



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

PETITION NO.2 OF 2017

IN THE MATTER OF: THE PREAMBLE AND ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 35, 47, 50(1), 73, 75, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 10, 21, 27, 35, 47, 73, 75, 159, 165, 201, 210, 232, 258, AND 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: DOCTRINE OF LEGITIMATE EXPECTATION

IN THE MATTER OF: THE CONTINUING MISAPPROPRIATION AND NEGLIGENCE BY THE COUNTY TREASURY IN MIS USE OF PUBLIC FUNDS

IN THE MATTER OF: THE PUBLIC FINANCE MANAGEMENT ACT, THE PUBLIC PROCUREMENT AND DISPOSAL ACT AND THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT

BETWEEN

MICHAEL KOJO OTIENO.....1ST PETITIONER

SAMORA MACHEL ALOSI.....2ND PETITIONER

VERSUS

COUNTY GOVERNMENT OF HOMA BAY.....1ST RESPONDENT

CYPRIAN OTIENO AWITI.....2ND RESPONDENT

COUNTY TREASURY OF HOMA BAY.....3RD RESPONDENT

COUNTY SECRETARY OF HOMA BAY.....4TH RESPONDENT

COUNTY EXECUTIVE OF WATER.....5TH RESPONDENT

COUNTY EXECUTIVE FOR TOURISM,

CULTURE & SPORT.....6TH RESPONDENT

COUNTY EXECUTIVE FOR TRANSPORT &

INFRASTRUCTURE.....7TH RESPONDENT

COUNTY ASSEMBLY OF HOMA BAY.....8TH RESPONDENT

THE ETHICS AND ANTI

CORRUPTION COMMISSION.....9TH RESPONDENT

RULING

1. **MICHAEL KOJO OTIENO** (1st Petitioner) and **SAMORA MACHEL ALOSI** (2nd Petitioner) have filed this constitutional petition against the 1st – 8th respondents whom they say are liable for financial impropriety as well as misappropriation, theft and loss of public funds belonging to the citizens of Homa Bay County. The details of such loss are contained in the reports of the Auditor General for the years 2014 and 2015 as well as other official reports including reports of the County assembly through its various committees.

2. The 9th and 10th Respondent are enjoined on grounds that the acts and omissions by the 1st – 8th respondents ought to compel them to move in immediately and institute prosecution and recovery proceedings against them.

The petitioners pray for:-

a) A declaration to issue against the 1st – 8th respondents that they have engaged in corrupt practices amounting to gross violation of the constitution and have been rendered incapable of discharging their mandates as required by the constitution and various statutes.

b) An order compelling the respondents to register all the assets of the county and to account for all the funds as provided under Article 226(5).

c) An order compelling the 9th respondent (the Ethics and Anti Corruption Commission) to commence investigations into the activities of the 1st – 8th respondents and officers serving under them and institute criminal and civil proceedings against them.

d) An order directing the County Government to eliminate the manual collection of revenue and instead adopt the IFMIS and G-PAY.

3. In the supporting affidavit by **SAMORA MACHEL ALOSI**, he deposes that:-

- The County Government of Homa Bay including the Governor and his Executive Committee as well as Senior Officers in the said Government and the County Assembly of Homa Bay have committed numerous and various acts in the course of their duties that are contrary to and in violation of the constitution and the law.

- In regard to the County Ministry of Tourism, Culture and Sports the following sums were lost or stolen for the financial year 2013 – 2014.

a) Kshs.381,000/= that was allegedly used for supervision of an inter-county ward sports tournament when it was not.

b) Kshs.100,000/= that was allegedly used to transport sports goods from Nairobi Sports House when in fact it was not.

c) Kshs.500,200/= which is the difference between what the Ministry says was paid for the sports goods and what it actually paid for them.

- As for the renovation of Homa Bay Stadium in the 2013 – 2014 financial year the amount of money allocated for the said works does not reflect the amount of work done and it is alleged that money was lost here even though the exact amount is not known because of the unwillingness and/or refusal of the County Government officers to make public the documents relating to the said works.

- In the year 2014 the County Executive Committee led by the Governor awarded a contract worth Kshs.3,389,587,000/= to a company known as Oasis Group International LLC, for the construction of various roads within Homa Bay County to bitumen standards. This is said to have violated all laws and regulations relating to procurement and financial management as provided in the Public Procurement and Disposal Act and the Public Finance Management Act as well as the regulation and guidelines made under the statutes.

- The petitioners refer to past instances where the EACC has brought against accounting officers and other concerned officers are under the said **Section 45(2)(b)** as well as under **Section 46** for abuse of office which all the members of the Homa Bay County Cabinet are now guilty of. In arguing that the agency be directed to take action against the respondents.

- The County Assembly is accused of spending a total sum of Kshs.5, 540,800/= on committee meetings outside the assembly and did not provide relevant supporting documents contrary to the law.

- The County Assembly could not account for Kshs.12, 168,800/= for temporary imprests given to its members for budget sessions and liaison meetings in Kisumu and Nairobi.

- In its budget the County Assembly had a variance of Kshs.186, 602,000/= which it could not account for therefore suggesting impropriety and irregularity.
- On the item called Other Receipts the Auditor General discovered an unexplained variance of Kshs.111, 420,903/= which is a further suggestion of illegality and possibly fraud.
- On Budget Utilization the County Government incurred excess expenditure of Kshs.438, 553,282/= and there was no proof of approvals of the same contrary to the Public Finance Management Act.
- On Recurrent Expenditure the County Government incurred excess expenditure of Kshs.245, 474,488/= without approval.
- On the office of the Governor the Report found discrepancies in terms of under expenditure and over expenditure indicative of lack of proper planning which is contrary to **Section 45 (2) (c)** of the Anti-Corruption and Economic Crimes Act.
- The County Government also failed to issue retirement notices to its officers who were due for retirement therefore contravening Government Circulars on the retirement of Public Servants as well as leading to loss of Public Funds through unlawful payment.
- In regard to the County Executive for Water, a report of the Water and Environmental Committee of the County assembly on selected projects for the financial years 2013/14 and 2014/15 dated 11th April, 2016 and tabled in the assembly on 12th April 2016 is relied on to demonstrate how a total sum of Kshs.55,069,113.16 of public funds have been lost or looted by public offices entrusted with protecting them.
- The court is referred to the Auditor-General's Report on Homa Bay County for the year ended 30th June, 2014 which is said to reveal the discrepancies, the malpractices and other unlawful acts on the part of the County Government that have been enumerated for the year 2015 and the court is invited to look at the said Report with a view to making appropriate orders.
- This Court is urged to issue an order of mandamus to compel the **EACC** to immediately commence proceedings against the Governor (being the accounting officer), the named members of the County Executive Committee as well as the officers serving under them for their violations of the law as has been set out in this affidavit.
- The **EACC** has set the precedent because many cases it has prosecuted concern breaches of procurement and financial management procedures even when the charges do not include loss of funds.
- The petitioners insist that they have shown that apart from the many breaches of such procedures, public funds were actually lost and that is all the more reason why prosecutions should be immediately instituted.
- They have cited some of the cases instituted by the **EACC** for failure to follow the law and abuse of office and annexed charge sheets in respect of:-

a) The case against the former officers of the IEBC.

b) The two cases against the former officers of the Judiciary.

c) The case against the former PS for Tourism Rebecca Nabutola and Mr. Ong'ong'a Achieng.

- Their lament is that the matters regarding corruption, abuse of office, misappropriation of funds,, theft, general mismanagement and nepotism have been brought to the attention of the Governor but he has failed to take any action.

4. They claim that the Human Resource Manager, Mr. Charles Otunga Owidi drew the Governor's attention to certain corrupt practices and misdeeds by certain officers of the County Government vide a letter dated 1st March 2016, asking him to take immediate corrective action but he has failed and neglected to do so thereby subjecting the Government to huge losses.

5. In opposing the petition the 1st – 7th respondents rely on the affidavit sworn by **CONGA JASEME** who deposes that the 1st respondent undertakes several projects in each given accounting period and without being specific, the petitioners are merely bent on a fishy expedition.

6. The petition is described as misplaced to the extent that the petitioners have not stated which of the 1st respondent's assets they have issues with and it amounts to inviting the court to involve itself in an investigative process, which is not part of its responsibilities.

The petitioners are accused of coming to court without sufficient material and/or substance to warrant granting the orders sought.

7. The respondents contend that in matters of corruption, ethics and integrity are personal and personal liability is essential, so the prayers sought are not tenable.

As regards the issue on assets and liabilities of the 1st respondent, it is submitted that the matter has not been concluded as the then Transnational Authority never finished its work and identification of the assets and liabilities is in progress. Consequently the petitioners are asking 1st respondent to provide information which is otherwise non-existent.

8. Further, that the 8th respondent's Committee report are matters whose recommendations had been forwarded to the 9th respondent (i.e. EACC), and in light of the fact that no material evidence has been presented by the petitioners then there is no basis for writing the court to take the 9th respondent's responsibilities.

9. As regards the Auditor General's report, it is contended that the 2nd respondent was cleared of any personal responsibility by the Senate Committee and to invite this court to again deal with the orders is tantamount to asking that the Senate proceedings be quashed (annexed is a letter by the senate marked CGHB2) which is dated 3rd July 2015 and addressed to Hon. Cyprian Awiti (Governor of Homa Bay County).

Ref: Meeting with the Senate Sessional Committee on County Public Accounts and Investments.

The Senate Sessional Committee on County Public Accounts and Investment pursuant to Article 96 (3) of the Constitution, to exercise oversight over national revenue allocated to the County Governments.....

At its meeting held on Tuesday 30th June 2015, the Committee resolved to deliberate on the Report of the Auditor General on the Financial Operation of Homa Bay County Executive for the Financial Year 2013/2014 (1st July 2013 to 30th June 2014) requires the Governor to attend a session with the said committee.

10. Consequently the financial matters raised by the petitioners are still pending before the Senate Sessional Committee as per the documents marked (9BH-3)

11. The petitioners contend that there is no evidence linking them to any misappropriation of funds by themselves and the petition is described as a classic example of self seeking citizens who, for personal gains and esteem want to use the court as focus of attention without any lawful justification. The petition is faulted as demonstration of ignorance of the operations of the County Government of Homa Bay and that the petitioners are not well versed with the roles of parties they have brought before this court and are motivated by a personal vendetta against **CYPRIAN OTIENO AWITI** (the 2nd respondent) so it ought to be dismissed.

12. On behalf of the 8th respondent **OTIENO BOB KEPHAS** (the Clerk to the County Assembly of Homa Bay) has deposed in his replying affidavit that the Homa Bay County Assembly Service Board in exercise of its powers, advanced car loan and mortgage financiers to the members of staff in compliance with the Salaries and Remuneration Circular Ref. **SRC/TS/ (GOVT/3/16** dated 27th November 2013 (marked **Exhibit OBK1**) Ref: Reviewed Remuneration and Benefits which at paragraph D provides:-

Car Loan Facility

“Members of the County assembly shall be entitled to a Car Loan of Kshs.2,000,000/= (Two Million Shillings) payable with interest of 3% per annum. This is a cash based fund subject to budgeting allocation and availability of funds. The loan is repayable within five (5) years before the end of term of office, whichever is earlier.

Paragraph E

Mortgage facility

Members of County Assembly shall be entitled to a Mortgage at Kshs.3,000,000/= (Three million shillings) payable with interest of 3% per annum. This is a cash based fund subject to budgetary allocation

This is further fortified by the circular from the Salaries and Remuneration Commission dated 17th December 2014 (**OBK2**).

13. Subsequently the County Assembly thereafter published the Homa Bay County Assembly (Mortgage Scheme) Regulations 2016 in the HOMA BAY County Gazette Supplement No.1 Legal Notice No.1 of 25th February 2016 (**Exhibit OBK3**), as well as the Homa Bay County Assembly (Car Loan Scheme) Regulation 2016 in OBK 4 (Legal Notice).

14. The Clerk to the County assembly as the officer designated the Homa Bay County Executive Committee to administer the funds then prepared, signed and transmitted to the Auditor General a statement of accounts relating to the financial year ending June 2016 in respect to the Regulations on the Mortgage and Car Loan Schemes (**OBK 5**).

15. The beneficiaries to these loan facilities have surrendered their log books and title documents to the fund administration until payment is completed by them.

It is also explained that sittings of the County Assembly of Homa Bay were held outside the precincts of the Assembly subsequent to the approvals of the Speaker in accordance with the County assembly Standing Orders, thereby warranting the payment of Kshs.5, 540,800/= as at the financial year ending 30th June 2015, the members of the Committees and their Secretarial (see **OBK 6**) which is the approvals by the County Assembly Speaker.

16. It is explained that transport allowance was paid to members and secretariat of the Committee on Budget and Appropriation, and the Liaison Committee in Kisumu and Nairobi respectively, totalling to Kshs.12, 168,800/= as at the financial year ending 30th June 2015 for conducting sittings outside the precincts of the Assembly as temporary imprests pursuant to the Homa Bay County Assembly transport policy (annexed as the policy marked **Exhibit OBK 7**).

17. It is further stated that the issues drawn from the Auditor General's Report for the Financial Year ending 30th June 2014 and 30th June 2015 is still pending before the Senate Sessional Committee on County Public Accounts and Investments. The senate Sessional Committee on County Public Accounts and Investments has the powers equivalent to those of the High Court and a petition to invite the court handle matters within the Committee's jurisdiction equates to quashing the decision of the senate. All the County Assemblies, including Homa Bay have been requested to submit written responses on all supporting documents to the specific issues raised in the Auditor General report on the financial operations of the County Assemblies for the financial year 2013/2014 and 2014/2015 to the relevant Auditor General Regional Offices on or before Wednesday 5th April 2017 and submit the same to the office of the Clerk of the Senate on or before the 12th of April 2017 (the copy of notice of the Committee's meeting is marked **OBK 8**).

18. At the interpartes hearing, 1st petitioner made oral submissions stating that the Assembly report SMA1 which he insists shows massive loss of funds which are supposed to be assisting members of Homa Bay County, and that has been a loss of 331,000/= which was meant for a sports tournament Kshs.100,000/= for transport and goods etc.

19. He referred to the Committee's recommendations at page 27 which states the respondents violated the constitution and the officers were to be held individually liable; and this is a threat to delivery of services.

20. They insist that the County Executive Committee member was supposed to account for the losses and that the 5th respondent (i.e. the County Executive for Tourism, Culture and Sports) did not report the misappropriation and ought to have been called to account.

21. Further that the contract of Kshs.3.383 billion awarded to Oasis company for construction of roads and the report (SMA) shows a loss of Kshs.112,500,000/=.

Also the Water project relating to County Executive for Water showed a massive loss of public funds and Kshs.4.6 million assigned for Kanyamwa was never used and not account for. The same thing happened to the contract awarded for Nyalkunyi Water Project.

The upshot of their complaint is that there were Water and Roads Projects for which cash assigned was never accounted for. These issues were raised by the County Assembly Committees.

22. As a consequence the petitioners urge the court to allow the prayers so as to satisfy public interest.

The 8th respondent is also faulted for failing to register any of the County's assets.

23. Mr. Nyauke on behalf of 2nd – 7th respondents submitted that the court cannot make declaratory orders that the County Government of Homa Bay has been involved in corruption and should thus not be in operation because that in effect will be winding up the County Government. He points out that for the County Government to cease existing there ought to be a referendum.

24. As for **CYPRIAN AWITI**, the issue of corruption ought to be treated as a personal responsibility, and it would have been wise to name the other joint personnel under whose watch corruption thrives with the blessings of **CPRIAN AWITI**.

Further the 2nd – 7th respondent are Public Officers and some of those office holders have been replaced. Counsel also points out that the 5th Respondent is the entire County Executive of Homa Bay, so how can order apply in financial.

25. Mr. Nyauke reiterated that no material evidence has been presented to support the allegations raised, and the recommendation presented to the committee remain just that as they have never been tabled before the plenary.

He argues that both the County Government and County Assembly have a system of working and accounting for funds is not done before the courts. Mr. Nyauke submitted that the Auditor has done his work and placed recommendations which ought to await deliberation and action.

26. What about auditing of County Government Assets? Mr. Nyauke submitted that the petitioners were not specific as to the nature of the assets required to be registered nor did they provide any evidence that they requested for information concerning the county assets and were denied. Counsel referred a Public Finance Management Act saying it gives clear direction where regarding procuring of services, and address the system of collection of county funds, which the petitioners has not addressed their minds to.

27. Mrs. Dhikusoka on behalf of the 8th respondent submitted that on mortgage and car loan, the Salaries and Remuneration Commission is mandated to set and regularly review recommendations of all Stated Officers; and in exercise of its powers issued the two circulars earlier reported to in this judgment.

28. She also referred to **Article 228 (5)** of the **Constitution** which provides that the Controller of Budget cannot authorize withdrawal of funds without requisite laws. It is her submission that the car loan and mortgage meet the provision of **Section 116** and **117** of the **Public Funds Management Act**.

29. **Further that** Regulation 7 (g) of the Mortgage and Car Loans Regulations provide that the accounting officer shall transmit to the

auditor general a statement of account concerning the car loan and mortgage facilities – which was done.

30. It is also pointed out that ordinarily the committee meetings are held within the County Offices but **Order 163** of the County Assembly Standing Orders requires the Speaker's authority before sitting outside the County assembly, and this was done.

31. With regard to the travel allowances, counsel submitted that the County Assembly has the transport policy approved by the Board and recognizes travel allowance both by road and air.

32. So what ought to be the fate of the auditor's report – Mrs. Dhikusoka argued that there is the Public Service Investment Committee which receives the reports for scrutiny then calls the committee members to address them.

Further the Senate on Investments sits to go through the issues raised in the audit report, yet the same has yet to be conducted.

33. It was also explained that the sectorial committee in exercising their oversight roles under **Article 185** of the **Constitution of Kenya**, discussed and made recommendations over where to be adopted allowed by resolutions. Once resolutions are made, they are passed to the Committee on Implementation through the County Clerk. Miss Dhikusoka pointed out that there are structures within the County Government which act on report and make recommendations which are then adopted by The County Assembly and it is not for this court to take up that role.

34. As for the Assets Register, counsel argues that there is no evidence presented that the County does not have an assets register nor is there anything to show that the Petitioners exercised their rights under **Article 35** and sought information regarding the county's register of assets.

35. In reply the petitioners maintain that there was a circular issued requiring all County Governments to submit their registers.

36. The petitioners acknowledge that the committees met, but they argue that the committees are the public watch dogs so if they make recommendations and no action is taken then the affected or aggrieved person must come to court.

37. The issues for determination are:

- Whether the petitioners have demonstrated adequately that the 1st -8th respondents have been engaged in corrupt practices amounting to violation of the Constitution of Kenya.
- Is there a basis for directing the Ethics and Anti-Corruption Commission (EACC) to commence investigations, criminal prosecution and civil proceedings?
- What is the legal process available once the Auditor General's report has been presented?
- Have the petitioners proved that the County government of Homa Bay does not retain a Register of assets.

LOSS OF FUNDS

38. According to the report by the Homa Bay County Assembly Tourism, Culture and Sports Committee dated 4th April 2015 (SMA 1), there was loss of funds in the Ministry of Tourism, Culture and Sports and also queries on how the tender for renovation of the Homa Bay stadium was awarded. Observations were also made regarding gross exaggeration of some materials.

39. The report under its recommendations noted that the County Executive Committee member and the Chief Officer in charge of Tourism, Culture and Sports violated section 22 of the Public Procurement and Disposal Act 2005 and Article 227 of the Constitution of Kenya and should be individually held responsible and accountable for the violation of the Constitution and loss/misappropriation of funds under section 156 of the Public Finance Management Act.

IRREGULAR AWARDING OF CONTRACTS

40. The petitioners relied on the Homa Bay County Assembly Transport and Infrastructure Committee on the construction of selected county roads report dated 24th March 2015 (SMA 2) to fault the awarding of a contract to Oasis Group International for construction of various roads in violation of the Public Procurement and Disposal Act 2005 and the Public Finance and Management Act. The Committee found that there was no evidence of international tendering nor documentation on how the bidders were sifted and several payment vouchers had irregularities. The contract was executed before the performance bond was issued and the County Chief Officer for transport and Infrastructure was a witness to the contract contrary to section 3 (b) of the Law of Contract, and the Performance Bond was issued by an insurance firm instead of a bank.

41. Further the procurement procedures for the consultancy were not followed, and the department of Transport and Infrastructure attempted to experiment with an unknown technology-without authorization from the Ministry of Transport, National Environment Management Authority (NEMA) and Kenya Bureau of Standards using public funds. The department also failed to conduct quality control prior to making payments for construction.

42. The Committee recommended that the County Executive Committee and the County Procurement Officer should bear responsibility for

the ills noted regarding the roads construction, and the County Governor should take responsibility for the loss of funds.

43. The Petitioners however acknowledge that with regard to funds which were diverted to **SIBO ENTERPRISES LTD** for construction of **Mbita-Kamsamba-Utango** road which never was, the payment voucher which had been prepared was stopped-hence no public funds were lost. The petitioners did not disclose under what circumstances the stoppage was made-preferring to let the court try to fish for the reasons from the voluminous documents they filed.

WATER PROJECTS

44. The Homa Bay County Assembly Water and Environment committee on selected water projects in their report dated 11th April 2016 noted irregularity in payments relating to the **Nyalkinyi Community Water Project**. Funds were disbursed for rehabilitation of **Kanyaluo Water** distribution pipeline and **Min Arot** mains yet no works were undertaken. A contract was awarded to a company which had no capacity to carry out the tasks at **Nyakweri Community Water** project while the Department of Water and Environment Services had submitted a report that the contract drilling and equipping a non-existent borehole at **Nyarath Community Water** project was complete.

45. The committee recommended that the County Chief Executive for Water and Environment Services had violated the Constitution and the relevant statutes,

CAR LOANS AND MORTGAGE

46. It is not disputed that members of the County Assembly and Secretariat benefitted from the car loan and mortgage scheme-the issue to be established is whether the funds were released before establishing the Board which was to manage the funds? And were the funds released without any security? Was there a failure by the County Government to submit its financial statement of the fund to the Auditor General?

47. The Auditor General's report noted that there were members who had loans without any collateral, making it difficult to ascertain how the loans would be cleared. The report recommended that the management ought to ensure that the all the loans were duly secured or else the responsible officer would be held liable

48. Apparently this report excited the petitioners' interest to the extent that they were persuaded the scenario was akin to what befell the Chief Accounting Officer of the judiciary and the Directors of various departments within the judiciary to be pursued by the EACC and eventually charged for abuse of office and failing to comply with the law relating to Procurement.

ASSETS REGISTER

49. The Auditor General's report pointed out that the County Assembly did not maintain an accurate and updated fixed assets register for the non-current assets. It would appear that there does exist an assets register but the information contained therein is incomplete-that was the observation made in the auditor's report to the effect that land of unknown value, Hansard machine and furniture were not listed in the register. The auditor recommended that the management reviews and updates the fixed assets register failure to which the responsible officer was to be held liable.

50. Certainly from the reports by the various committees and the Auditor General, there were apparent violations detected and certain recommendations made. The validity of these reports is borne by the oversight role of the County Assembly is addressed under **Article 184 (3)** of the **Constitution** that:

“A county assembly..., may exercise oversight over the county executive committee and any other county executive organs.”

51. Assembly Committee is a group of Members of the Assembly designated to do the detailed work of the Assembly. **Section 14 (1)(b)** of the **County Governments Act, 2014** provides that subject to the standing orders, a county assembly “may establish committees in such a manner and for such general or special purposes as it considers fit, and regulate the procedure of any committee so established”. Committees perform specific roles on behalf of the Assembly. Therefore, their mandate and powers are given by the Assembly, through the Standing Orders (Rules of Procedure).

52. Committees are integral parts for the conduct of Assembly business. An effective Committee system makes the Assembly to be more responsive to the needs of the electorate while making the role of the Members more relevant and the democratic process more representative of, and accountable to, the views of the electorate.

53. Committees conduct detailed investigation into an issue which may not be carried out efficiently and effectively by the whole parliament and therefore contributes to the attainment of democratic ideals especially transparency and accountability.

54. With regard to accounts and auditing of public entities Article 226 (2) of the Constitution of Kenya provides:-

“The accounting officer of a national public office is accountable to the National Assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.”

55. What then becomes the fate of the recommendations made in those reports- are the courts the direct vessels of ensuring implementation? Committees of the Assembly make recommendations to the Plenary of the Assembly in the form of resolutions. Their recommendations may or may not be acted upon by the Assembly or may be rejected or ignored altogether. Mrs Dhikusoka argued that there is the Public Service Investment committee which receives the Auditor General's report for scrutiny, then calls the committee members to address it. Also there is

the Senate Public committee on Investments which sits to go through the reports before taking action. As for the sectorial committee reports, she states that once recommendations have been made and resolutions passed, the same are passed to the Committee on Implementation through the County Clerk-so these steps have not been exhausted.

56. I note that the Public Accounts and Investment Committee is responsible generally for:

- Examining accounts showing appropriations by the County assembly to meet public expenditure
- Examining reports, accounts and workings of the County public investments
- Examining whether affairs of the County Public investments are managed with sound financial or business principles and prudent commercial practices.

57. In addition, the Committee is responsible for receiving and discussing at first instance, reports from the Auditor General. With the assistance of the Auditor General, the Committee develops recommendations which it must implement. The Auditor General is required to follow up to confirm whether the recommendations have been implemented.

58. What follows once the Auditor General's report has been presented to the County Assembly? The empowering provisions of **Article 229 (7) and (8)** as follows:

“229 (7) Audit reports shall be submitted to Parliament or the relevant county assembly.

(8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.”

59. Further Senate has an oversight role over the affairs of the County Governments, indeed under **Article 96 (3)** the Senate the allocation of national revenues to the counties and exercises an oversight role over the national revenue allocated to the County governments. The Senate Sessional Public Accounts and Investments Committee is established by the Senate pursuant to Standing Order No 212 and is mandated-

(a) “pursuant to article 96 (3) of the Constitution, to exercise oversight over national revenue allocated to the county governments;

(b) Pursuant to article 228 (6) of the Constitution, to examine the report of the controller of Budget on the implementation of the budgets of county governments;

(c) Pursuant to article 229 (7) and (8) of the Constitution to examine the reports of the Auditor-General on the annual accounts of the county governments;

(d) To examine special reports, if any, of the Auditor-General on county government funds;

(e) To examine the reports, if any, of the auditor general on the county public investments; and

(f) To exercise oversight over county public accounts and investments. It is not disputed by the petitioners that the reports have been presented to the Senate Sessional Committee, but there is no evidence that the Senate has sat to deliberate over the reports.”

60. Certainly **Article 258 (1)** grants every person the right to institute court proceedings claiming that the constitution has been contravened, or is threatened with contravention. I think the petitioners had a valid concerns following the sectoral reports and the audit queries, but they were in haste and did not await the structural modes set in place to play their role.

61. This court cannot proceed to declare that the respondents have engaged in acts of corruption while at the same time it is being asked to compel the EACC to commence investigations and prosecution-that proposition is contradictory. The respondents in law remain innocent until they go through a proper court process and the court finds otherwise-only after analysing the evidence and hearing both sides.

62. It must also be borne in mind that the EACC has investigative powers which cannot just be used at whim and I am persuaded that their hesitation to move into action is stemmed by the fact that all the structural procedures have not been exhausted.

63. As for the register of assets, I need not repeat the observation made by the Auditor General that infact such a register does exist but does not reflect all the assets and he made specific recommendations on the actions the County Government is required to take. I note that no evidence or arguments were presented to warrant directing that the County Government stops manual collection of revenue.

64. Consequently the orders sought do not meet the threshold and cannot be granted. The petition is dismissed and being a public interest litigation, I make no orders on costs.

Delivered and dated this 19th day of March 2018

H.A.OMONDI

JUDGE