



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**PETITION NO. 24 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA AND ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL, RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLE 29(a) , (b) FREEDOM AND SECURITY OF THE PERSON & ARTICLE 39 FREEDOM OF MOVEMENT AND RESIDENCE**

**IN THE MATTER OF ARTICLES 1,2,3,4,10 (2), 27,36,38.47 AND 260 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ETHICS AND ANTI-CORRUPTION ACT**

**BETWEEN**

**HON.WILLIAM BARAKA MTENGO.....PETITIONER**

**AND**

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1 On 25<sup>th</sup> January, 2017, Oscar Onyango Otieno, an investigator with the 2<sup>nd</sup> Respondent through Miscellaneous Application Number 264 of 2017 moved the Chief Magistrates Court at Milimani under section 118 of criminal procedure code and was issued with search warrants authorising him to enter the office, businesses and residential premises of the Petitioner and to seize and take possession of all documents relating to forgery of academic certificates and any other documents/ information that would facilitate conclusion of the investigations. He was authorized to use such assistance as may be required and if necessary to use reasonable force to fulfill the search.

2 Pursuant to the search warrant, the said Oscar Onyango Otieno accompanied by other officers of the 2<sup>nd</sup> respondent and uniformed police officers set out to conduct the searches. The places searched were the Petitioner’s residence in Nyali, his farm at Lulu, Majimboni, the Malindi Constituency Development Fund Office and his farm at rural residence at Msabaha.

**THE PETITION**

3 The Petitioner filed a Petition dated 3<sup>rd</sup> February 2017 under Articles 10(2), 27, 28, 29,31,36,38, 47 and 260 of the Constitution of Kenya 2010 seeking the following prayers:-

1. A DECLARATION that the warrants to investigate an account given to OSCAR ONYANGO OTIENO on the 25<sup>th</sup> day of January 2017 in Milimani Chief Magistrate Miscellaneous Criminal Case No. 264 of 2017; Ethics and Anti-Corruption Commission versus William Barake Mtengo breached the Petitioner's rights and fundamental freedoms under the provisions of Article 31, 40(1), 40(2),47(1), 47(2) and 50(1) of the Constitution of Kenya , hence void for all intents and purposes.

2. Judicial Review by way of an order of certiorari to remove into the Court and quash warrants to investigate an account given to Oscar Onyango Otieno on the 25<sup>th</sup> day of January 2017 in Milimani Chief Magistrate Miscellaneous Criminal Case No. 264 of 2016; Ethics and Anti-Corruption Commission versus William Baraka Mtengo.

3. Judicial Review by way of an order of prohibition directed to the Ethics and Anti-Corruption Commission, Oscar Onyango Otieno either by themselves, agents and or associates from investigating of further investigating, inspecting of further inspecting and or further lifting copies of Petitioner's academic certificates, bank statements, deposit slips, CDF projects and or any other information held by the Petitioner on account of him being the Member of Parliament for Malindi Constituency.

4. Judicial Review by way of an order of Mandamus compelling the EACC and Oscar Onyango Otieno to return all the property and documents that Oscar Onyango Otieno and officers from EACC confiscated on the 31<sup>st</sup> day of January 2017 at the residences of the Petitioner, the Petitioner's relatives and the Petitioner 's office in Malindi.

5. A DECLARATION THAT the Petitioner is entitled to the enjoyment to rights ogf privacy, property, fair administrative action and fair hearing as stipulated under Articles 31,40,47 and 50 of the Constitution AND right to human dignity and freedoms of association, conscience and to political rights protected under the Constitution of Kenya 2010.

6. AN ORDER OF PERMAMNENT INJUNCTION restraining the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondents whether by themselves, their agents, servants representatives and or assigns from summoning, arresting, intimidating, harassing, entering the Petitioner's residence's or otherwise interfering with the freedom of privacy and liberty of the Petitioner and his relatives.

7. AN ORDER OF PROHIBITION issued to debar the 2<sup>nd</sup>,3<sup>rd</sup> & 4<sup>th</sup> Respondents whether by themselves, their agents, servants representatives from arresting, summoning, intimidating, harassing, charging the Petitioner until after the General Elections are held in August 2017.

8. Damages

9. Costs of and incidental to this Petition

10. Any other order that this Honourable Court deems fit and just to grant in the circumstances.

#### **THE PETITIONER'S CASE**

4 The above Petition was supported by the supporting affidavit of the Petitioner herein Hon. William Baraka Mtengo and many others. He averred that on 31<sup>st</sup> (sic) February 2017, at about 6a.m, he got a call from his parents' home in Msabaha and was informed that there was a huge contingent of heavily armed security officers at the gate and that some had destroyed the fence to gain access to the homestead. A few minutes later, his house help in his Nyalı residence one Mr. Kaingu Masha frantically knocked on his door and when he opened for him to get in, he informed him that there were many armed men at the gate.

5 He then instructed Mr. Masha to open the gate and the armed men about 10 in number gained access to his door. Upon gaining access to his residence, the armed men informed him that they were from the EACC and the Kenya Police Service. In fact, one of the law enforcement officers produced a search warrant and informed him that they had instructions to search his house.

6 He complied and allowed them to conduct a search. Apparently, they gained access to his bedroom while his wife was half -naked preparing herself to go to work and the officers had to step out and allow her to finish dressing. The officers then asked him and his wife to hand over their cell phones and they also took his firearm. Furthermore, the officers held his wife and young daughter under hostage by not allowing them to go to work and school respectively. They also prevented them from calling or walking around the house.

7 In the course of the officers conducting a search in his house, they threw everything into disarray and confiscated his new dell laptop (personal property) which had his personal information. After about an hour of the search which included searching of toilets, all rooms including garbage bins, stores and his personal vehicles, they concluded and gave him an inventory of recovered items from the 2<sup>nd</sup> Respondent and a search certificate which according to him was improperly filled. However, the 2<sup>nd</sup> Respondent confiscated his dell laptop and failed to include the small document of on-going CDF projects in the inventory.

8 He further averred that he is not aware of any investigations of any nature that are being carried out and neither have the Police, DCI nor EACC summoned him to answer to any charge. That on 31<sup>st</sup> January 2017, he was informed by the caretaker of his parents home that law enforcement officers ambushed and stormed into his parent's home; by forcefully entering the house, ransacking and upsetting everything in his parents house-hold whereby they confiscated his original KRA Pin Certificate, a copy of a title deed and other documents belonging to his Constituents who had sought some assistance. They also carried out a similar search at all his three residences at Nyalı, Msabaha and

Majimboni besides his parents and siblings residences.

9 He further deponed that being a popularly elected leader representing an entire Constituency in the National Assembly, and a law abiding citizen, he should not be harassed or intimidated by law enforcement agencies for alleged crimes which have not been disclosed to him.

10 He also averred that his constitutional rights including rights to privacy, property, fair administrative action and fair hearing have been infringed by the search. That he was not invited to participate in the proceedings before the Chief Magistrates Court in Nairobi in Misc Criminal Application NO. 264 of 2017 **Eacc v William Baraka Mtengo**. A search warrant was left at his premises after the search.

11 Lastly, he averred that he had no criminal record nor taken part in any illegal activity or committed acts/ omissions that constitute a crime. Furthermore, that from the other acts of intimidation and threats being meted on him, his family, his colleagues, his office and their party members, he is very apprehensive that he may fall victim and face arrest.

12 **Loice Nguma** the Petitioner's sister, in her supporting affidavit to the Petition averred that on the 31<sup>st</sup> January, 2017 at about 5:00a.m, as she was making preparations for her children to go to school, she saw many men heavily armed roaming her compound with torches yet the gate was closed.

13 As they drew nearer to her house, she noticed they were policemen because a few wore the blue Kenya Police uniform; about 7 of them were in civilian clothes and 4 others wore protective vests while many others were outside the homestead. They greeted her and asked her to co-operate because they were police officers together with anti-corruption officers and they wanted to search her house.

14 They declined to show her any search warrant, but forcefully entered her house, dispersed into various rooms, ransacked, intimidated and bullied her, her mother and young children. Furthermore, they did not allow even her young children to go to the toilet, receive or make calls or messages and go to school.

15 Consequently, the officers took some documents from her dresser and questioned her about her banking statements, banking slips, other documents and confiscated many documents including banking slips, itax return, copy of her identity card and sticker books from her former workplace. They then confiscated her phone, laptop, perused and tried checking her phone and laptop but later returned them after about 3 hours.

16 Thereafter, at about 9:30am when the officers were leaving, she asked them to give her an inventory of the items they had confiscated. They gave her an unsigned inventory(LN-1) with a log that did not bear time, case number and case name.

17 Lastly, she averred that she was not aware of any investigations of any nature that are being carried out against her. No one has summoned her or the Petitioner to answer any charge. She further averred that she is a law abiding citizen and as such, she should not be harassed or intimidated by law enforcement agencies for alleged crimes which have not been disclosed to her.

18 **Cosmas Charo Gona** a shamba boy in the Petitioner's farm in his supporting affidavit dated 3<sup>rd</sup> February 2017 averred that on 31<sup>st</sup> January 2017 at about 6:00 a.m., he saw 2 unmarked unregistered vehicles at the gate i.e. a land cruiser and a taxi.

19 He then proceeded to the chain link fence and met a police officer in uniform and one without uniform who showed him a search warrant obtained from Milimani Commercial Court's Nairobi. He then opened the gate allowing them to gain entry.

20 The land cruiser with 9 armed people came into the homestead while the taxi blocked the entrance at the gate with its occupants. His cell phone was confiscated. They then entered the Petitioners farm house and dispersed into the various rooms including toilets and ransacked the whole house. They returned his cell phone as they were leaving at about 6:25a.m.

21 **Joseph Safari Kingwagu** the care taker at the Petitioner's house in Msabaha also swore an affidavit to the Petition dated 3<sup>rd</sup> February 2017. He averred that on 31<sup>st</sup> January 2017, at about 5:00a.m, the watchman (Charo) for Mama Patience's homestead woke him up and told him that they were having visitors at the gate.

22 He further averred that there were about 10 heavily armed men in civilian clothes accompanied by 2 females claiming that they are from anti-corruption office in Nairobi. They gained access to the compound by jumping over the gate and fence with bright torches which they carried.

23 As he got out of his house, they asked him to show them the Petitioner's house as they wanted to search it. They declined to show him a warrant and instead manhandled him together with Charo and a fundi (Ishmael) who was nearby and issued threats that they could finish them. They entered the Petitioner's house; dispersed into the various rooms and ransacked it, confiscated items i.e title deeds, receipts e.t.c and bullied them.

24 Afterwards, they went to the Petitioner's mother's house one mama Patience and took some documents from Kenya Revenue Authority, receipts and similarly left the house in a mess. He claimed they had been held hostage for the entire period the officers were there.

25 **Raymond Menza Iha** is an employee of the National Government Constituency Development Fund Board deployed to Malindi as the Co-ordinator for the Constituency Development Fund Office. He averred that on 31<sup>st</sup> January 2017 at about 8:30am, he was called by their secretary Doris Mwari who told him that there were visitors from the EACC and they wanted to search the CDF office.

26 On being ushered to his office, he noted that they were about 25 heavily armed people with yellow reflective jackets written EACC at

the back. He immediately reached for his phone with the intention of calling the Petitioner but the EACC officers grabbed it. They then started ransacking their office for about 2 hours. Later, his phone was returned to him.

27 **Joseph Saro Ngowa** is an employee of the Parliamentary Service Commission deployed to Malindi as the Manager for the Malindi Constituency Office. He averred that in his affidavit supporting the Petition dated 3<sup>rd</sup> February 2017 averred that at about 8:25 a.m, he was outside his office and about 25 heavily armed people came wearing yellow reflective jackets with the letters EACC written at the back.

28 One of the officers from Eacc team approached him after he was told by office orderlies that he was the Manager of the office. That the said officer gave him a warrant (JSN-1) and told him that they wanted to search the Petitioner's office. However, there was no key to access the office of the M.P so he asked them to wait for the secretary to arrive.

29 They searched his office but they did not find anything to confiscate. After wards, they forcefully searched the secretary's desk, checked the computer and printed the staff list and did a write up of staff who had taken the bursary forms for further distribution.

30 Upon the arrival of the secretary, the eacc team forced her to open the Petitioner's office and from there they confiscated a Samsung tablet, 3 company profiles and one proposal. At about 10:34 am when the officers were leaving, he asked them to give him an inventory of the items they had confiscated and they gave him an unsigned inventory (JSN-2) with a log that did not bear time, case number and case name.

## **THE 2<sup>ND</sup> RESPONDENT'S CASE**

31 The 2<sup>nd</sup> Respondent opposed the Petition through their replying affidavit dated 23<sup>rd</sup> March 2017 sworn by Oscar Onyango Otieno an investigator with the 2<sup>nd</sup> Respondent. He averred that the 2<sup>nd</sup> Respondent received information that the Petitioner may have falsified his academic certificates and used them to gain employment at the Kenya Ports Authority (KPA) (***He attached a copy marked "OOO1" of the Petitioner's Employment Form***).

32 Consequently, the 2<sup>nd</sup> Respondent launched investigations into the aforesaid allegation which established that the Petitioner sat for his Kenya Certificate of Primary Education (KCPE) at Malindi Primary School in 1986. He was later to enroll at Kenyatta High School in Form 2 in 1988 but he did not sit for Kenya Certificate of Secondary Education (KCSE) at the aforesaid High School (***He attached a copy of a letter from Kenya National Examination Council Ref KENC/GEN/R&QA/ARCH/01/16/066 dated 24<sup>th</sup> February 2017***).

33 Afterwards, the Petitioner was employed by Kpa as a Cadet Officer Grade Pa 5 to be confirmed on Grade Pa 4 upon successful completion of one year on the job training. He further averred that according to the Kpa Revised Staff Regulations as at 1992, Grade PA 5 was the entry point which was only open to university graduates. Hence, the employment opportunity was offered to the Petitioner on the basis of the information he had indicated in the application for employment form that he had sat his Kcse in 1990 in Kenyatta High School and obtained a Bachelor of Science (Hospitality) Degree from Schiller International University, Germany in 1996(***He attached a copy of Revised Staff Regulations in KPA as at 1992 "OOO3"***).

34 The Petitioner rose through the ranks to the post of Senior Marketing Officer (Uganda) Grade HM 2 and even got full sponsorship for a full time Master of Arts Degree Programme in International Public Relations at Cardiff University in the United Kingdom from KPA based on false information.

35 During the course of their investigation, they further established that the Petitioner resigned with immediate effect as of 1st September 2011 and was paid one month's salary in lieu of notice when KPA'S internal investigations concluded that he did not possess KCSE and Bachelor Degree Certificates. He averred their officers visited KPA and perused the Petitioner's personal file they established that the purported copies of the Petitioner's KCSE and Bachelor Degree Certificates had been missing from his file from 2011.

36 In the belief that the academic documents could be in the Petitioner's office, business and/or residential premises, the 2<sup>nd</sup> Respondent moved the court vide ***Misc. Criminal Application No. 264 of 2017*** under Section 118 of the Criminal Procedure Code for a warrant to search the afore-said premises situated in Nairobi, Mombasa and Kilifi Counties, for the said documents.

37 The search warrant was obtained the search warrant pursuant to an order of the Court issued on 25<sup>th</sup> January 2017. On 31<sup>st</sup> January 2017, the deponent led a team of 10 comprising of 8 Commission officers and 2 uniformed Police Officers to execute the search warrant issued by the Court.

38 On arrival at the Petitioner's residence at Nyali in Mombasa County at 0615 hrs he produced the search warrant and informed the Petitioner of their intention to search his residence. The Petitioner on his part complied and they gained access into the house and quickly searched all rooms in order to identify the occupants. Furthermore, the said occupants were restrained from moving around the house so as not to interfere with the search process.

39 As a consequence, they temporarily seized the Petitioner and his wife's cellphones so as to avoid any communication with outside parties that they reasonably felt would have come to disrupt the execution of the search warrant. They also seized the petitioner's firearm for their own security purposes. After the search, the phones and firearm were returned to them.

40 During the search, they came across the Petitioner's personal Dell laptop. Upon requesting the Petitioner, he agreed to log in and a quick search revealed that there was personal information related to his academic qualifications material which was relevant to their search. Hence, they seized the said laptop and recorded the same in an inventory of recovered items.

41 The Petitioner signed the inventory and search certificate which confirmed that the search was conducted between 0615hrs and 0730hrs and that the Petitioner had no complaint with the manner in which the search was conducted. The team that searched Lulu Farm Majimboni was led by Daniel Tipape Loomu and arrived there at 0600hrs and one Cosmas Charo Gona opened the gate. They were ushered in after they introduced themselves and handed over a copy of the search warrant. As a matter of procedure, Cosmas Charo Gona was asked to hand over his cellphone during the search which was returned to him after the search.

42 At the farm, no items were recovered from the Petitioner's farm house and Cosmas Charo Gona signed a search certificate in which he did not raise any complaint signifying that he was satisfied with the manner in which the search had been conducted. Daniel Tipape Loomu proceeded to the Petitioner's office within the National Government Constituency Development Funds Offices within Malindi town to execute the search warrant.

43 Upon arrival at about 8:30am, they introduced themselves and the purpose of their visit. They were then referred to the in-charge of Public Relations as the most senior officer at the time. The latter then advised the team to wait for the Constituency Development Fund Coordinator who was yet to arrive at the office.

44 As soon as the CDF Coordinator arrived, the search was conducted in the presence of CDF Office staff, namely: Joseph Saro Ngowa, Geoffrey Kadhengi and Mariam Ali. The search was conducted at the Manager's office, store room adjacent to the Manager's office, protocol officer's office, Petitioner's office, front office, and waiting lounge. During the search, the 2<sup>nd</sup> Respondent's officers seized cellphones from CDF staff which were returned upon completion of the search.

45 The inventory of documents and items recovered from the Petitioner's office was prepared and signed both by the 2<sup>nd</sup> Respondent's officers and three CDF office staff including the manager Joseph Saro Ngowa, who retained a copy. The said manager also signed a search certificate which confirmed that he was satisfied with the manner in which the search was conducted.

46 He explained that a team of 11 comprising of 9 Commission's officers and 2 Police Officers led by Abraham Arapkoko Lorot conducted a search in the Petitioner's residence at Msabaha on the outskirts of Malindi town, Kilifi County. They arrived at Msabaha, Kilifi County at 0620hrs when a gardener opened the gate after they introduced themselves. They produced the search warrant and requested to speak to the head of the homestead. The gardener availed the Petitioner's mother who was informed of the purpose of the officers' visit.

47 Subsequently, the Petitioner's mother voluntarily allowed them access to all the buildings in the compound and upon conclusion of the search, an inventory of the items recovered was prepared which was signed by the Commissioner's officers and the Petitioner's mother. She also signed a search certificate where no complaint was recorded signifying that she was satisfied with the manner in which the search was conducted.

48 He averred that contrary to the averments by the Petitioner that the Commission violated Section 28 of the (ACECA) the investigations into the Petitioner's unethical conduct were not commenced or conducted under the said Section. The search warrants were issued pursuant to and in accordance with Section 118 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya (CPC). Section 23 of the ACECA empowers the Commission to seek for and execute a warrant to search a premises for purposes of obtaining documents or information believed to have been used for unethical conduct or to commit corruption.

49 He further averred that the procedure for obtaining a search warrant is expressly provided under Section 118A of the CPC which states that the said application shall be made ex-parte to a Magistrate. Hence, it is a misapprehension of the law for the Petitioner to assert that the Commission ought to have issued notice to him before moving the court in terms of **Article 47** of the Constitution.

50 He further averred that the right to fair administrative action under **Article 47** of the Constitution is contextual. Further, that in the context of the investigation giving rise to the present Petition, the 2<sup>nd</sup> Respondent did not violate the Petitioner's rights. He deponed that Courts have pronounced themselves on this issue on several occasions stating that to notify the party against whom the warrant is being sought before moving to court would undermine the very purpose of the ex-parte warrant, which is, to prevent deliberate destruction of documents or evidence.

51 He deponed that the freedom from discrimination and the right to privacy protected under **Articles 27** and **31** of the Constitution is not absolute and does not fall within the non-derogable rights under **Article 25** of the Constitution. He added that the right may be limited and qualified in accordance with **Article 24(1)** of the Constitution hence the Commission cannot be held liable for executing lawful court orders.

52 He further deponed that the right to fair trial protected under **Article 50** of the Constitution is accorded to an accused person and not a person the subject of an investigation. Hence, the searches conducted by the 2<sup>nd</sup> Respondents officers in the Petitioner's office and residences were done professionally, without any malice, and with the full tenor of the law. Furthermore, that the search was also done systematically; searching all strategic rooms that they believed they would have obtained the exhibits and going through all documents recovering only that which was relevant to the search.

53 He denied that there was use of threats, harassment or intimidation of the Petitioner, his relatives and employees during the search and that nobody was held hostage during the search and children were allowed to go to school. Lastly, he reiterated that the investigation conducted by the 2<sup>nd</sup> Respondent followed allegations of falsification of academic certificates and not because of the Petitioner's political affiliation.

### **THE 3<sup>RD</sup> AND 4<sup>TH</sup> RESPONDENTS RESPONSE**

55 The 3<sup>rd</sup> and 4<sup>th</sup> Respondents also filed a replying affidavit dated 30<sup>th</sup> April 2018 sworn by Ann Gitau in opposing the Petition. She averred that the law under section 118 of the CPC and section 23 of ACECA provides that the search warrants be obtained ex-parte hence the

Petitioner's allegation that he was not summoned to answer to charges is without legal basis.

56 She averred that the matter is still under investigations and the search was just part of the investigations. That a decision as to whether a criminal offence(s) have been committed or not is therefore premature for the Petitioner to allege that he was not summoned to answer to any charges.

57 She further deponed that the law gives the Eacc and National Police Service the mandate to conduct investigations by use of various investigative techniques including searching premises and investigating accounts where the evidence may be found and there is probable cause, upon obtaining Court orders as was in this case. Hence, the action of searching the Petitioner's premises was done in accordance with the law through Misc. Criminal Application No. 264 of 2017 where warrants were issued by a court of competent jurisdiction and cannot be termed as an infringement on the Petitioner's rights.

58 She finally deponed that the orders being sought by the Petitioner are not tenable in law as the Petitioner has failed to demonstrate that the Respondents violated any of his rights under the Constitution. Further, that the Orders of judicial review being sought by the Petitioner cannot be granted since the Petitioner has failed to demonstrate that any of the Respondent's acted in excess of their jurisdiction and /or irrationally or unprocedurally.

#### **THE PETITIONER'S REPLY**

59 The Petitioner in reply filed a supplementary affidavit dated 6<sup>th</sup> July 2018 and denied falsifying any information to gain employment at KPA. In response to annexure 0002 dated 24<sup>th</sup> February 2017, he denied that he did not declare in his employment form that he sat for his KCSE at Kenyatta High School. He stated that his employment letter was not annexed and any information on it is hearsay.

60 He denied ever being in charge or in control of any personal file at KPA and accused the 2<sup>nd</sup> Respondent of being on a fishing expedition for offences committed even before the EACC was established and decades before he became a public officer. He further accused the 2<sup>nd</sup> Respondent of not inviting him to participate in Misc. Criminal Application No. 264 of 2017 which his counsel on record informed him that was contrary to the Constitution of Kenya 2010 and Articles 47(1),(2) and Article 50.

61 It was thus the Petitioner's case that the procedure for execution of search warrants issued in from a Court not resident in Mombasa & Malindi where the search was conducted was not followed thereby rendering such searches illegal.

The 1<sup>st</sup> Respondent did not enter any appearance and so did not participate in these proceedings. The names of the 5<sup>th</sup> and 6<sup>th</sup> Respondents were expunged from the Petition by this court on 19/4/18.

#### **THE PETITIONER'S SUBMISSIONS**

62 M/s Aoko Otieno for the Petitioner relying on Article 31 on the right to privacy submitted that the early morning raid with no prior notification or summons was an infringement on the Petitioner's privacy. She relied on the court case of **Gordon Ngatia Muriuki v DPP & 2 Others Pet No. 207 of 2014** where it was held:-

**“.....the issuance of an order to search without any reasonable basis being established in accordance with the law; was a violation of an individual's right to privacy as provided under Article 31 of the Constitution.”**

63 Counsel further submitted that the Petitioner had denied presenting falsified certificates to his former employer and has maintained that he was employed in 1997. In reference to the exhibits attached to the 2<sup>nd</sup> respondent's replying affidavit she contended that the same do not disclose that the Petitioner presented any falsified academic certificates to his former employer. She relied on **Berstein v Bester NO (1996) (2) SA 751 and Article 8(2)** of the European Convention on Human Rights which provides:

**‘.....the right to privacy consists essentially in the right to live one's own life with a minimum interference. It concerns private, family and home life , physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially.’**

64 It was her submission that there was no factual basis that was presented to the Hon. Magistrate's Court in Misc Criminal Case that would have warranted a breach of the Petitioner's rights under Article 31 of the Constitution. Further, that the seized laptop did not contain any academic certification and its being taken away violates the provisions of Sections 27(3), 27(5), 28(3), 28(7) , 27(10) of ACEA and also violated the Petitioners rights to property under Article 40(1) of the Constitution.

65 It was thus the Petitioner's counsel's submission that before applying for search warrants for his residence and offices, the 2<sup>nd</sup> Respondent was required to issue him with a notice of its application. This would have afforded him an opportunity to be heard before the said Magistrate's Court before issuance of the search warrants. Moreover, according to counsel, under section 27 of the ACECA, the 2<sup>nd</sup> Respondent was required to give a notice in writing to the Petitioner requesting him to furnish the Respondents with any information in his possession relating to a person suspected of a crime. Their action violated sec 27 & 28of the ACECA she said.

66 It was counsel's submission that there was no report filed by KPA or by the Respondents to support their assertion that the Petitioner resigned because his academic certificates were under investigations. Counsel relied on the case of **Republic v Attorney General exparte Kipgeno No. 406 of 2001** where the Attorney General had preferred charges against the Applicant 9 years after the alleged commission of the offence and the Applicant sought to stop the prosecution on account of delay and the court observed:

**“In the case before us, the delay was nine years. No attempt has been made to explain it. Why did the State not mount a prosecution immediately? We cannot think anything else but that the criminal prosecution against the Applicant was motivated by some ulterior motive. It is not a fair prosecution.”**

67 Counsel submitted that the Respondents not only violated the Petitioner’s fundamental rights and freedoms as provided for in the Constitution but also were in contravention of the rights of his servants, agents and family members. Counsel relied on Article 28 on the right to human dignity and submitted that the 2<sup>nd</sup> Respondents contravened these rights in their manner of search.

68 Hence, according to counsel, the 2<sup>nd</sup> Respondent failed to issue the Petitioner with a notice in writing of their application to the Chief Magistrate’s Court at the local jurisdiction where the search was due to take place and this was an express violation of the CPC. Counsel urged the court to apply the case of **Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti- Corruption Commission & 5 Others [2016] eKLR** where a similar Petition was commenced after the EACC obtained warrants in a similar fashion as in this instant Petition and the judge observed:

**“Before I finally dispose of this matter, it is imperative that I should state that this judgment brings to the fore the need for investigations to re-read the operative law in the conduct of their investigations within the new constitutional reality of Kenya.”**

69 Counsel submitted that a permanent injunction ought to be granted in order to protect the Petitioner from the excesses and abuse by the Respondents.

### **The 2<sup>nd</sup> Respondent’s Submissions**

70 Mr. Nyoike submitted that the main contention in the petition touches on whether the search warrants were validly issued. The search warrants to the petitioner’s offices, business and residential premises were issued by the Chief Magistrate’s court at Milimani in Miscellaneous Application Number 264 Of 2017. The application had been made under **section 118** of the CPC Laws of Kenya and **Section 23 and 29** of the ACECA No. 3 Of 2003. Section 118 of the CPC which is titled ‘**Power to issue search warrant**’ provides that:

**“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”**

Section 118A of the CPC further provides that:

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

71 According to counsel, the 2<sup>nd</sup> Respondent discharged their duty by following the right procedure to apply for the search warrants. That afterwards, the determination on whether to issue the search warrants or not is a judicial process and at the discretion and wisdom of the issuing court. In this instance, the Court equally discharged its mandate after exercising discretion and issued the said warrants.

72 It was thus Counsel’s submission that unless the petitioner can demonstrate that the Honourable Chief Magistrates Court exercised the discretion improperly or un judicially his averments on validity of the search warrants and prayer that the same should be quashed is without a legal basis.

73 He further submitted that there is no legal basis under section 118 of the CPC and under Section 23 and 29 of the ACECA for the Petitioner to be informed before the search warrants are issued as the same would defeat the same object of conducting the search. Counsel relied on the case of **James Humphrey Oswago v Ethics and Anti-Corruption Commission [2014] eKLR** where Justice Mumbi Ngugi pronounced herself thus:

**“With regard to the public interest, the administration of justice and the apprehension of offenders, I believe the section is intended to ensure that investigating authorities can gain access to incriminating information or evidence without the suspected offender getting an opportunity to conceal or destroy such evidence. That being the case, it would clearly defeat the purposes and intention behind searching premises as contemplated under section 118 of the Criminal Procedure Code set out above if an application for a search warrant were to be made inter partes, with notice, and for the person in respect of whose property or premises the warrants of search are directed to be heard before such warrants are issued.”**

74 He further submitted that the Petitioner seemed to allude that the search warrants were issued pursuant to section 28(1), 28(2), 28(3) and 28(7) of the ACECA which would have required his involvement/ enjoining. That is however not the position as on the face of the search warrants it was clear beyond peradventure the provisions used were section 118 of the CPC and Section 23 and 29 of the ACECA.

75 Counsel submitted that the search warrants were being sought for investigative purposes. As such the Petitioner was yet to be charged and there remained various stages before he could be brought before the court for trial. Hence he submitted that his assertion that his rights to fair trial were infringed is unjustified. Counsel relied on **James Humphrey Oswago (supra)** where the court held thus:

**“It is undisputed that a person charged with a crime is entitled, under the provisions of Article 50(2)(b) of the Constitution, to information with regard to the charges facing him, and to an opportunity to be heard and to challenge the evidence brought against him. In my view, the provisions of Article 50(2) do not have any application in the present circumstances. The petitioner was not, at the time the application for search warrants was made before the Magistrate’s Court in Kibera, charged with any offence. If he had been, he would indeed have been entitled to all the rights that an accused person is entitled to under the said Article 50(2).”**

76 Counsel stated that in respect to his right to property the Petitioner prays for an order of mandamus to compel the second respondent to return all the property and documents that were confiscated during the search. He contended that once property or documents are seized pursuant to judiciously issued search warrants, it then becomes the province of the issuing court to determine what happens to such property or documents. Hence, any application in the first instance should be made at the Chief Magistrates Court at Milimani where he will have to prove that he has endeavoured to approach the said court and a remedy has been denied.

77 On the Petitioner’s right to privacy counsel submitted that one of the reasons why the permission of the court is required before the search warrants are issued is to safeguard the rights of the petitioner to privacy from unnecessary intrusion. In the stated case of *James Humphrey Oswago (supra)* Justice Mumbi Ngugi stated thus:

**“The question is what the purpose of obtaining the search warrants under the above section is. In my view, it is two-fold. With regard to the protection of the rights of citizens, it is to ensure that any entry into a citizen’s premises or property is done in accordance with, and with the sanction and authority of, the law. Without such a provision, police officers could easily infringe citizen’s rights by way of arbitrary entries and searches.”**

78 Counsel thus submitted that the very fact that the search warrants were issued by the honourable court a legal avenue was created for the interference of the petitioner’s right to privacy to the extent allowed by the search warrants. Counsel contended that the searches were conducted professionally and any limiting of the petitioners right during the search was kept to the minimum in strict compliance to the search warrants and for the safety of all the parties and for the period of the search only.

79 Mr. Nyoike went on to submit that the Petitioner’s assertion that he was specifically targeted by the 2<sup>nd</sup> respondent as a result of his allegiance to the Orange Democratic Movement is also unsupported. What was in issue was an ongoing investigation for criminal culpability which is not disputed by the Petitioner. This is what was presented on oath before the honourable Chief Magistrates court before the search warrants were be issued.

80 He argued that if the Petitioner is ever charged, the basis of the investigation by the 2<sup>nd</sup> respondent is that the petitioner forged a degree certificate to secure employment at the KPA. The Petitioner was suspected to have accessed employment using the forged certificate for a position in which it was mandatory for him to have been a graduate. According to counsel, when the Petitioner’s employer noted the anomaly, he hurriedly resigned to avoid a probe. Investigations were then launched by the 2<sup>nd</sup> Respondent to examine his culpability. He relied on the case of *Mea Limited v Competition Authority of Kenya & another [2016] Eklr* where the Court held:

**“The court in all the cases while appreciating that warrants of seizure may be obtained ex parte reiterated the need for a foundational basis or reasonable suspicion. The information relayed to the court was, in my view, above mere suspicion. It was pegged on to a market inquiry in which even the Petitioner had participated in. I am not satisfied at this stage of the proceedings and on the basis of the evidence availed as well as the circumstances of the case that the Petitioner has shown that it has a prima facie case with a likelihood of success that its right to fair administrative action was violated by the want of notice prior to the investigations including the application for search warrants. The right under Article 47 is not absolute. Instances where it is limited by law include both Section 118 of the Criminal Procedure Code and Section 32 of the Act. The constitutional invalidity of these sections is not in doubt”**

81 It was thus Counsels submission that the ruling in *Tom Ojienda t/a Tom Ojienda & Associates Advocates –vs- EACC & 5 Others [2016] eKLR*, which the Petitioner sought to rely on was not meant to invalidate section 118 of the CPC but rather to fortify it where there are reasonable grounds warranting issuance of search warrants.

82 On the power of the 2<sup>nd</sup> respondent to investigate, Counsel submitted that the 2<sup>nd</sup> Respondent is established under section 3 of the Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011) and pursuant to Article 79 of the Constitution. Hence, it’s being responsible for enforcing Chapter six of the Constitution and overseeing and enforcing the implementation of the Leadership and Integrity Act. Counsel contended that the investigative role of the 2<sup>nd</sup> Respondent is granted by virtue of section 11(1)(d) of Ethics and Anti-Corruption Act with Part IV of Anti-Corruption and economic Crimes Act giving it the mandate to investigate economic crimes.

83 He submitted that recommendations arising from such investigations are usually forwarded to the Director of Public Prosecutions who has the mandate to prosecute. It was thus counsel’s submission that it is in the public interest for the 2<sup>nd</sup> respondent and indeed all the respondents to be allowed to exercise their mandate. He relied on the case of *Alfred N. Mutua v Ethics & Anti-Corruption Commission & 4 others [2016] eKLR* where the Court held thus:

**“It is also not contested that the EACC is mandated under Section 11(1)(d) of the EACC Act to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to Chapter Six of the Constitution. Further, under the provisions of Section 35 of ACECA as read with the provisions of Section 11(1) (d) of Ethics and Anti- Corruption Commission Act, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not ...With that understanding in mind, it would in fact be for the benefit of the Petitioner if he stands trial and clears his name within known legal avenues. As I see it now, he has literally jumped the gun because he has**

basically presented what I see as his possible defences of innocence not before the trial Court but in this Court, a mistake on his part.”

### The 3<sup>rd</sup> and 4<sup>th</sup> Respondents Submissions

84 M/S Kahoro submitted that the Petitioner was served with a search warrant before the investigators conducted the search therefore, the search was legally conducted. She contended that the law gives the EACC and National Police Service the mandate to conduct investigations by use of various investigative techniques including searching premises and investigating accounts where the evidence may be found and there is probable cause of obtaining the court orders. Hence, in this case the action of searching the Petitioner’s premises was done in accordance with the law through Misc. Criminal Application No. 264 of 2017.

85 Counsel submitted that the mere fact of fear of arrest by the Petitioner once investigations are complete does not entitle the Petitioner to orders preventing arrest as this would amount to circumventing the criminal justice system. She contended that the matter under investigations as enumerated by the 2<sup>nd</sup> Respondent is in regard to his academic qualifications and not political in nature as alleged by the Petitioner. Counsel urged the court to rely on the case of **Cape Holdings Ltd v Attorney General and Another(2012) eKLR**, Miscellaneous Civil Application 240 of 2011 where the court held:-

“.....in my view it is up to the Police to investigate the Complaint and it is solely for the DPP and no one else after the investigations have been completed to decide whether the complaint discloses any criminal offence(s) requiring prosecution.”

86 It was thus counsel’s submission that while the Constitution provides for enjoyment of rights by individuals, it also provides under Article 24 a limitation by law. That the investigations in this case are allowed by the Laws of Kenya including search warrants obtained *ex parte* where probable cause has been shown.

### DETERMINATION

87 After considering the above Petition, it’s supporting affidavits, the replying affidavits by the Respondents and all the submissions and authorities, the issues which present themselves for determination are:-

- i. **The Constitutionality of Issuing search warrants *ex parte*.**
- ii. **Whether the Petitioner’s rights were violated.**
- iii. **The Powers of the 2<sup>nd</sup> Respondent to investigate and whether they acted *ultra vires* the said powers.**

88 I must point out that provided there is no abuse of process, the issuing of search warrants and the seizure of articles consequent thereupon is a vital, indeed a necessary element in the effective combating of crime. On the other hand, all citizens have constitutionally enshrined rights to dignity, privacy, freedom, security, trade and property, when search warrants are being executed.

Section 118 of the Criminal Procedure Code Cap 75 Laws of Kenya provides that:-

**“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.”**

Section 118A CPC provides:

**“An application for a search warrant under [section 118](#) shall be made *ex-parte* to a magistrate.”**

89 In a leading South African decision on the subject, that is, **Minister of Safety and Security vs Van der Merwe & others 2011 (5) 61 (CC). Mogoeng J.** delivering the unanimous judgment of the court, at paras 55 and 56 stated:-

**“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.

**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."

90 In the instant case, there are no allegations that the above ingredients are missing in the search warrants. I have keenly considered the above guidelines against what happened in this case and I find the following to be the position:

(i) **The Magistrate had authority to issue the orders he did.**

(ii) **The supporting affidavit contained sufficient information on the issue at hand.**

(iii) **The terms of the warrants were clear to the searcher and the person to be searched.**

(iv) **The warrants were valid having been issued by a court with competent jurisdiction. They did not have to be issued from Mombasa court.**

91 The right to privacy is expressly guaranteed by **Article 31 of the Constitution. In Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2018] eKLR** the judges observed:

**".....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.'"**

This court finds that the above inbuilt requirements are present in this case.

93 What is clear from the position of the law is **first**, that Police officers or other state agents therefore cannot save for exceptional cases without a search warrant, lawfully enter upon and search any premises, nor can they carry away any property without the authority of the Court. **Second** that from the provisions of the CPC the onus is on the person seeking the search warrant to prove the necessity for such warrant. The above requirements have not been proved to be absent in the proceedings leading to the issuance of the warrant of the search herein. There was reasonable suspicion on the Petitioner's academic qualifications which had to be investigated.

94 In *Vitu Limited vs The Chief Magistrate Nairobi & two others* H.C. Misc. Criminal Application No. 475 of 2004 (Osiemo J.) the court stated that:-

**"It is therefore expected that when a police officer or any other investigator approaches the Court for a warrant, there must be reasonable suspicion of an offence being about to be committed or having been committed..."**

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

96 The order or warrant is never to be granted as a matter of course. Again in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2018]* the judge observed:-

to give the notice to the person to be investigated can easily jeopardize the incriminating evidence.

Onguto J. put it bluntly in *Mape Building & General Engineering vs Attorney General & 3 others* {2016}eKLR. when he stated that:-

***"In the circumstances of this case, the warrants and freezing orders were evidently necessary for the purposes of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations the 2<sup>nd</sup> Respondent was, in my view, justified in making the application for both the warrants and freezing order ex parte."***

97 Counsel for the Petitioner placed heavy reliance on *Tom Ojienda, SC t/a Tom Ojienda & Associates Advocates*(supra). However, in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others*(supra) judges opined that:-

***"It is settled law that a case is only an authority for what it decides."***

The judges in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others*(supra) quoted the case of *State of Orissa vs. Sudhansu Sekhar Misra* MANU/SC/0047/1967. where it was held:-

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

98 The ratio of any decision must be understood in the background of the facts of the particular case See. *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986 It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. See *Bhavnagar University vs. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59). Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.

99 In *Erastus Kibiti Stephen vs Euro Bank Limited & another* {2003} eKLR, *Waki J* (as he then was). the learned Judge was very clear that:-

***"the order may be obtained ex-parte at the first instance where the circumstances so dictate, for example where prior notice to the customer would lead to the closure of the Account, thus defeating the very purpose of the exercise."***

The judges in the *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others*(supra) in reference to the *Tom Ojienda, SC t/a Tom Ojienda & Associates Advocates vs Ethics and Anti-Corruption Commission & 6 others*(supra) observed:-

***" In Tom Ojienda, SC t/a Tom Ojienda & Associates Advocates vs Ethics and Anti-Corruption Commission & 6 others*(supra) the court was clear that Section 27(1) ACECA requires the 1<sup>st</sup> Respondent to apply ex-parte to Court requiring an associate of a suspected person to provide information in relation to any property under investigation. The Respondents, in agreement with the Petitioner, contended that this provision had not been invoked in the instant case as the Petitioner was not an associate of any person suspected of a crime. That being so, why then was Section 28 of ACECA which mandates the Commission to apply to Court with notice to an affected person for an order to produce specified records required for an investigation, not complied with?"**

In the instant case, the Petitioner was not an associate of any person suspected of crime. Clearly, the above two cases are distinguishable from the facts before me.

100 On the alleged violation of Article 47 Rights, I rely on the Court of Appeal decision in *J.S.C. vs Mbalu Mutava* {2015}eKLR which succinctly elucidated the law in cases of this nature. It held:-

***" that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50 (1) of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law."***

101 Further, from the facts and circumstances of this case, I find that the Petitioner has not proved the alleged breach of his right to property under Article 40 of the Constitution. Accordingly, I find no basis to hold that there has been a violation of the Petitioner's rights to be heard or violation of rights under article 47 of the Constitution or rights to property under Article 40 of the Constitution. In any event the search warrants having been lawfully issued by the court, if any items are seized, the Petitioner should make the necessary application before the issuing court. Section 121(1) CPC is clear on where seized items are taken, or how they are handled.

102 It has been confirmed by the provisions of the law cited that the applications for search warrants under section 118 of the CPC & Sections 23 & 29 ACEA are ex parte. There was no requirement for the Petitioner to be notified before their issuance. There was therefore no breach of Article 47 or 50 as the right procedure was followed and the matter is at the investigation stage and not ripe for hearing.

103 On the Power of the 2<sup>nd</sup> Respondent to investigate, the second respondent is established under section 3 of the Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011) and pursuant to Article 79 of the Constitution. It is responsible for enforcing Chapter six of the Constitution, overseeing and enforcing the implementation of Leadership and Integrity Act. The investigative role of the 2<sup>nd</sup> respondent is granted by virtue of section 11(1)(d) of Ethics and Anti-Corruption Act with Part IV of Anti-Corruption and economic Crimes Act which give it the mandate to investigate economic crimes. Recommendations arising from such investigations are then forwarded to the Director of public prosecutions who has the mandate to prosecute.

104 The Petitioner had a duty to demonstrate to this court that the Respondents acted outside their statutory mandate and that they abused the process. This has not been done. This court cannot therefore, bar the Respondents from carrying out their mandate just because the Petitioner feels it is politically motivated.

105 From the foregoing it is thus in public interest for the 2<sup>nd</sup> Respondent and indeed all the Respondents to be allowed to exercise their mandate.

106 In conclusion, I find this Petition to have no merit and I dismiss it with costs.

**Signed, dated & delivered this 23<sup>rd</sup> day of October 2018 in open court at Nairobi.**

.....

**HEDWIG I. ONG'UDI**

**JUDGE**