it was sweeping, overbroad, invasive, intrusive and expansive and therefore unconstitutional, unlawful and a nullity; that it violated the particularity requirement; did not limit the scope and boundaries of the search and seizure and the type of evidence the 1st respondent was authorized to search for.

11. It is his contention further that the warrant did not specify the offences being investigated. Further, that the items seized by the 1st respondent from his residences show, on their face, that there was no probable cause, justification or reasonable suspicion to provide a legal basis or factual foundation for the warrant to be issued by the subordinate court and executed by the 1st respondent. He contends that the subordinate court that issued the warrant took a cursory, perfunctory and mechanical approach, and in the circumstances failed to apply the constitutional and statutory principles and requirements before granting the order of search and seizure.

12. The applicant relies on several grounds set out on the face of the application, which include several legal arguments and judicial authorities. Essentially, the applicant alleges violation of his constitutional rights under Articles 31, 27(1) and 50 of the Constitution. He argues that the court has jurisdiction to hear and determine this application and grant the orders that he seeks; that he has the right to privacy under Article 31; the right to equality before the law and non-discrimination guaranteed under Article 27(1) and (2); and the right to fair hearing under Article 50(1) of the Constitution, all of which he alleges have been violated by the actions of the 1st and 2nd respondent.

13. A further ground relied on is that he is not aware and has not been informed of the investigations that are being conducted against him, nor has he been afforded the right or opportunity to confront the allegations made against him. Further, that the subordinate court irrationally and unreasonably gave an impermissibly overbroad authorization of search and seizure with a single sweeping blanket warrant that enabled the 1st respondent to carry out simultaneous and multiple areas of search and seizure; and that it did not properly limit and confine the scope

of the search, nor did it set a boundary to what could be seized.

14. He further argues that there was no limiting language in the warrant, which created room for abuse and over reach as the offence prompting the investigations and the need for search and seizure and the focus of the search were not set out or disclosed in the warrant.

15. It is further asserted that the 1st respondent has disobeyed the orders of the subordinate court by not returning with promptitude the warrant together with an endorsement certifying what the 1st respondent has done upon execution and giving to the court a full account and inventory of what was seized.

16. In his submissions on behalf of the applicant, Learned Senior Counsel, Mr. Orengo reiterated, more or less, the averments set out in the applicant's affidavit as well as the grounds in support of the application. He submitted that the search warrant had authorised the search in connection with the procurement and contracts relating to the building of a mall by the Lake Basin Development Authority, (LBDA) which was the scope of the search and seizure. However, a look at the inventory of the documents seized would show that items such as ammunition and firearms were seized, which items were not the subject of the search.

17. Mr. Orengo submitted further that a perusal of the inventory would show that there were items seized which belong to third parties, which were also not covered by the search warrant. Such items included title deeds whose connection with the search warrant was not shown.

18. It was also contended on behalf of the applicant that the search warrant was over broad in scope. Mr. Orengo submitted that a search warrant should be limited in scope and should set out the limits of the search and seizure. It should not be so worded as to allow the seizure to extend to anything. It should also not be vague but precise and contain only what is to be seized.

19. Learned Counsel further submitted that there was no foundation for the search. His submission was that there should be a clear object and a jurisdictional basis and foundation for the order of search and seizure, which was missing in the present case as the documents placed before the Magistrate's Court would show. The submission was that the application for warrants should not consist of general statements but statements that would show that an offence has been committed. It is the applicant's case that the court was wrong in issuing the orders under section 118 of the CPC.

20. Reliance was placed on the case of **Gordon Ngatia Muriuki v Director of Public Prosecutions High Court Petition No. 207 of 2014** and **Manfred Walter Schmitt v Republic & Another [2013] eKLR** in which the court held that such a search should not be based on a perfunctory statement. While conceding that the public interest should be protected, Mr. Orengo submitted that a balance must be struck and the only way to do this is through laying a proper foundation for issuance of a search warrant.

21. Mr. Orengo observed that in the pleadings before the trial court, the reasons for the search and seizure are not consistent and demonstrate that the search was in connection with the construction of the mall in Kisumu. His submission was that there should be a connection between the search and the items seized, but the warrant itself does not talk of the offence being inquired into. His case was that the warrant should state the offence being investigated with some clarity, reliance being placed on the decision of Ong'udi J in **Hassan Mohammed vs EACC & Another [2019] eKLR**. He also asked the court to be guided by comparative jurisprudence from South Africa and India on the issue of warrants, and to allow the application and grant the orders sought by the applicant.

The Respondent's Case

22. In her submissions in reply, Ms. Ng'ethe for the EACC relied on an affidavit sworn by Charles Kiptanui on 28th June 2019 in opposition to the application and a bundle of authorities filed on 22nd July 2019.

23. In his affidavit, Mr. Kiptanui, a forensic investigator with the 1st respondent, avers that he is the lead investigator in the inquiry relating to the subject matter of this application. He states that the 1st respondent has been engaged in investigating procurement and other irregularities relating to the construction of a mall at the Lake Basin Development Authority's (LBDA) land in Lower Kanyakwar within Kisumu County. Intelligence received with regard to the project indicated that certain specified key persons involved in the project received financial and other inducements to facilitate the documented irregularities in favour of the main contractor, Erdemann Property Limited. He had made an application to the magistrate's court on 27th May 2019 seeking warrants to access and search the business and residential premises of the applicant within the Republic of Kenya. The court had issued him with a search warrant dated 29th May 2019 upon being satisfied that he had sufficiently demonstrated grounds raising reasonable suspicion that the applicant was involved in corrupt conduct touching on the subject matter of the investigations.

24. According to Mr. Kiptanui, some of the facts that raised reasonable suspicion was that the contract was varied by 57% from the initial figure of Kshs. 2,451,035,643/- to Kshs. 3,860,000,000/- over and above the limit of 25% allowed by the Public Procurement and Disposal (Amendment) Regulations, 2013, and that this was done without approval by the Tender Committee as required by law.

25. It was his averment further that the applicant in this case had further gone ahead and irregularly signed three charges over LBDA's land title number L.R No. 15239 (IR No. 150443) dated 13th March 2014, 19th January 2015, and 29th May 2015 respectively to secure advances made to the contractor totaling Kshs. 2.5 Billion by the Co-operative Bank of Kenya. This had been done without the approval of the National Treasury and had exposed LBDA's property to risk of sale in case of default in repayment of the loan.

26. Mr. Kiptanui confirmed that on 4th June 2019 he and a team of investigators proceeded to the residential premises of the applicant at Mamboleo, Milimani area and Manyatta, all in Kisumu City in Kisumu County, and Syokimau in Machakos County. They had conducted searches in the said premises and seized several documents and items as set out in the inventory filed in court on 10th June 2019. He annexed a copy of the inventory ("CK 1"), observing that contrary to the averment by the applicant that it had not obeyed the order of the court, the

1st respondent had done so and had filed the inventory as required in the warrants.

27. Mr. Kiptanui averred that upon execution of the search warrant, the 1st respondent had recovered several documents and items including land ownership documents, bank account documents, logbooks, company ownership documents, and electronic gadgets. Among the documents seized are documents relating to LBDA and LBDA mall construction including minutes, correspondences and agreements, despite the fact that the applicant had long ceased to be the Chairman of the Board of LBDA. Further, that some of the documents seized related to transactions concerning sale and/ or acquisition of property between the applicant and Erdemann Property Limited, the company which had constructed the LBD mall.

28. Mr. Kiptanui averred that the applicant was the Chairperson of the LBDA from December 2014 to July 2015, the period material to the investigations the subject of this application. That this demonstrated a clear conflict of interest and bears witness to the reasonable suspicion, as envisaged under section 118 of the Criminal Procedure Code, of involvement in corrupt activities by the applicant in construction of the LBDA mall. It was his further deposition that the applicant had been invited on 14th March 2018 vide a letter dated 6th March 2018 (annexure "CK 2") to the 1st respondent's office for interview and recording of statements. He had appeared on 12th April 2018 at 12.15 pm at the EACC offices located at Central Square Building, Kisumu City and recorded a statement ("CK 3").

29. Mr. Kiptanui contended that he did demonstrate to the court that there was reasonable suspicion by way of the 1st respondent's application dated 27th May 2019 and the supporting affidavit. The court had exercised its discretion and granted the order sought as it was satisfied that there was reasonable suspicion as required by the relevant provisions of the law.

30. It was Mr. Kiptanui's averment that search warrants are issued to aid an investigative process; that this means that at the time the warrants are issued, the available information is limited and the applicant is only required by law to demonstrate reasonable suspicion. He therefore asserts that the search and seizure was not a fishing expedition and was not based on general exploratory rummaging of the applicant's belongings and property. Rather it was based on facts that raised reasonable suspicion of the applicant's involvement in corrupt conduct regarding construction of the LBDA mall. In his view, to grant the orders sought in the application would be to curtail the 1st respondent's constitutional and statutory mandate of investigating allegations of corruption and economic crimes and taking appropriate action.

31. With regard to the applicant's prayer for the return of his property, the averment on behalf of the 1st respondent is that once property or documents are seized pursuant to judiciously issued search warrants, it was the province of the issuing court to determine what happens to such property or documents, and any application in the first instance should be made at the Chief Magistrates Court at Milimani.

32. Mr. Kiptanui denied that the 1st respondent had violated the rights of the applicant under Articles 27 and 31 of the Constitution as alleged, nor had there been a demonstration of how such violation had been done. In any event, under Article 24, a right or fundamental freedom, including the right to privacy, can be limited by law, taking into account such factors as the importance of the purpose of the limitation and the nature and extent of the limitation. His averment was that it is in the public interest that investigations on corruption and economic crimes be conducted expeditiously and to their logical conclusion.

33. He averred that the warrant to search the applicant's premises obtained on 29th May 2019 was obtained lawfully and the court employed its juridical mind to the facts presented before it and the law in issuing the warrants.

34. This averment was reiterated by Ms. Ng'ethe in her submissions on behalf of the 1st respondent. She asserted that the court did not act unreasonably or irrationally in issuing the warrants. This was because the power to issue warrants is granted to the court under sections 118 and 118A of the CPC. Her submission was that the determination of the question whether to grant the warrants or not is a judicial process which is within the jurisdiction of the court. It was her position that the applicant has not demonstrated that the court exercised its discretion irrationally or injudiciously, and the prayer sought by the applicant to set aside the orders should not be granted.

35. Ms. Ng'ethe noted that prayer 5 of the application seeks prohibition of any prosecution on the basis of the orders of the subordinate court. Her submission was that the 1st respondent has no power to prosecute, such powers being vested in the office of the Director of Public Prosecutions (DPP) under Article 157, and the DPP was not a party to the present matter.

36. As regards prayer 7 of the application which seeks return of the items seized, her submission was that section 121 of the CPC is clear on how the applicant should approach the court which granted the orders of search and seizure to make orders on how the items seized should be handled. Ms. Ng'ethe cited in support the decision in the case of **Okiya Omtatah v AG and 4 Others (2018) eKLR** in which the court states that a petitioner should not approach a constitutional court to circumvent a process as this would be an abuse of process. Ms. Ng'ethe submitted that the application has not shown that he made any attempt to move the court that issued the warrants but has instead transformed the matter into a constitutional issue and alleges violation of Articles 31, 27(1) and 50 of the Constitution.

37. It was her submission that the 1st respondent followed the due process for obtaining warrants under section 118 and 118A CPC, her argument being that since due process had been followed, there was no violation of rights as alleged. In any event, the rights violation of which is alleged are not non derogable and may be limited under Article 24 of the Constitution. Ms. Ng'ethe cited the decision in **Mape Building and General Engineering vs AG & Others (2016) eKLR** in which it was held that an application for search and seizure is made *ex parte* for obvious reason and to hold otherwise would not be in the public interest. What is in the public interest, in her view, is that suspects of economic crimes are brought to book, and in weighing public versus private interest in economic crimes, the public interest weighs heavily.

38. With regard to the manner in which the warrants were crafted, Ms. Ng'ethe's submission was that the warrants were specific on where the officers were to search, which was at the applicant's residential houses wherever they may be situated within the republic. Though the investigators visited the residence belonging to the applicant's mother, nothing was seized from there as the applicant indicated at para 8 of

his affidavit. She denied that the application for the warrants was overbroad or unintelligible as alleged as could be discerned from ground 1 of the application for the search warrant. The offence which was being investigated was also clearly specified.

39. Ms. Ng'ethe further noted that, as averred by Mr. Kiptanui, the applicant was invited for an interview on 14th March 2018, reference being made to annexure CK2 in the affidavit of Charles Kiptanui. He was also invited to record a statement as deposed at paragraph 5 of the replying affidavit. He was therefore fully aware that investigations were being carried out. She urged the court to find that the application was an abuse of the court process and strike it out.

40. The 1st respondent relied on various authorities in support of its case, among them **Mape Building & General Engineering v Attorney General & 3 others [2016] eKLR**; **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2018] eKLR**; **Omwanza Ombati t/a Nchogu, Omwanza & Nyasimi Advocates v Director of Criminal Investigations Department Emmanuel Kanyungu & 3 others [2017] eKLR**; **Francis Njau Njoroge & another t/a Francrom General Merchants v Insurance Regulatory Authority & 5 others [2018] eKLR** and **William Baraka Mtengo v Attorney General & 3 others [2018] eKLR**.

41. In submissions in response, Mr. Orengo noted that in the case of **Okiya Omtatah Okoiti v AG & Others (supra)** reliance had been placed on the South African decision of **Minster of Safety and Security vs Van De Merwe & Other**s which, at paragraph (e) describes what is required of a valid warrant, while paragraph (f) specifies the offence and the offender.

42. To the argument that the matter should have gone to the court that issued the warrants, Mr. Orengo noted that the applicant in the **Omtatah** case had filed a petition, while the applicant in this case had come under Article 165(6) and (7) and section 362 CPC. He reiterated that the offence being investigated is not stated in the warrant.

Analysis and Determination

43. I have considered the application and the affidavit and grounds in support, as well as the affidavit in response sworn on behalf of the 1st respondent. The application is brought under the statutory provisions which, under section 362 of the CPC, require the court to *"call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."*

44. The applicant, however, also raises constitutional issues, alleging violation of his constitutional rights to privacy, equality and non-discrimination, and the right to fair hearing under Articles 31, 27 and 50(2) of the Constitution. The applicant thus has to demonstrate to the court the manner in which his constitutional rights under these Articles have been violated-see **Anarita Karimi Njeru vs Republic [1979] 1 KLR 154** and **Trusted Society of Human Rights Alliance vs Attorney General and 2 Others [2012] eKLR**. He also has to establish that the impugned search warrants and the execution thereof did not meet the requirements of a lawful search warrant.

45. In this latter respect, several issues of fact and law arise. The first is whether the search and seizure warrants issued in respect of the applicant were vague and overbroad in scope; whether the subordinate court failed to indicate the limits of the search; whether the 1st respondent exceeded the scope of the search and seizure as indicated in the search warrants; and finally, whether there was a legal or factual foundation for the issuance of the warrants. I will consider these issues in the course of the analysis.

46. It is apposite at this stage to set out the application on the basis of which the impugned search warrants were issued, and the impugned warrant itself. The application, expressed to be brought under sections 118, 118A, 119, 120, 121 and 122 of the Criminal Procedure Code and section 23 of the Anti-Corruption and Economic Crimes act, 2003 and filed by Grace K. Omweri on behalf of the 1st respondent, sought the following substantive orders:

> ***1. …***
>
> ***2. That the Honourable Court to 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 of the respondent situated within Kisumu County and wherever they may be situated within the republic of Kenya and to obtain documents of ownership of property acquired through proceed 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 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 of the conduct of investigations into offences constituting corruption and economic crimes suspected to have been committee 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.***

47. The grounds on which the application was based were that:

> **(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 document from the Lake Basin Development mall without success.

(c) That information received by the applicant suggests that the respondent herein, who has since left the Lake Basin Development Authority, may be in possession of the said relevant documents

(d) That to compile the investigations, it is necessary that a search be conducted at the premises of the respondent including his residential premises situate within Kisumu county and wherever they may be situated within the republic of Kenya and relevant evidence be seized.

48. The affidavit in support of the application sworn by Charles Kiptanui, a forensic investigator with the 1st respondent is worded as follows at paragraphs 2, 3 and 4:

"2. THAT I am in a team of investigators investigating allegations of irregular procurement, bribery and inflation of cost with regard to the Lake Basin Development Authority Mall complex project.

3. THAT the Respondent having been a beneficiary of the said corrupt activities the applicant believes that they have [in] their (sic) custody relevant documents that can assist in the conclusion of the ongoing investigation hence necessary to search his premises.

4. THAT by the nature of the urgency of the intended search, it is necessary that the same be executed in the premises of the respondent both within Kisumu and in any part within the republic and at any hour and day that may be conducive to the success of the investigations."

49. Upon hearing the application, the court issued the following orders:

"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 of the respondent within and without Kisumu County 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."

50. The application and the order were premised on sections 118, 118A, 119, 120 and 121 of the CPC. These sections provide as follows:

118. Power to issue search warrant

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

118A. Ex-parte application for search warrant

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

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.

51. 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.***

52. The question that has been the subject of much litigation and judicial consideration is what constitutes valid warrants under the above sections. The applicant and the 1st respondent have placed before the court various decisions in which courts have considered these issues.

53. The applicant cited the decision of Majanja J in **Nairobi High Court Petition No. 207 of 2014, Gordon Ngatia Muriuki vs Director of Public Prosecutions and Others** in which he set out the purpose of search warrants as follows:

> ***"The purpose of warrants is to protect the right of a person from unreasonable searches and seizures and unnecessary arrests in light of the protections conferred by Articles 29 and 31 of the Constitution. Article 29 protects the right to freedom and security of the person and includes the right not to be deprived of that freedom arbitrarily or without just cause. Article 31 protects the right of privacy which includes the right of a person not to have their person, home or property searched and possessions seized. By issuing an order without a reasonable basis being established in accordance with the law, the court violated the rights of the individual".***

54. The applicant also relied on the decision of Majanja J in **Manfred Walter Schmitt & Another V Republic & Another (supra)** in which he had addressed the duty of the court and the police with respect to search warrants as follows:

> ***"I would be remiss if I did not comment on the nature of the proceedings before the subordinate court. The duty imposed on the judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual. The Court is not a conveyor belt for issuing warrants when an application is made nor must the court issue warrants of search and seizure as a matter of course. When an application is made, the Court is required to address itself to the facts of the case and determine, in accordance with the statutory provisions, whether a reasonable case has been made to limit a person's rights and fundamental freedoms. On the other hand, the duty of the State and its agencies, in investigating and prosecuting crime, is to furnish the Court with facts upon which the court can conclude that there is reasonable evidence of commission of a crime by the person it seeks to implicate by the application for search and seizure".***

55. Also cited is the case of **Cassady vs Goering -07-1092 United States Court of Appeals, (Tenth Circuit)** which the applicant submits laid down the principles against courts issuing warrants of search and seizure which are impermissibly overbroad:

> ***"It is not enough that the warrant makes reference to a particular offense; the warrant must ensure that the search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause."***

56. The applicant further relies on **Cassady vs Goering (supra)** for the proposition that where the warrant "***authorizes a general search, it is overbroad and invalid".***

57. The applicant also relies on the decision in **United States of America vs George – United States Appeals Court, Second Circuit** which the applicant submits justified judicial abhorrence to general warrants in the opening words of the judgment:

> ***"Because everyone has some kind of secret or other, most people are anxious that their …..privacy be respected. For that very human reason the general warrant, permitting police agents to ransack one's personal belongings, has long been considered abhorrent to fundamental notions of privacy and liberty".***

58. He also cites **United States vs Rosa 09-0636-ca the United State Court of Appeals, Second Circuit** in which the court, stated as follows:

> ***"We therefore conclude that the warrant failed to describe with particularity the evidence sought and, more specifically, to link that evidence to the criminal activity supported by probable cause".***

59. The applicant has also relied on an article titled **"The Constitutional Validity of Search and Seizure Powers in South African Criminal Procedure by Vinesh Basdeo"** in which the authors deal with the objective grounds for issuance of warrants of search and seizure.

60. I have considered the above decisions and authorities. In general terms and giving due consideration to the fact that they represent

judicial and academic opinions from other jurisdictions, I believe these authorities represent fair summations of the law with respect to issuance of search warrants, the scope of such searches, and the circumstances in which they can be held to be invalid. However, what must also be remembered is that each case must be considered on the basis of its facts and circumstances, and that the authorities from other jurisdictions are of persuasive authority.

61. Both parties have relied on 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 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.***

62. This decision has been cited with approval in various decisions in Kenya. In **Okiya Omtatah v AG and 4 Others** (supra), the court, after citing the words of the court in **Der Merwe** set out above, observed 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. …***

63.The court conclude as follows:

> ***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).

64. See also para 27 and 28 of the decision in **Omwanza Ombati t/a Nchogu, Omwanza & Nyasimi Advocates v Director of Criminal Investigations Department Emmanuel Kanyungu & 3 others [2017] eKLR.**

65. I agree with the reasoning of the court in the two decisions from the High Court set out above. The 1st respondent in this case had obtained a search warrant prior to the search. The warrant was issued by a judicial officer presiding over a court which had the jurisdiction to issue the warrant. There was reasonable suspicion of commission of an offence by the applicant in this case. While, as observed by the courts above, 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.

66. In this case, 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 LBDA mall complex project and that the applicant, a former Chairman of the LBDA, was a beneficiary of the alleged offences.

67. Unlike the case in **Manfred Walter Schmitt & Another v Republic & Another (supra)** in which the applicants' bank accounts had been frozen and 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, and the period when, the applicant had been the Chairman. I am satisfied therefore that there was a factual and legal foundation for the warrants, and the facts of the **Manfred Walter Schmitt** case are distinguishable from the present case.

68. The warrant issued in this case has also been faulted for being overbroad in scope. I have scrutinised the search warrant, which I have set out above. It authorise searches of the residence of the applicant 'within and without' Kisumu County. The 1st respondent had sought orders to search *'residential houses of the respondent situated within Kisumu County and wherever they may be situated within the republic of Kenya'*, and the seizure of documents and other items specified in the warrant. The warrant also directs the person authorised to carry out the search to *"forthwith […] 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."*

69. There is no dispute that the searches and seizures were carried out in the applicant's three residences, in Kisumu Milimani and Mamboleo as well as in Syokimau in Nairobi. The 1st respondent returned the warrant, with the inventory as required, on 10th June 2019, contrary to the averments by the applicant.

70. Given the above facts, I would agree with the 1st respondent that the warrant issued was not overbroad in scope, nor did it lack a factual foundation. It was clear about who was to carry out the search, against whom and at what locations. It was time bound, requiring that such documents as were seized should be brought before the court *'forthwith'* upon execution, which was done on 10th June 2019.

71. The applicant complains that there was non-compliance with the directions issued by 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.***

72. The above directions were issued on 8th November 2018. It is not clear whether the directions, issued in a specific matter before the High Court, were brought to the attention of Magistrates' Courts. Nonetheless, the 1st respondent returned the warrant, issued on 29th May 2019, together with the inventory, on 10th June 2019. This was within the 14 days indicated in the directions of the High Court set out above. I am therefore not satisfied that the court that issued the warrant can be faulted for non-compliance with the above directions in the circumstance of this case.

73. A further question that arises is whether there was such gross violation of the rights of the applicant that this court should intervene and set aside the search warrant as was held in **Okiya Omtatah v AG and 4 Others (supra)** and **Omwanza Ombati t/a Nchogu, Omwanza &**

74. In support of the allegation that indeed there was violation of his rights, the applicant has complained that the 1st respondent carried out searches in his mother's house in Manyatta. It is, however, conceded that nothing was taken from there. While a search of the house in Manyatta was not authorised in the warrant, it seems to me that the search of the applicant's mother's house was not such a gross violation of the applicant's right to privacy, nor was it such an unreasonable act- the possibility that documents and other items relevant to an investigation would be secreted in a close relative's house cannot be overlooked. However, I am not satisfied that it is sufficient to vitiate the warrant in this case. With respect to the items such as firearms and ammunition taken from Syokimau, an application for their release can be made before the court that issued the warrant.

75. I note also that the wording of the warrant does not quite accord with the guidelines set out in **Okiya Omtatah v AG and 4 Others (supra)** which were culled from the decision in **Minister of Safety and Security vs Van De Merwe & Others** (supra). The warrant could have clearly specified the offence alleged, which was already placed before the court in the application and affidavit sworn by the 1st respondent. The court could also have specified the provisions of law on which it issued the warrant However, in my view, these technical reasons, given the need to balance the public interest against the applicant's rights, are not sufficient to nullify the warrants and the search and seizure carried out thereunder.

76. I bear in mind also the fact that the form of the warrant in this case, as in many others that have been challenged before this court, appear to be a standard form developed in the past. There may be a need to issue practice directions and new templates on search warrants given the changing times and the prescriptions in judicial precedents.

77. The applicant has alleged violation of the non-discrimination provisions in Article 27. No attempt, however, was made to demonstrate how this provision and the rights protected thereunder was violated, so I make no finding with respect thereto.

78. Violation of the right to a hearing contained in Article 50 has also been alleged. As is the case with alleged violation of Article 27, no evidence or submissions with regard thereto were placed before the court, so I am unable to make a finding with respect thereto. In any event, at the stage of investigation and issuance of search warrants under section 118 and 118A of the CPC, and without a demonstration by the applicant of the alleged violation of constitutional rights, it is difficult to make a finding with regard thereto given that the provisions require that the orders sought are applied for *ex parte*.

79. The upshot of my findings above is that I find no merit in the application before me. It is hereby accordingly dismissed.

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