



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

PETITION NO. 7 OF 2017

JIMMY MUTUKU KIAMBA.....1ST PETITIONER

TRACY MBINYA MUSAU.....2ND PETITIONER

JIMBISE LIMITED.....3RD PETITIONER

MUTHAIGA GREEN ACRES LTD.....4TH PETITIONER

VERSUS

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

THE KENYA REVENUE AUTHORITY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

AND

EQUITY BANK LIMITED.....1ST INTERESTED PARTY

PUBLIC SERVICE COMMISSION OF KENYA.....2ND INTERESTED PARTY

JUDGMENT

1. The Petition dated 17th March, 2017 was filed by the 1st petitioner alongside his wife the 2nd petitioner and they are both directors of the 3rd and 4th petitioner's company. The petitioner seeks the following orders:

1. A declaration that the petitioner's constitutional right to human dignity and freedom and security of the person as guaranteed by Article 25(a), 28 and 29 of the Constitution have been violated by the 1st and 2nd respondent, their agents, employees, representatives and/or servants.

2. A declaration that the petitioners' constitutional right to privacy as guaranteed by Article 31 of the Constitution have been violated by the 1st and 2nd respondent s, their agents, employees, representatives and/or servants.

3. A declaration that the petitioner's constitutional right to fair administrative action as guaranteed by Article 40(1) & (2) of the Constitution have been violated by the 1st and 2nd respondent s, their agents, employees, representatives and/or servants.

4. A declaration that the petitioner's Constitutional right to fair administrative action as guaranteed by Article 47(1) & (2) of the Constitution have been violated by their agents, employees, representatives and/or servants.

5. A declaration that the petitioner's be compensated a total sum of ten million Kenya Shillings (kshs 10,000,000/=) or any other amount that the court deems sufficient and/or appropriate by the 1st and 2nd respondents jointly and severally for violating the petitioner's constitutional rights.

6. A declaration that Section 55 of the Anti-Corruption and Economic Crimes Act, Cap 65 Laws of Kenya, the Anti-Corruption and Economic Crimes Act, 2003 and the Anti-Corruption and Economic Crimes Act No. 3 of 2003 is unconstitutional for contravening Article 50(2)(a) & (1) of the Constitution.

7. A declaration that Section 56 of the Anti-Corruption and Economic Crimes Act, Cap 65 Laws of Kenya, the Anti-Corruption and Economic Crimes Act no. 3 of 2003 is unconstitutional for contravening Articles 40(1) & (2), 47(1) &(2) and 50(2)(a) of the Constitution.

8. A declaration that the proceedings and consequent orders in Nairobi Tax Appeals Tribunal appeal no. 183 of 2015 are illegal, null and void.

9. A declaration that the proceedings and consequent orders in Nairobi High court Anti-Corruption and Economic Crimes no.1 of 2016, formerly Nairobi High Court Civil suit No. 33 of 2016 (O.S) are illegal, null and void.

Petitioners Case

2. The basis of this petition is that the 1st and 2nd respondents have investigative powers as per the anti-corruption laws and the Income Tax Act but their conduct is reviewable by a court or tribunal. The 2nd respondent has investigative powers for administration of income tax even though the Income tax is a self-assessment Act in which taxpayers are expected to disclose their income based on honesty and integrity.

3. According to the petitioners, the 2nd respondent's co-operation in this exercise is unconstitutional in light of **Articles 232** as read with **Article 10 of the Constitution**. They argue that there should be some precursor to the audits and that the audits should not be random. The petitioners are of the view that the 1st and 2nd respondents assume that the taxpayer is guilty and his fundamental rights should be disregarded. That their rights to institute court proceedings are provided for under **Article 22 (1) of the Constitution**.

4. The petitioners re-affirm that they have a constitutional right to human dignity, freedom and security of the person and freedom from torture.

5. The petitioners case is that on the 5th day of November 2014 the 1st respondent launched investigations as per **Section 7 of the Anti-Corruption and Economic Crimes Act 2003** on the petitioners after receiving information that the petitioners were receiving money in their bank accounts beyond their known source of income. They proceeded to invoke their inquisitorial powers as per the Income Tax Act without complying with the overseeing provisions of the Constitution as well as the Fair Administrative Actions Act.

6. Further to that they drew erroneous conclusions from information that they acquired from third parties. In the process, they went against the petitioners' right to privacy. They proceeded and sought a court order restraining the said petitioners from accessing funds.

7. In addition to that, on 5th November, 2014 the said **Section 7 of the ACECA 2003** had been repealed by **Section 37 of the Ethics and Anti-Corruption Commission Act, No.22 of 2011** therefore the investigation by the 1st respondent and consequent findings are illegal, null and void. Given the circumstances, the 1st respondent made a finding that the 1st petitioner had unexplained assets amounting to Ksh.872,094,147/=.

8. The petitioners argue that EACC ought to have interviewed them on this and given them a chance to seek legal advice as to the implications of the interview as per **Article 50 of the Constitution** which provides for a right to fair hearing. The 1st respondent based their conclusion from information acquired from third parties and approached the court for orders to assist in satisfying their burden of proof.

9. They allege that the petitioners made accounting errors and this led EACC to conclude that they are fraudulent. They have as a result suffered psychologically, physically and have lost business opportunities following the exercise by the 1st and 2nd respondents which they term as a witch hunt. The 1st respondent went further and made a recommendation to the DPP to commence criminal proceedings against the 1st petitioner amongst other people in **Nairobi Anti-Corruption Case No. 7 of 2015 R -vs- Jimmy Mutuku Kiamba and 4 others.** This case related to a sum of kshs 17,000,000/= which case relates to the preservation orders obtained.

10. They claim that the 1st respondent has also instituted recovery proceedings against the 1st petitioner's daughter who is not a party to the recovery against the 1st petitioner. The 1st and 2nd respondents sought court orders in two different applications in **Nairobi High Court Anti-Corruption and Economic Crimes no. 1 of 2016 (Formerly Nairobi High Court Civil Suit No. 33 of 2016 O.S and Nairobi High Court Miscellaneous Civil Application No. 285 of 2015.** In the latter case, orders were obtained and extended before the main suit was filed.

11. The petitioner lodged an appeal before the Tax Appeals Tribunal in **Nairobi Tax Appeal Tribunal Appeal No. 183 of 2015.** The court extended the orders in **Miscellaneous Application No. 285 of 2015,** and through this the 1st respondent compelled the petitioners to give self-incriminating evidence through notices. This resulted in their dignity and freedom being violated.

12. The second prayer is based on the violation of the petitioner's right to privacy as guaranteed by Article 31 of the Constitution. The 1st petitioner is a Public Officer as **per Article 260 of the Constitution** and has faithfully declared his wealth and that of his family as required by the law. The information he gives to the 2nd respondent is so private that it ought not to be bandied around arbitrarily even amongst law enforcement agencies. **Section 30 of the Public Officer Ethics Act of 2003** provides clearly that this information should be confidential.

13. In the replying affidavit dated 29th March 2017 the 1st respondent offered to reveal its sources of credible information that they relied on when making the decision to investigate the petitioner. They stated that the Intelligence Dissemination Report forwarded a report revealing a

suspicious in flow of money into the petitioner's account of kshs.200,000,000/= which still remains a suspicion. The 1st respondent apart from seeking orders from the lower court to investigate the 1st petitioner's account also placed heavy reliance on the 1st petitioner's series of declaration of income, assets and liabilities that were submitted to the 2nd interested party.

14. The petitioners have also claimed that the 1st respondent had unlawfully gathered evidence against them which they revealed to the 2nd respondent. This was breach of their right to privacy, and a declaration should be made to that effect. They prayed that the evidence accessed by the 1st respondent from the 2nd interested party should not be used against them.

15. The third prayer is on violation of the petitioner's constitutional right to property as guaranteed by **Article 40(1) & (2) of the Constitution**. This therefore obligates parliament not to enact laws that permit the state to arbitrarily deprive a person property of any description. They submit that **Section 56** of the **ACECA** is unconstitutional since it arbitrarily denies the person or persons suspected to have committed a corrupt conduct the use and enjoyment of his/her/it/their properties which he/she/it/they are entitled to acquire and own under Article 40 of the Constitution. The 1st respondent moved the court ex parte through an application dated 13th November, 2014 to obtain orders to restrain the 1st petitioner from accessing funds held in his accounts.

16. Counsel for the petitioners indicated that the 1st respondent vide an application dated 8th May 2015 sought prohibition orders for properties that belonged to the 1st petitioner under the same **Section 56 (1), (2) and (3) of the ACECA**, the said application failed. The bank accounts that these orders sought to freeze hold monies that the 1st and 2nd petitioners use for their daily upkeep.

17. Part of the frozen accounts belongs to their daughter who is still a minor. As the investigations by the 1st and 2nd respondents are still being carried out the orders for preservation are still in place and yet the accounts continue to receive income, the net income could fundamentally change and the orders are speculative.

18. The two orders in place are an abuse of the court process and that the accounts being frozen fell short of the arbitrariness test. The orders were first issued on 14th November 2014 but the petitioners have never been convicted of any given crime. They therefore pray for an order and a declaration that the petitioner's right to property has been violated.

19. The fourth prayer is on the violation of the petitioners' constitutional right to fair administrative action as guaranteed Article 47(1) & (2) of the Constitution. Compulsory or investigatory provisions of the enabling laws of the 1st and 2nd respondents do not necessarily excuse the said agencies from being procedurally fair, adhering to the spirit and letter of the constitution. The orders that the 1st respondent obtained in their application dated 13th November 2014 in **Nairobi Miscellaneous Application No. 804 of 2014** restrained the 1st petitioner from accessing funds held in his accounts which is a decision affecting his fundamental right to property. The orders were obtained ex-parte and he had no opportunity to be heard and thus violated his right to fair administrative action.

20. The application was based on **Section 56** of the **ACECA** which sets out the mandatory provisions including adequate notice to be issued to the respondents as well as a chance for them to respond in court. The person affected with the said order ought to be furnished with information and the process ought to be expeditious, efficient, lawful, reasonable and procedurally fair.

21. The 1st respondent mooted figures of kshs.872,094,147/= to which the court relied on as *prima facie* evidence of a possible economic crime. It is a principle of common law that the denial of a right to be heard renders any decision made null and void *ab initio*. They prayed for an order declaring that the petitioner's constitutional right to fair administrative action as guaranteed by **Article 47(1) and (2) of the Constitution** have been violated by the 1st and 2nd respondents, their agents, employees, representatives and/or servants.

22. Prayer five is on violation of the petitioners' constitutional right to fair hearing as guaranteed under **Article 50(2) (a) & (1) & 50(4) of the Constitution**. The Supreme court in its decision in **Evans Odhiambo Kidero and 4 others -vs- Ferdinand Ndungu Waititu and 4 Others** placed the right to fair hearing on a higher pedestal than the right to fair trial hence the right to fair hearing is a non-derogable right. The nature of the offences being investigated are criminal in nature.

23. Section 55(8) of the ACECA under the proceedings for the forfeiture of unexplained assets, provides that the record of proceedings under this section shall be admissible in evidence in any other proceedings, including any prosecution for corruption or economic crime. This means that the section shifts the onus to a person suspected to have 'unexplained assets' to prove that it was not acquired illegally.

24. The petitioners are also being investigated for tax evasion. They claim to have explained how they acquired their assets through various letters giving extensive and elaborate explanations. Their petition is that **Section 55** of the **ACECA** flies on the face of the fundamental right against self-incrimination as enshrined by **Article 50(2)(1) the Constitution**. The various applications by the respondents after the letters of explanation were based on the self-incriminating evidence contained in the said letters. **Article 50(4) of the Constitution** provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

25. They prayed that whereas the demands for explanation relating to the assets belonging to the petitioner were made pursuant to **Section 55** of the **ACECA**, the same is unconstitutional for purporting to cloth the 1st respondent with purported powers to compel an accused person to give self-incriminating evidence contrary to **Article 50(2)(1) of the Constitution**. The section further offends the general law and application on the burden of proof under **Section 107 of the Evidence Act**.

26. The investigations on the petitioners began but more than a year later neither the 1st nor 2nd respondent have labored enough to retrieve evidence on their own. They have tortured the petitioners to give self-incriminating evidence which they pray be excluded from the matter as it was obtained in a manner that violates any right or fundamental freedom. The violation is that of the right to fair trial as well as the right to

privacy. There ought to be a justification for limitation of rights and in their opinion there are less intrusive ways of confirming tax statements of criminal culpability without grossly infringing on the rights of the petitioners.

27. The petitioners prayed for compensation saying they suffered and continue to suffer immensely and their rights have been violated. They prayed for a compensatory sum of kshs.10,000,000/=. To back up this sum they relied on the case of ***Otieno Mak'onyango –vs- Attorney General & Another [2012] eKLR*** whereby the damages awarded was that of ksh.20,000,000/= for violation of the plaintiff's fundamental rights.

1st Respondents Case.

28. The 1st respondent filed a replying affidavit dated 29th March 2017 deponed to by an investigator Pius Maithya. He stated that the petitioners claim that the relevant provisions of the repealed **Section 7** of the **ACECA** are illegal and unsupported by evidence. The 1st respondent has legal empowerment to investigate corruption and economic crime to facilitate criminal prosecution and/or civil recovery as per **Sections 11(1) (d) and (k)** of the **EACC ACT, 2011**. They are also empowered by **Article 252(1) (a)** of the **Constitution** to conduct investigations on their own initiative or on a complaint made by a member of the public.

29. The investigations in this particular matter were triggered by an Intelligence Dissemination Report forwarded to the 1st respondent by **Financial Reporting Centre as per Section 24(b) of the Proceeds of Crime and Anti-Money Laundering Act, 2009**.

30. The 1st respondent submitted that the conservatory orders being sought by the petitioners can only be granted if principles that were well summarized in the case of ***Board of Management of Uhuru Secondary School –vs- City County Director of Education & 2 Others (2015) eKLR***. The principles in summary as follows:

1. The applicant ought to demonstrate a *prima facie* case with a likelihood of success and that in the absence of conservatory orders he is likely to suffer prejudice.
2. Once the applicant has established to the court's satisfaction a *prima facie* case with a likelihood of success the court is then to decide whether a grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of rights.
3. Flowing from the two principles, is whether an interim conservatory order, if not granted, would render the petition or its substratum nugatory.
4. The court must consider conservatory orders also in the face of the public interest dogma.

31. He averred that the petitioners are in essence challenging the constitutionality of **Section 55** of the **ACECA** as it shifts the burden of proof to the defendants. Counsel for the 1st respondent submits that it would appear the petitioners' claim is based on a selective appreciation of the term 'burden of proof'. From the definition of *Black's Law dictionary* which they have quoted;

“A party's duty to prove a disputed assertion or charge; a proposition regarding which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find. The burden of proof included both the burden of persuasion and the burden of production also termed evidentiary burden; evidential burden; onus probandi.' ‘Strictly speaking, burden of proof denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law. Burden of proof is sometimes used in a secondary sense to mean the burden of going forward with the evidence. In this sense it is sometimes said that a party has the burden of countering with evidence a prima facie case made against that party.”

32. From that definition and further on the definition of '*burden of production*' they submitted that under certain circumstance the burden of proof can and does shift urging the court to refer to the case of ***Peter Wafula Juma and 72 Others –vs- Republic (2014) eKLR***. In criminal cases while the legal burden of proof is on the State which must prove its case beyond reasonable doubt, it is also permissible in law to place the burden of proof of some specific facts on a defendant in civil proceedings. In **Section 112** of the **Evidence Act** it is provided that in civil proceedings, when any fact is especially within the knowledge of any party to these proceedings, the burden of proving or disproving that fact is upon them.

33. The proceedings in Section 55 of the **ACECA** are civil in nature. Counsel opines that the legal burden of proof remains with the commission throughout the proceedings. The evidential burden only shifts to the defendant, if after the commission has adduced evidence that the person has unexplained assets and the court is satisfied on a balance of probabilities and in light of the evidence so far adduced, that the person concerned does have unexplained assets.

34. They rely on the case of ***Ethics and Anti-Corruption Commission (The Legal successor of Kenya Anti- Corruption Commission versus Stanley Mombo Amuti (2015) eKLR*** in which the constitutionality of Section 55 of the ACECA was upheld in the Court of appeal;

“the act provides that the burden of proof remained with EACC and it was the court to determine that it was discharged on a balance of probability. It is at this stage the burden would shift to the petitioner if the court so ordered. In our view this is not an alien process in civil litigation. It also happens in defamation cases where there is a defence of justification...”

35. The petitioner's also sought that **Section 56** of the **ACECA** be declared unconstitutional though the Counsel submits that there are no subsisting preservation orders that have been sought under this section in respect of the petitioners assets. In any event, any preservatory

orders obtained under the aforesaid Section 56 are not set aside through constitutional petitions but through the mechanisms set out in Section 56(4) and (5) of the ACECA. The 1st respondent sought injunctive orders against the 1st petitioner on 9th February 2016 in ***Nairobi High Court Anti-Corruption and Economic Crimes No. 1 of 2016, Formerly Nairobi High Court Civil Suit No. 33 of 2016 (O.S)***. The orders were granted under Order 40 of the Civil Procedure Rules 2010. As at the time the parties filed their written submissions the orders had not been set aside. Counsel cited the case of ***Kenya Anti-corruption Commission –vs- Lands Limited and 7 Others (2008) eKLR***, where it was held as follows;

“I find that contrary to popular belief with some practitioners of law in this country, the Constitution does not anywhere prevent the legislature from placing the burden of proof of some specific facts on a suspect. Thus Section 112 of the Evidence Act provides. ‘In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him’ this section is not inconsistent with any provision of the Constitution. When a party has the knowledge in question there is no real burden which has been placed on him by the Section. Section 56 proceedings are civil in nature and therefore Section 112 of the Evidence Act does apply.”

36. They further submit that the provisions are in consonance with our international law commitments, Article 20 of the United Nations Convention against Corruption adopted on 9th December, 2009. It provides that subject to its constitution and the fundamental principles of its legal system each state party shall consider adopting such legislation and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

37. The petitioners seek to have orders obtained in ***Nairobi H.C Miscellaneous Civil Application No. 285 of 2015*** discharged. Counsel argued that the 1st respondent was not a party to the said proceedings and the 2nd respondent has its own legal mandate that is distinct from that of the 1st respondent. The nature of the evidence relied on by the 2nd respondent as well as its source has not been placed before this court to demonstrate that it was illegally obtained.

38. He argued that the assertion that the 1st respondent conducted its investigations under the repealed Section 7 of the ACECA is ridiculous as the 1st respondent is legally empowered under Section 11(1)(d) and (k) of the EACC Act to investigate and facilitate criminal prosecution and or civil recovery.

39. He also argued that the 1st respondent is equally empowered under provisions of Section 11(3) of the EACC Act 2011 to cooperate and collaborate with other state organs and agencies in the prosecution and investigation of corruption. Under the law there is a mechanism provided for challenging the kind of orders obtained by the 2nd respondent in the said proceedings. He submitted that the petitioners have not met the criterion that is required to grant the orders sought and the petition lacks merit and is based on unfounded allegations. The 1st respondent prayed that it be dismissed with costs.

2nd Respondents Case.

40. The 2nd respondent in their submissions opposing the petition informed the court that the petitioners filed an appeal at the ***Tax Appeals Tribunal in Appeal No. 183 of 2015*** challenging tax assessments. The petitioners pray that this court sets aside, discharges and/or vacates court orders obtained by the 2nd respondents in ***Nairobi High Court Miscellaneous Civil Application No. 285 of 2015*** on the ground that it was based on evidence obtained illegally from the 1st respondent and shared with the 2nd respondent.

41. Section 5a of the Kenya Revenue Authority Act allows the 2nd respondent to receive information on tax evasion from third parties. The **EACC Act, 2011 under Section 11(3)** provides that the commission may cooperate and collaborate with other state organs and agencies in the prevention and investigation of corruption.

42. The 1st respondent gave the 2nd respondent information on finances relating to the 1st petitioner of which the 1st respondent analyzed against his tax compliance status and thereafter checked his tax compliance. In turn the 1st petitioner confirmed his willingness to pay the 2nd respondent a sum of kshs.17,000,000/= and this was captured in the ruling by Justice Fred A. Ochieng dated 1st October 2015.

43. He added that the petitioners have also not demonstrated how their rights had been violated when the 2nd respondent asked the 1st respondent to investigate them for possible tax evasion. The findings were shared with the 1st petitioner and he was allowed to respond to the findings resulting in the 1st petitioner filing an appeal at the tax appeals tribunal challenging the tax assessments.

44. The issue of legality of assessments was never raised before the tax appeals tribunal and is merely an afterthought. They also added that the assessment was raised on documents and information legally obtained within the statutory powers of the 2nd respondent. He relied on the case of ***Nicholas Randa Owano Ombija –vs- Judges and Magistrates Vetting Board [2015] eKLR*** where the issue of illegally obtained evidence was considered and the court stated as follows;

“There is no doubt that the documents relating to the appellant’s vetting of 10th September 2012 are relevant as his case hinges on them. Common law principles show that evidence, if relevant is admissible even if it has been illegally obtained.”

45. The 1st and 2nd respondents have different statutory mandates with different remedies and their seeking preservation orders with respect to the same funds does not amount to an abuse of office. The reasons for preserving funds by each respondent are different. The 2nd respondent cannot rely on the orders by the 1st respondent as it is not a party to the proceedings between the 1st respondent and the petitioners. The taxes in question are of colossal amounts and if the same are not preserved recovery of the same will be a frustrating process.

46. He submitted that it would be unfair and against public policy to set aside, vary or discharge the orders as prayed for by the petitioners. In addition to that, staying the proceedings in the tax appeals tribunal will only delay in resolution of the tax dispute. They said the petitioners had also not demonstrated to this court how their constitutional rights have been violated by the tribunal hearing the appeal.

47. He contended that payment of and collection of taxes is a public interest matter and the 2nd respondent have the statutory obligation under article 209 of the Constitution to assess and collect taxes on behalf of the national government. In addition to that **Section 32(1)** of the **Tax Appeals Tribunal Act** provides for a right of appeal to the high court. They prayed that the petition be dismissed and that the 2nd respondent be allowed to discharge their functions as provided for by the Law.

Determination

48. I have considered the pleadings, affidavits plus the written submissions and authorities. The petitioners have sought various declarations claiming that their constitutional rights have been infringed by the respondents. The issue for determination is whether the petitioners have demonstrated how the respondents have violated the various rights.

49. Article 23(1) of Constitution provides that the high court has the jurisdiction in accordance with Article 165, to hear and determine applications for redress of denial, violation and infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In particular, **Article 165(3) (d)** of the **Constitution** states that the high court has jurisdiction to hear any question respecting the interpretation of the constitution including the determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of the Constitution.

50. The Learned Judge in the case of *Robert Njeru Mwathi –vs- Kenya Wildlife Service & Another [2014] eKLR* stated that

“The petitioner has an obligation in law to demonstrate the provisions of the Constitution violated by the respondents and the manner of violation with regard to him-see Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance -vs- Attorney General & Others High Court Petition No. 229 of 2012.”

51. The petitioners have highlighted the various rights that they purport have been infringed. They are as follows:

- i. Right to Human dignity and freedom.
- ii. Right to privacy.
- iii. Right to property.
- iv. Right to fair administrative Action.
- v. Right to fair hearing.

52. The rights that the petitioners purport have been infringed all stem from cases that have been investigated by the respondents who have come to court and sought orders for preservation of assets belonging to the petitioners. The 1st respondent’s mandate to investigate corruption and economic crime related cases stems from Article 252 (1) (a) of the Constitution and Section 11 (1) (d) and (k) of the **EACC Act 2011**. The repeal of section 7 of the **ACECA** did not take away the 1st respondent’s investigative powers as claimed by the petitioners.

53. The 2nd respondent’s investigative power in terms of revenue and tax included is grounded in Section 56 (1) of the Income Tax Act and Section 48 (1) of the Value Added Tax. The petitioners are not challenging the respondents investigative mandate. They claim that in the process of investigating the 1st and 2nd petitioners, they violated their constitutional rights.

54. The petitioners have moved this court seeking orders that affect proceedings and/or decisions in the following cases;

- i. Nairobi High Court Anti-Corruption & Economic Crimes No. 1 of 2016 (O.S).**
- ii. Nairobi High Court Miscellaneous Civil Application No. 285 of 2015.**
- iii. Nairobi Tax Appeals Tribunal Appeal No. 183 of 2015.**

55. The court vide an order issued on 29th March, 2017 in this file stayed proceedings in *Nairobi High Court ACEC No. 1 of 2016 (O.S) formerly Nairobi HCCC No. 33 of 2016 (O.S)* in order to address the issues that the petitioners brought on the question of their constitutional rights having been infringed. The prayers sought affecting the other two suits were not granted and reasons were outlined in the Ruling delivered by this court on 20th September, 2017.

56. The 1st respondent herein was informed that the 1st petitioner was receiving amounts in his accounts beyond his known sources of income. The 1st respondent investigated the said claims and concluded that the 1st petitioner had unexplained assets. They then moved to court and sought orders to have the 1st petitioners bank accounts preserved through *Nairobi High Court Miscellaneous Civil Application No. 285 of 2015*. A ruling was delivered on 1st October, 2015 and the orders were then extended pending hearing and determination of a tax due against the 1st petitioner.

57. The 1st petitioner appealed the decision in the suit in *Nairobi Tax Appeals Tribunal Appeal No. 183 of 2015*. The orders of preservation were in place pending hearing and determination of the tax appeal which was pending ruling at the time of filing of this instant petition. The 1st respondent thereafter sought for preservation orders in *Nairobi High Court Anti-Corruption and Economic Crimes no. 1 of 2016 (O.S)*, formerly *Nairobi High Court Civil Suit no.33 of 2016 (O.S)* to preserve a list of assets the bank accounts included.

58. All that the 1st respondent did is set out in Sections 55 and 56 of the ACECA.

Section 55 of the ACECA provides as follows:

1) In this section, “*corrupt conduct*” means— (a) conduct that constitutes corruption or economic crime; or (b) conduct that took place before this Act came into operation and which— (i) at the time, constituted an offence; and (ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

2) The Commission may commence proceedings under this section against a person if— (a) after an investigation, the Commission is satisfied that the person has unexplained assets; and (b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

3) Proceedings under this section shall be commenced in the High Court by way of originating summons.

4) In proceedings under this section— (a) the Commission shall adduce evidence that the person has unexplained assets; and (b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.

5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

7) For the purposes of proceedings under this section, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds — (a) are held in trust for the person whose assets are in question or otherwise on his behalf; or (b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration.

8) The record of proceedings under this section shall be admissible in evidence in any other proceedings, including any prosecution for corruption or economic crime.

9) This section shall apply retroactively.

59. Section 56 of the ACECA provides;

(1) On an *ex parte* application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.

(2) An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.

(3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission.

(4) A person served with an order under this section may, within fifteen days after being served, apply to the court to discharge or vary the order and the court may, after hearing the parties, discharge or vary the order or dismiss the application.

(5) The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.

(6) A person who is served with an order under this section and who contravenes it is guilty of an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.

(7) In this section, “*corrupt conduct*” means—

(a) conduct that constitutes corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which —

(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

60. The Court of Appeal in the case of *EACC (the legal successor of Kenya KACC) –vs- Stanley Mombo Amuti [2015] eKLR* allowed the appeal and stated thus;

““Did the originating summons offend the respondent’s fundamental rights to a fair trial or to ownership of his property” In our own assessment of the matters that were before the trial court, and with tremendous respect to the learned judge, the evidence that was before the judge was not given any consideration. The entire evidence by both parties was overlooked and the matter was determined on an assumption that the evidence if applied, would offend the above articles. Speculation and apprehension rarely have a place in a court of law; the judge ought to have examined the evidence that was before court and to apply it against the provisions of the Constitution instead of postulating an assumption in theory. We say so, because the suit was filed according to the provisions of a statute. There was no complainant regarding the independence or the impartiality of the Court. The problem that was seen by the judge was the Act if applied would contravene the Constitution. Such a conclusion in our view without applying the facts or evidence and testing it against the particular enactments of the Constitution was not only impossible but left the contested issues of facts undetermined. It was important for the judge to substantially deal with the contested facts so that the appellant at the end of the day would have a decision on their case. [32] The Constitution also makes provisions for national values and principles of good governance that includes integrity, transparency and accountability. Declaring the appellant’s suit null and void summarily on assumption that the respondent was going to be denied his right to property, before considering the evidence that was before the Judge, did not give the appellant its day in court. The trajectory adopted by the learned judge when on her own motion she teased out the provisions of the constitution clearly denied the appellant an opportunity to be heard on the three questions that were framed in the suit and a determination of the issues on merit. The same Constitution Article 159 (1) underscores the need for a Court or a tribunal to be guided by the principles that justice shall be done to all irrespective of status and it shall be administered without undue regard to procedural technicalities. [33] The Act provides that the burden of proof remained with EACC and it was the court to determine that it was discharged on a balance of probability. It is at that stage the burden would shift to the respondent if the court so ordered. In our view, this is not an alien process in civil litigation. It also happens in defamation cases where there is a defence of justification. The allegations by the appellant that the respondent acquired the listed assets corruptly through abuse of office were hotly contested by the respondent according to the pleadings. Determining a matter that was founded on such contestation on a preliminary point of law that was raised by the court suo moto denied the appellant an opportunity to be heard on their evidence. [34] In any event, it is trite that a preliminary objection cannot be founded on contested facts. The learned judge had an opportunity to consider the contested facts and make a determination one way or the other according to the law and the Constitution.”

The above case stresses on the need for the trial court to consider all the evidence before it, to enable it arrive at a decision.

61. In the instant case which is not a preliminary objection the petitioners have based their prayers on infringement of constitutional rights on the entire process and mandate that the 1st and 2nd respondents exercised. The mandate and process conducted by the respondents leads them to present their evidence before the trial court in appropriate cases. It is at that point that the petitioners would have a chance to respond to the issues raised against them and a hearing is conducted.

62. The petitioners claim that their right to a fair hearing has been violated, yet no hearing has been conducted. If anything, the instant petitioners have caused the cases filed against them to be held in abeyance while causing delays in concluding the matter e.g. Nairobi High Court ACEC No. 1 of 2016 (O.S).

The court has a duty to hear all parties in a case and make a fair decision. Nairobi High Court ACEC No. 1 of 2016 is a matter which has a public interest element in it and causing unnecessary delays in its determination is unfair to all parties. The plaintiff in that case has always been ready to proceed with witnesses, while the applicants herein have never been keen on proceeding.

63. The petitioners have challenged the constitutionality of Section 55 of the ACECA. The Court of Appeal rendered a judgment on this issue in the case of *EACC (the legal successor of KACC) –vs- Stanley Mombo Amuti (supra)* where it stated;

“Further, under Section 55 (3), (4), (5) and (6) of the Act EACC is provided with a procedure to follow once they have carried out investigations and they are satisfied that the person has unexplained assets and the person has been given an opportunity to explain the source. If EACC is not satisfied with the explanation, they can institute proceedings by way of an originating summons and the burden remains with EACC to discharge, on a balance of probability, that the alleged assets were acquired through abuse of public office.”

64. Sections 55 and 56 of the ACECA have provision for a person suspected of having corruptly acquired assets to give an explanation. It cannot therefore be said that they are condemned unheard in violation of Article 50 of the Constitution. Once the matter is filed in court, the person is again given an opportunity to present his/her case.

Investigation involves inspection and scrutiny of documents. Asset declaration forms once surrendered to KRA are examined by the officers of the said authority. Such an exercise cannot be said, to be invading ones privacy. If the petitioners have any issue with inadmissible evidence, the best forum to address such an issue is the trial court seized of the matter.

65. The 2nd respondent initiated an investigation into the tax compliance status of the 1st petitioner, his family members and associated companies. This was after receiving information from EACC indicating that the 1st petitioner had accumulated a substantial amount of assets and cash amounts into his accounts. The investigation covered the years 2007 – 2014. Did the 1st respondent violate any law in giving that information to the 2nd respondent?

Section 11 (3) of the EACC Act provides;

“The Commission may co-operate and collaborate with other state organs and agencies and any foreign government or international or regional organization in the prevention and investigation for corruption.”

66. The 1st respondent was simply carrying out its lawful mandate by involving the 2nd respondent in its investigations, on the part that touched on the 2nd respondent’s mandate. I have curiously noted that the petitioners have not mentioned any single provision of Sections 55 and 56 of the ACECA or Section 5 of the KRA Act that have been violated by the respondents in their investigations. All allegations by them are generalities which cannot suffice in such a petition.

67. My finding is that the 1st and 2nd respondents have discharged their mandate and the only way for the matter to be determined fairly is to allow the matters already filed to be heard fully with all parties being given a chance to articulate their case and the decision rendered.

68. The issue of compensation could only have been considered if the petitioners had proved violation of any of their constitutional rights.

I find none of the prayers sought proved and I dismiss the petition with costs.

Signed, dated and delivered this 20th day of **March, 2018** in open court at Nairobi.

HEDWIG I. ONG’UDI

HIGH COURT JUDGE