



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 309 OF 2014

BETWEEN

PRAVIN BOWRY.....PETITIONER

AND

THE ETHICS & ANTI-CORRUPTION COMMISSION..... RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Pravin Bowry, is an advocate of the High Court of Kenya of 43 years standing having been admitted to the Roll of Advocates on 3rd July 1971. Vide Gazette Notice No.8416 published on 23rd July, 2010, he was appointed an Assistant Director (Legal Services) at the Kenya Anti-Corruption Commission (hereinafter 'KACC'), since renamed the Ethics and Anti-Corruption, Commission (hereinafter 'EACC') for a period of five years. He served in that capacity from 1st July 2010 up to and including 15th September 2011.
2. Following the promulgation of the Constitution, 2010 and pursuant to **Article 179** of the **Constitution**, Parliament enacted the **Ethics & Anti-Corruption Commission Act** (hereinafter the 'EACC Act'). **Section 34(1)** of the **Act** provided as follows;

“Subject to Sub-section (4), a person who immediately before the commencement of this Act was serving on contract as a member of staff of the Kenya Anti-Corruption Commission, other than the Director and Deputy Directors, shall at the commencement of this Act, be deemed to be an employee of the Commission for the unexpired period, if any, of the term”.
3. On 29th August, 2011 the Chairman of the Advisory Board of the Kenya Anti-Corruption Commission allegedly issued a press statement to the effect that there would be a necessary transition from the Director and his Assistants to appropriate managers to be appointed by the Advisory Board within a week and that the Director and his Assistants would be required to hand over their responsibilities to the new managers. Subsequently, on 8th September, the Chairman of the Advisory Board wrote to the Petitioner directing him to hand over his office to the Principal Attorney-Evidence Analysis by end of business on 9th September, 2011 and his services were thereafter terminated. Vide a letter dated 29th September, 2011, he wrote to KACC demanding to be reinstated to his position but he was never reinstated.

4. The Petitioner then filed a suit against KACC being **Nairobi Industrial Cause No.1168 of 2012**. By a judgment delivered on 18th December 2013, he was awarded the sum of Kenya Shillings Thirty Five Million, Four Hundred and Ninety One Thousand, Nine Hundred and Eighty Three Shillings (Ksh.35,491,983) in damages as well as costs of the suit.
5. Both the Petitioner and the Respondent have allegedly expressed their intention to appeal against the Industrial Court judgment by invoking the provisions of **Section 17** of the **Industrial Court Act** but no party has filed an application for stay of execution of the Industrial Court judgment, pending the hearing and determination of the intended appeal.
6. The Petitioner has now filed this Petition claiming that his fundamental right to equality and freedom from discrimination and right to access justice have been violated by virtue of **Section 61 A** of the **EACC Act** which bars him from exercising the fruits of his judgment.
7. In his Petition dated 8th July 2014, he has therefore sought the following orders;

“(a) A declaration that Section 61A of the Anti-Corruption and Economic Crimes Act is unconstitutional and to that extent a declaration that it is void.

(b) A declaration that Section 61A of the Anti-Corruption and Economic Crimes Act is unconstitutional to the extent that it purports to prohibit the Commission from paying the sums due from an Order of Judgment of a competent Court established by law where a party to the suit has filed an appeal against such judgment or filed an application for stay of such judgment.

(c) A declaration that the inherent, inalienable, fundamental, legal and constitutional right to equality and freedom from discrimination and access to justice protected by Articles 27 and 48 respectively of the Constitution of Kenya, 2010 applies at all times to the Petitioner and cannot be eroded by a statutory provision in the Anti-Corruption and Economic Crimes Act.

(d) A declaration that the Ethics and Anti-Corruption Commission has no constitutional or other lawful power or authority to prohibit the Petitioner or any other successful litigant from enforcing a judgment issued by a competent Court of law through the lawful process of execution or attachment of its assets.

(e) A declaration that any provision in a Kenyan statute prohibiting the execution of any process issued to enforce a judgment of a competent Court of Law on the ground that there is an appeal or an application pending against the judgment or order or any provision in a Statute purporting to annul the judgment of a competent Court of law and to destroy rights acquired thereunder is without legal foundation and is unconstitutional null and void.

(f) This Honourable Court do issue an order of Mandamus requiring the Respondent to comply with the Judgment issued on the 18th December, 2013 in Industrial Cause No.1168 of 2012.

(g) Such other orders(s) as this Honourable Court shall deem just.”

The Petitioner’s Case

8. The Petitioner’s case as contained in his Petition, Supporting Affidavit and written submissions can be summarized as hereunder;
9. That **Section 61A** of **EACC Act** is discriminatory and violates **Article 27(1)** of the **Constitution** in that the EACC can obtain a judgment in its favour and execute it but a third party obtaining

judgment against it cannot do so.

10. That under the provisions of **Section 3** of the **EACC Act**, the Respondent is a body corporate capable of suing and being sued in its corporate name, and it is therefore a distinct legal entity and not a Government department. That such, in any legal process, it is bound by the consequences that flow from litigation and to that extent, execution proceedings apply to the Respondent as they would apply to any other corporation. In that regard, reliance was placed on the case of **J.M Kimani t/a Renco Car Identity v Parliamentary Service Commission (2009) e KLR** where it was held that the Parliamentary Service Commission, though a constitutional institution, was not a Government department.
11. It was also submitted that **Section 61 A** of the **EACC Act** which bars a successful litigant from enforcing judgment against the Respondent through execution or attachment of the Respondent's assets renders a judgment issued by a competent Court useless and violates the Petitioner's right to equal protection and benefit of the law. In that regard the Petitioner relied on the case of **Romer, Governor of Colorado et.al v Evans et al (94-1039) 517 U.S 620 1996**.
12. Further, that a decision made by a competent Court must be given effect as each person under **Article 50(1)** is entitled to having any dispute that can be resolved by application of law determined in a fair and public hearing. That the execution of the judgment of the Industrial Court is a remedial consequence that cannot be taken away from the Petitioner. He relied on the case of **Macharia & Macharia Co. Advocates v East African Standard (No. 2) (2002) KLR 63. R v Home Secretary EX P Pierson (1998) AC 539 and United States v Peters 9 US (5Cr) 115 (1908)** in support of that proposition.
13. It was also the Petitioner's case that **Section 61A** of the **EACC Act** bars his right to access justice especially as regards delay in enforcing his lawful judgment. That the refusal to pay decree holders who have preferred an appeal is also offensive to a successful litigant and erodes the right of such a litigant to use the appeal process to further the cause of justice.
14. He further contended that **Section 61A** of **EACC Act** is contrary to public policy considerations and is an impediment to the realization of the right to access to justice. In that regard he relied on the case of **Privadarshini v Secretary to Government Education Chennai (2005) (3) MLJ 97** where the Court held that Government policies may be quashed if they are illegal, unconstitutional or shockingly arbitrary.
15. That the Respondent by virtue of **Section 22** of the **EACC Act** has its own funds which it manages and can be used to settle claims made against it. The Petitioner thus contended that **Section 61A** is unreasonable and unjustifiable in the circumstances.
16. He further claimed that the office of the 'Director' was abolished and the new Act does not provide for such an office accordingly, there is no one who can implement his judgment and in addition, that **Section 61 A** of the **Act** is in any event impossible to be complied with especially given the enactment of **Section 34 (1)** of the **EACC Act**. That by that Section the term 'Director' cannot be interpreted in any other way than the office of Director previously constituted before the coming into force of **Section 34(1)**.
17. As to the applicability of the provisions of the Statute Law Miscellaneous (Amendment) Bill, 2014, the Petitioner submitted that it was not applicable as the same had not been assented to by the President and is not law. In any event, that the provisions of the Statute Law Miscellaneous (Amendment) Bill, 2014 are not applicable in the instant case because it cannot apply retrospectively.
18. The Petitioner therefore urged the Court to declare **Section 61A** of the **EACC Act** unconstitutional in so far as its provisions violate the Petitioner's right to equality, equity, human dignity, freedom from discrimination and access to justice and to grant him all the orders sought in

the Petition.

The Respondent's Case

19. The Respondent, The Ethics and Anti-Corruption Commission, in reply to the Petition filed a replying affidavit sworn by Halakhe D. Waqo, its Secretary/Chief Executive Officer. In response to the issues raised in the Petition, he deponed that;

(a) The Petitioner has not produced any evidence or otherwise demonstrated that his constitutional rights have been violated or are about to be violated in any manner whatsoever and the grounds proffered in support of the Petition do not entitle the Petitioner to the prayers sought.

(b) The Respondent has filed **Civil Appeal No.140 of 2014**, against the decree that the Petitioner is seeking to execute which appeal has high chances of success.

(c) The Petitioner has on his part confirmed that he is dissatisfied by the whole of the decision of the Court in **Industrial Court Cause No.1168 of 2012. Pravin Bowry vs Ethics & Anti-Corruptions Commission** and thus it's only fair and just that the appeal be heard and determined first before any execution of the decree can take place.

(d) That the alleged delay in having the appeal heard and determined can be cured by any party to the appeal taking steps to have the pending appeal heard on a priority basis or otherwise disposed of expeditiously.

(e) The Respondent draws its funding from the Consolidated Fund and the Petitioner has not demonstrated that there is a risk of failure to satisfy any decree in his favour.

(f) It is against public policy and interest for conscientious deployment of scarce resources drawn from the public to tie down funds intended for future satisfaction of a contested decree.

(g) The public interest insulating the Respondent from execution and attachment of its assets far outweighs the Petitioner's enjoyment of his rights and the fruits of the contested judgment.

(h) the Respondent does not have any funds kept aside to settle decrees and must await the pending appeal to be heard and determined before requesting Parliament to approve any amount found to be due and owing to the Petitioner.

(i) The Petition is premised on a misconception of the intents and purposes of **Section 61A of EACC Act** which must be read together with **Section 21(4)** of the **Government Proceedings Act** and **Order 29 Rule 2** of the **Civil Procedure Rules**.

(j) There are no constitutional issues that arise from the present Petition and the mere allegations made in the Petition do not clothe it with constitutional issues.

20. In addition to the above, the Respondent also filed written submissions and submitted that **Section 61A of EACC Act** is not unconstitutional as alleged by the Petitioner. That it is a replica of **Section 21(3)** and **(4)** of the **Government Proceedings Act (Cap 40 Laws of Kenya)** and **Order 29 Rule 4(1)** of the **Civil Procedure Rules** all which provide criteria for satisfaction of orders against the Government. That the Government and its agencies are thereby cushioned against attachment of their assets pursuant to Court decrees, orders and other processes. It relied on the

- decision of *Kisya Investments Ltd v Attorney General & Another (2005) 1 KLR* where the Court held that the provisions of **Section 21(3) and (4)** of the **Government Proceedings Act** and **Order 29 Rule 4(1)** of the **Civil Procedure Rules** are not unconstitutional. That further, it is crucial to cushion the Government and its agencies against attachment of their assets as there would be an onslaught on state operations if execution of decrees against them could be done willy-willy.
21. It was also its submission that the Respondent is a Government agency that deals with ethics and corruption related matters as provided for under **Article 79** of the **Constitution** and as such, the provisions of the Government Proceedings Act are applicable to it.
22. It was its further submission that even if the Court were to declare **Section 61A** of the **EACC Act** to be unconstitutional, the Respondent would still be bound by the provisions of **Sections 21(3) and (4)** of the **Government Proceedings Act** and **Order 29 Rule 4(1)** of the **Civil Procedure Rules**, which the Petitioner has not sought to be declared unconstitutional.
23. That the order sought by the Petitioner that *“any provision in a Kenyan Statute...”* as relates to execution against the Government or its agencies cannot be granted as he has a duty to state with precision the law that has infringed his fundamental rights and freedoms and it cannot be left to speculation as which law he is referring to and seeking to be declared unconstitutional. On that proposition, it relied on the cases of *Anarita Karimi Njeru v Republic (1976-80) 1 KLR 1272* and *Cyprian Kubai v Stanley Kaiyongi Mwenda Misc Applic No. 612 of 2002*.
24. On whether **Section 61A** of **EACC Act** is impossible to implement, it submitted that the **EACC Act** should not be read in isolation but should be read together with **Section 16(7)** of that **Act** which provides that the Secretary is the accounting officer of the Respondent. In any event, that the EACC Act has been amended to substitute the word *‘Director’* with *‘Secretary’* as per the Statute Law Miscellaneous (Amendment) Bill, 2014.
25. In conclusion, the Respondent submitted that the Petitioner had not advanced any plausible grounds to entitle him to the declarations and orders sought and prayed that the Petition be dismissed with costs.

Determination

26. Looking at the Parties’ pleadings and submissions, the core issue presented before this Court for determination is whether **Section 61A** of **EACC Act** is constitutional. However, before I determine that issue, I recall that the Respondent alleged that the Petition as presented did not plead with reasonable precision how the Constitution has been violated and the manner in which the Petitioner’s fundamental rights and freedoms have been violated. I deem it appropriate to address that issue first.
27. In that regard, it is now a determined principle in constitutional litigation that where a person is seeking redress from the High Court for an alleged violation of the Constitution, he must set out with a reasonable degree of precision that of which he complains of, the provisions said to have been infringed and the manner in which they have been infringed - See *Anarita Karimi Njeru vs Republic (supra) and Trusted Society of Human Rights vs Mumo Matemu and Another Petition No.279 of 2012*.
28. I agree with the Respondents’ submissions on the said issue and the principle restated above has previously been well articulated and guides the arena of constitutional litigation in this Court. The question I must therefore ask is whether the Petitioner has fulfilled that requirement. Looking at the dispute before me, it is clear that the Petitioner has set out in great length how he considers **Section 61A** of the **EACC Act** to have violated his fundamental rights and freedoms as provided for under **Articles 27(1) and 48** of the **Constitution** and I need not repeat those allegations which I have summarized elsewhere above and will also refer to, shortly. In any case, it is on that understanding that the Respondent responded to the Petition in an elaborate response and

submissions. It has not been denied anywhere by the Respondent that this Court, under the provisions of **Article 165(3) (d)(i)** of the **Constitution**, has no jurisdiction to determine the question whether any law is inconsistent with the Constitution. With that clarification, I am of the firm view and do find that the Petitioner has met the threshold established by the celebrated case of *Anarita Karimi Njeru (supra)*.

29. Having so found, the Petitioner's case is straight forward; principally, that **Section 61A** of **EACC Act** is unconstitutional as it allegedly violates the Petitioners' rights under **Articles 27(1)** and **48** of the **Constitution**. I will start by reproducing the impugned provision which is as follows;

“Notwithstanding anything to the contrary in any law, where a judgment or an order has been given against the Commission for payment of money by way of damages or otherwise;

- a. *No execution or attachment in the nature thereof shall be issued against the Commission or against the assets, debts or bank deposits of the Commission,*
- b. *The Director shall, except if there is an appeal or an application pending against the judgment or order, cause to be paid out of the funds of the Commission, provided expressly for such purposes in the annual estimates, such amounts as may be payable under the decree to the person entitled thereto;*
- c. *No property of the Commission shall be seized or taken by any person having, by law, power to attach or distrain property without the previous written permission of the Director”.*

Article 27(1) of the **Constitution** then provides for equality and freedom from discrimination in the following manner;

“27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law”

In addition, **Article 48** states as follows;

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”.

30. The Petitioner has claimed that **Section 61A** of **EACC Act** is unconstitutional as it violates his rights to equal benefit of the law and protection from discrimination because it impedes on his right to realize the judgment in **Industrial Cause No.1168 of 2012**. In response to this allegation, the Respondent submitted that **Section 61A** is not unconstitutional as it seeks to protect the Government and its agencies against execution and attachment of its assets as it would be against public interest and policy to do so. In rebuttal, the Petitioner has submitted that the Respondent was not Government and is an independent Commission capable of suing and being sued in its name and as such, should be able to honour the decree despite the provisions of **Section 21** of the **Government Proceedings Act** as well as **Order 29 Rule 4(1)** of the **Civil Procedure Rules**.

31. I will, in addressing the above issue, start by examining whether the Respondent is a Government agency or not. In that regard, **Article 1(3)** of the **Constitution** is relevant. It provides that the sovereign power of the people of Kenya is exercised by the following State organs; namely, Parliament and Legislative Assemblies in the County Governments, National Executive and Executive Structures in the County Government and Judiciary and Independent Tribunals. **Article 260** has defined the term 'State organ' to mean *“a commission, office, agency or other body established under this Constitution”*. **Article 79** of the Constitution then provides thus;

“Parliament shall enact legislation to establish an independent ethics and anti-

corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of the provisions of this Chapter”.

Pursuant to this provision, Parliament enacted the **Ethics and Anti-Corruption Commission Act as Act No. 22 of 2011**. The Preamble to that Act states that it is;

“An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution, to provide for the functions and powers of the Commission.

32.Of relevance to the present Petition is the provision of **Section 11(3) of EACC Act** which provides that; ***“The Commission may cooperate and collaborate with other state organs and agencies in the prevention and investigation for corruption”.*** This provision read with all the others cited above clears any doubt as to the legal standing of the Commission; It is a state organ and ought to work jointly with other state organs in the prevention and investigation of corruption. The submission made by the Petitioner that the EACC is independent is true to the extent that it means that the Commission, in carrying out its mandate shall not be subject to the control, direction, supervision, command and or superintendence of any other person.

33.Having so said, is a **“State Organ”** the same as a **“Government agency”**? **“Government”** has been defined to mean;

“1. The structure of principles and rules determining how State or organization is regulated.

2. The sovereign power in a Nation or State” – See **black’s Law Dictionary, 8th Edition.**

34.In addition, Dixon J. in **Burns vs Ransley [1949] A.L.R. 817** defined “Government” as to **“signify the established system of political rule, the governing power of the County consisting of the executive and the legislature considered as an organised entity and independently of the persons of whom it consists from time to time.”**

A Government agency is necessarily therefore a unit within the larger concept of Government and in the United States includes boards, departments, divisions and commissions to implement particular legislative act – See <http://legal-dictionary>.

35.From the foregoing it is easy to conclude that State and Government agencies are the same but are differentiated by their constitutive instruments and functions. The Respondent is therefore both a State organ with certain defined functions within the governmental structure and in executing its functions is independent of any other organ or agency by dint of **Article 250(2)(b) of the Constitution.**

36.I am also aware that under the provisions of **Section 3 of the EACC Act**, the Respondent is a body corporate capable of suing and being sued in its corporate name. In my understanding, being a corporate entity with capabilities of suing and being sued in its own name does not take away the fact that the Respondent is a State organ or agency. In my view, it is not therefore a distinct legal entity outside the realm of the State qua State as argued by the Petitioner and I have stated why. The authority of **J.M Kimani t/a Renco Car Identity v Parliamentary Service Commission (supra)** relied upon by the Petitioner is clearly therefore distinguishable in the sense that the Constitution, 2010 has made the Respondent a constitutional State organ or agency unlike the situation that existed under the Repealed Constitution where it was merely an executive Governmental unit regulated by Statute.

37.Having so found, the crux of the Petitioner’s case as earlier stated is that **Section 61A** is unconstitutional as it inhibits him from realizing his fruits of litigation. The Respondent on the

other hand contended that **Section 61A** is not unconstitutional as it cushions the EACC like other Government agencies against execution and attachment pursuant to Court decrees. The task at hand therefore demands that I should first deal with the issue involving the interpretation of the various provisions of the Constitution as well as the impugned provision of the EACC Act and in that regard, it is important to set out from the outset the relevant principles that will guide this Court in the task ahead.

38. It is now a well settled principle of law that a statute should be construed according to the intention expressed in the Act itself - See *Craies on Statute Law (6th Edition)* p. 66. It was also held in *Direct United States Cable Co. v The Anglo-American Telegraph Co, (1877) 2 A.C 394* that;

“The Tribunal that has to construe an Act of a legislature or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words, it is natural to inquire what is the subject-matter with respect to which they are used and the object in view.”

Similarly in *Hiralal Ratanlal v S.T.O AIR 1973 SC 1034*, the Supreme Court of India stated that;

“In construing a statutory provision, the first and foremost rule of construction is the literary construction. All that we have to see at the very outset is what does the provision say? If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of Statutes. The other rules of construction are called into aid only when the legislative intent is not clear”.

39. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect - See *R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295*, *Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]e KLR* and *Samuel G. Momanyi v Attorney General and Another (2010) e KLR*.

40. There is also the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise - See *Ndyanabo v Attorney General of Tanzania [2001] EA 495* and I must therefore reiterate that following the above authorities, I will start by assuming that **Section 61A** of **EACC Act** is constitutional and valid unless the contrary is established by the Petitioner.

41. With those principles in mind, **Section 61A** must be read together with **Section 21(3)** and **(4)** of the **Government Proceedings Act** which states as follows;

“Satisfaction of orders against the Government;

1. ...

2. ...

3. *If the order provides for the Payment of any money by way of damages or otherwise, or any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon;*

Provided that the Court by which any such order as aforesaid is made or any Court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part

thereof, shall be suspended, and if the certificate has not been issued, may order any such direction to be inserted therein.

4. *Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out by any such Court for enforcing payment by the Government of any such money or costs as aforesaid and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”*

A similar provision is also found in **Order 29 Rule 4(1)** of the **Civil Procedure Rules** which provides thus;

“No order for the attachment of debts under Order 23 or for the appointment of a receiver under Order 41 shall be made or have effect in respect of any money due or accruing or alleged to be due or accruing from the Government”.

It must be noted that the Petitioner has not complained of either **Section 21(3)** and **(4)** of the **Government Proceedings Act** nor **Order 29 Rule 4(1)** of the **Civil Procedure Rules** but it matters not because the principle in both is replicated in the impugned **Section 61A** of the **EACC Act**.

42. In that context, in *Kisya Investments Ltd v Attorney General (supra)* it was held that **Section 21(3) and (4) of the Government Proceedings Act** and **Order 29 Rule 4(1)** of the **Civil Procedure Rules** were important safeguards against attachment of Government assets. The Court stated in that regard as follows;

“The essence of all the foregoing provisions of the law is that they protect and insulate the government against any form of execution or attachment of its property, assets, funds or personnel in or during the enforcement of any judgment, decree or other orders of the court against it or any other person as a result of which it affects the government’s property etc”.

43. Can the same be said of **Section 61A** of the **EACC Act** and does it protect the EACC against execution or attachment of its property? That would seem to be the case and in that regard the Petitioner has submitted that it bars a successful litigant from enforcing a judgment against the Respondent through execution or attachment of the Respondent’s assets and renders a judgment issued by a competent court useless and violates the Petitioner’s right to equal protection and benefit of the law. Is that so? I now turn to answer that question.

Right to Equality and freedom from discrimination

44. **Article 27** of the **Constitution** enshrines the right to equality and freedom from discrimination in the following terms;

“(1) Every person is equal before the law and has the right to

equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status,

ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

45. “**Discrimination has**” been defined as a;

“distinction which whether intentional or not but based on grounds relating to personal characteristics of an individual or a group [which] has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of Society” (Andrews vs. Law Society of British Columbia (1989) 1 SCR 321, per Wilson J.).

The Court in *Peter K. Waweru v Republic [2006]eKLR* also defined “**discrimination**” as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions ... whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”.

46. I adopt the above definitions and would also add that the principle of equality and non-discrimination has its underpinnings in various International conventions which now form part of our laws by dint of **Article 2(5) and (6) of the Constitution**. The *United Nations Universal Declaration on Human Rights (UDHR)* provides at **Article 1** that “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*” **Article 7** of the UDHR further states that;

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Article 2 of the **African Charter on Human and People’s Rights** also stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, or sex. **Article 28** goes further to state that;

“Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”

47. Applying my mind to the law as set out above in the present Petition, I have difficulties in finding that by dint of **Section 61A of EACC Act** the Petitioner has been discriminated against and I am constrained to ask, against whom has he been discriminated against? To my mind, one can allege discrimination if in ordinary circumstances, he has been afforded some differential treatment or different standards have been applied as against him in comparison to another person of an equal situation as him. The Petitioner for instance has not demonstrated to this Court that someone else who holds a decree as he does against the Respondent has been paid despite the provisions of **Section 61A** of the **EACC Act**.

48. Moreover, I must add that the right to equality as provided for under **Article 27** of the **Constitution** is not absolute. The principle of equality and discrimination has long been the

subject of determination by Courts across jurisdictions. The Court in ***State of Kerala and Another v N. M. Thomas and Others***, Civil Appeal No.1160 of 1974 had this to say regarding the equality principle;

“The principle of equality does not mean that every Law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its Laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.” (Emphasis added)

49. I am in agreement and a Court, in my view, will uphold a law that targets a class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end. That is why in the case of ***Romer v Evans (supra)*** the Court stated;

“In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group or if the rationale for it seems tenuous.”

50. In applying, the above findings, while I am aware that it is trite law that a decree holder must realize the fruits of his judgment, the Court must bear in mind the reason why the impugned provision of law was enacted. I say so because it is a principle of interpretation that there is always a presumption that a legislature does not enact laws in vain; that it knows the needs of its people and all laws enacted serve a particular need in society. In saying so, the words of the Supreme Court of India in the case of ***Hambardda Wakhana v Union of India Air (1960) AIR 554*** ring true. The Court stated that;

“In examining the constitutionality of a Statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enact laws which they consider to be reasonable for the purpose for which they are enacted.”

51. The obvious question therefore is what is the rationale behind **Section 61A** of the **EACC Act** and what mischief was sought to be cured by its enactment? To answer that question, I will refer to the reasoning of the High Court in ***Kisya Investment (supra)*** where Ibrahim and Visram JJ (as they then were) expressed themselves as follows in regard to the Government’s immunity from execution;

“Before we conclude this decision, it is our view that it is essential, if not imperative on the Court’s part, to give its observations regarding the history, purpose and usefulness or otherwise of Section 21 (4) of the Government Proceedings Act and order XXVII, rules 2(1)(a), (2) and 4(1).

In preparing our judgment, we have carried out some considerable research regarding the history of the protection and immunity of the Government from execution and attachment of its property/goods but could not find any text covering the subject. We could not obtain any case law or precedent directly on the point. However, it would appear that the genesis of the said protection and immunity arose from two situations:-

1. *Firstly, there has been a policy in respect of Parliamentary control over revenue. This is threefold and is exercised in respect of:*

- i. *The raising of revenue – (by taxation or borrowing)*
- ii. *Its expenditure and*
- iii. *The audit of public accounts.”*

The learned Judges went on to say;

“The satisfaction of decrees or judgments is deemed to be an expenditure by Parliament and as a result this must be justified, in law and provided for in the Government’s expenditure. It is for this reasons that Section 32 of the Government Proceedings Act provides as follows;-

“32(1) Any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of moneys provided by Parliament.”

Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority. No payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered – (see Halsbury’s Laws of England 4th Edition, Volume 11 at paragraphs 970,971 and 1370).”

The Court proceeded on to state that;

“As a result of the aforesaid provision which was borrowed from the Crown Proceedings Act, 1947 (Section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that parliament is very jealous of its control over expenditure. This is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgments. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. In a case from New Zealand, - Auckland Harbour Board vs R (1924) AC 318, it was held (p 326) by Viscount Haldane in the Privy Council;-

“... For it has been a principle of the British constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the Consolidated Fund into which revenue of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are gone by in which the crown, or its servants, apart from Parliament could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government it can, as here, be traced”.

52. The Court also identified a second reason for the justification of the rule against execution of Government assets. It stated thus;

“The second situation which arises from the above is that once a decree or judgment is obtained against the Government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, the Comptroller and Auditor General etc for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments. Considering the nature of Government structure, procedures, red-tape and large number of claims, this could take a long time.”

Further, that;

“If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgments and it will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached, its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. ... State operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt, but it’s constitutional and Statutory duties will not be capable of performance. This will lead to chaos, anarchy and the breakdown of the Rule of Law.”

It then concluded as follows;

“In our view, this is the rationale or the objective of the Law that prohibits execution against and attachment of the Government’s assets and property. We form this view from a general reading of the English Statutes, Halsbury’s Laws of England and some case law which do not bring out all these, but one is able to construe the intentions.

This brings us to the proviso in Section 70(a) of the Constitution;-

“... the provisions of this Chapter shall have effect from the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest”.

53.I agree with the learned judges and I would without hesitation apply their reasoning in the instant case as if it were mine. I will however only add and say that I am also in agreement with the submission made by the Respondent that it would not be in the public interest to allow execution and or attachment against the Government and that Public interest should in such an instance override an individual’s enjoyment of his fundamental rights and freedoms. The Court in the **Kisya Investments Case (supra)** while declining to find **Section 21(4)** of the **Government Proceedings Act** and **Order 29 Rules (4) (1)** of the **Civil Procedure Rules** as unconstitutional went further and stated as follows;

“If the facts and circumstances of this case, could have led us to decide that the applicant’s fundamental rights and freedoms under Sections 70, 72, 75 and 82 have been violated or infringed upon by the operation of Sections 21(4) of the Government Proceedings Act and Order XXVIII Rules 2 and 4, then we would certainly have held that the public interest herein in insulating the Government from execution and attachment overrides the applicant’s enjoyment of his rights and the fruits of judgment through execution and that it was in the public interest that the said laws have been enacted and must continue to be in force unless and until Parliament legislated otherwise”.

All the above findings apply to any logical interpretation of Section 61A of the EACC Act and I need not say more.

54.Having so said, I hereby hold and find that **Section 61A of EACC Act** does not violate **Article 27** of the **Constitution** in the circumstances of the present Petition.

Right to access justice

55.It was the Petitioner’s contention that **Section 61A of EACC Act** is contrary to public policy

considerations and is an impediment to the realization of the right to access to justice. The right of access to justice is to be found at **Article 48** of the **Constitution** and for avoidance of doubt it provides as follows;

“The State shall ensure access to justice for all persons, and if any fee is required, it shall be reasonable and shall not impede access to justice”.

In explaining the right of access to Justice, Majanja J in *Dry Associates Ltd v Capital Markets Authority (2013) e KLR* stated as follows;

“Access to justice is a broad concept that defies easy definition. It includes the enshrinement of right in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s right; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”

56. While I agree with the learned judge that access to justice entails the important component of expeditious enforcement of judicial decisions, such judicial decisions must be enforced within the established legal framework and if I understood the Petitioner well, his case *inter-alia* is that **Section 61A** of **EACC Act** denies him the fruits of his judgment and is therefore unreasonable and unjustified. In that regard, I have already stated elsewhere above that **Section 61** of **EACC Act** exists in our law books for a good reason is justifiable and I have already said why. The authority of *Privadarshini v Secretary to Government Education Chennai (supra)* relied upon by the Petitioner that Government policies may be quashed if they are illegal, unconstitutional or shockingly arbitrary is distinguishable in the circumstances.

57. Having found that **Section 61A** is constitutional, it is very difficult to find that it impedes access to justice. In fact, on relooking that Section, it has sufficient safeguards to ensure that a decree is protected and is certainly payable once an appeal has been decided in favour of a decree-holder. See **Section 61A(b)** of the **EACC Act** I have elsewhere above noted that the payments can only be made pursuant to an approved budget and annual estimates and that fact cannot in the wider context be seen as a denial of expeditious enforcement to judicial decisions.

That being the case, I find and hold that the limitations to the rights under **Article 48** of the **Constitution** are justifiable and reasonable in the circumstances of the Petition before me..

Office of the Director

58. While it is not in dispute that the office of ‘Director’ of the EACC was abolished and the EACC Act does not provide for such an office, it is not correct for the Petitioner to claim that the decree against him is incapable of enforcement since there is no one who can implement his judgment.

59. I have perused the provisions of the **EACC Act** and of importance on this aspect is **Section 16(7)** of **EACC Act** which provides as follows;

The Secretary shall be –

- (a) the Chief Executive Officer of the Commission;***
- (b) the accounting officer of the Commission; and***
- (c) responsible for -***
 - i. Carrying out of the decision of the Commission;***

ii. *Day-to-day administration and management of the affairs of the Commission;*

iii. *Supervision of other employees of the Commission;*

iv. *The performance of such other duties as may be assigned by the Commission.”*

It is therefore clear that the Secretary is the accounting officer of the EACC and has sworn an affidavit that as the person with authority to incur expenditure, he will apply to the Treasury, as per the laid down procedures for procuring funds to settle the decree upon the conclusion of the appeal at the Court of Appeal

60. Without saying more, I do not find that **Section 61(A)** is incapable of compliance and in any event, the law is likely to be amended through the Statute Law Miscellaneous (Amendment) Bill 2014, which has deleted the word ‘Director’ in the EACC Act and substituted it with the word ‘Secretary’. I am aware that this law is at an advanced stage of enactment and is only awaiting presidential assent and gazettelement.

61. In any event, the Respondent is still carrying out its functions and there must be existing procedures on how it incurs expenditure on a day to day basis. I see no reason in the circumstances to find that there is any impediment in having **Section 61A** of the **EACC Act** complied with.

Conclusion and disposition

62. Having found as I have, it is not contested that both Parties have been aggrieved and are both dissatisfied with the Judgment of the Court in the **Industrial Cause No.1168 of 2012**. They have both appealed against that judgment and each of the parties deposed that their individual appeals has high chances of success. That being so, it is only fair and reasonable to wait for the conclusion of the pending appeal. The parties should and must take the necessary steps to have the appeal now pending before the Court of Appeal i.e. **Civil Appeal No. 140 of 2014** concluded with speed both in the public interest and in the interest of the Petitioner who is holding a valid judgment and money decree.

63. Having found as I have, and looking at the prayers sought by the Petitioner, it follows that prayers (a), (b), (c), (d) and (f) cannot be granted and the reasons can be seen above.

64. As regards prayer (e) the Petitioner sought;

“A declaration that any provision in a Kenyan statute prohibiting the execution of any process issued to enforce a judgment of a competent Court of Law on the ground that there is an appeal or an application pending against the judgment or order or any provision in a Statute purporting to annul the judgment of a competent Court of law and to destroy rights acquired thereunder is without legal foundation and is unconstitutional null and void.”

A careful scrutiny of the above prayer would reveal that there is no specific declaration or order sought as regards any other Kenyan law that gives the Government immunity against execution and/or attachment of its assets. Therefore prayer (e) can be interpreted to mean anything and it is a futile exercise for this Court to try and decipher what the Petitioner may have meant. The parties are bound by their pleadings and the Court will only deal with or grant that which is expressly asked for.

Final Orders

65. For reasons given above, the Petition is dismissed.

66. As for costs, each Party shall bear its own costs as they are still pursuing **Civil Appeal No.140 of**

2014.

67.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MAY, 2015

ISAAC LENAOLA

JUDGE

In the presence:

Miron – Court clerk

Miss Wairimu holding brief for Mr. Jamal for Petitioner

No appearance for Respondent

Order

Judgment duly delivered.

Copies to be supplied.

ISAAC LENAOLA

JUDGE

29/5/2015