



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. 2 OF 2013

**IN THE MATTER OF ARTICLES 22 AND 23 AND 165 OF THE CONSTITUTION OF KENYA
2010**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 49 AND 50 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: ANTI-CORRUPTION CASE NO. 3 OF 2011

BETWEEN

JOB KIPKEMEI KILACH PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC

PROSECUTIONS 1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

The genesis of this Petition is a criminal trial that was filed before Eldoret Chief Magistrate's Court as **ANTI-CORRUPTION CASE NO. 3 OF 2011, REPUBLIC -VS- JOB KIPKEMEI KILACH**. The Petitioner herein Job Kipkemei Kilach was charged with *failing to comply with a notice to furnish a written statement of property contrary to Section 26 (1) as read with Section 26 (2) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003*.

The particulars of the charge are that on the “*8th day of September, 2006, at Eldoret Town in Uasin Gishu Province being a person reasonably suspected of corruption or economic crimes and having been duly served with a notice dated 12th July, 2006 to furnish written statement of your property by the Director of the Kenya Anti-Corruption Commission failed to comply with the said notice*”.

The trial progressed well. The prosecution closed its case and the Petitioner was put on his defence. It is at this point he filed the Petition.

The Petition is dated 30th April, 2013. It is brought under Articles 49 (1) (d), 50 (1) and 50 (2) (c), (j), (k) and (l) of the Constitution of Kenya. The following reliefs have been sought:-

(a) The said notice be declared incompetent and unconstitutional.

(b) The further trial of the Petitioner based on the said notice be declared unconstitutional and oppressive.

(c) An injunction be issued restraining the Ethics and Anti-Corruption Commission and the Director of Public Prosecution from further prosecuting the Applicant on the basis of the said notice.

(d) Costs of this Petition.

The Respondents opposed the Petition. The 1st Respondent filed a Statement of Grounds of Opposition dated 24th July, 2013, which is as follows:-

1. That the Petition is incompetent and an abuse of the court process.
2. That the relief sought by the Petitioner was also sought by him in Petition No. 1076 of 2007 and a ruling delivered by Lady Justice R. P. V. Wendoh.
3. That provisions which ought to apply to the Petition are provisions of the old constitution not the new Constitution of Kenya 2010.
4. That the Petitioner is asking the court to apply the amended Anti- Corruption and Economic Act No.3 retrospectively in contravention of the principles of interpretation of statute.

The 3rd Respondent's Grounds of Opposition are dated 8th August, 2013. I duplicate them as under:-

1. The Petition is a gross abuse of the due process of law.
2. There is no cause of action disclosed against the 3rd Respondent.
3. The joinder of the 3rd Respondent offends Article 156 of the Constitution of Kenya, 2010.
4. Alternatively the 3rd Respondent has since 27th August, 2010 no prosecutorial powers against the Petitioner touching on criminal cases.
5. The prayers sought offend the wider public interest.
6. The Petition is a collateral attack on a decided matter namely Nairobi High Court Petition No. 1076 of 2007 and offends the cardinal principle of finality.
7. Litigation (whether civil or criminal) has to come to an end.

The 2nd Respondent opposed the application by way of a Replying Affidavit sworn by Goerge Ojowi, a forensic investigator with the 2nd Respondent sworn on 19th July, 2013.

The main issues raised in the Replying Affidavit are as follows:-

- That the charges herein were preferred against the Petitioner after failing to comply with the notice issued in accordance with the provisions of section 26 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (ACECA). (See paragraphs 1, 2 and 3 of the Replying Affidavit).

- That the Petitioner was initially charged at the Makadara Law Courts vide Makadara Anti-Corruption

Criminal Case No. 21 of 2007.

- That later on the Petitioner sought for the nullification of the said notice at the High Court of Kenya at Nairobi vide Petition No. 1076 of 2007 whereby his application was dismissed by Justice R. P. V. Wendoh J. who ordered the proceedings in the Makadara Law Courts to proceed. In this regard the Petitioner moved to the Court of Appeal vide Civil Application No. 116 of 2008 (UR. 71/2008) seeking stay of Justice Wendoh's Judgment which was declined.

- That on transfer of the trial Magistrate at the Makadara Law Courts to Embu, this matter was later ordered to be transferred to Eldoret Law Courts by Justice Ombijah and that therefore it is false and misleading for the Petitioner to purport that he was charged for the first time in 2011 at the Eldoret Court following his failure to comply with the Notice dated 12th July, 2006 and that the Petitioner has failed to disclose the material facts and that he is also guilty of inordinate delay.

- That the issue of Constitutionality of section 26 of the ACECA was settled by the Constitutional Court (J. W. Lessit, R. P. V. Wendoh and M. J. Anyara Emukule JJ) in High Court Miscellaneous Civil Application No. 54 of 2006; Dr. Christopher Murungaru and Another).

- That the Petitioner is guilty of gross abuse of the Court process and is absolutely not deserving of this court's attention and or audience as all the issues he has raised herein are a complete duplicity of the same issues he had raised and have effectively been determined by another court of competent and concurrent jurisdiction, a matter which he has failed to bring to the attention of this court.

The Petition was disposed of by way of filing written submissions. Before I analyse the submissions, it is important that I briefly set out the Petitioner's case.

He brought this Petition under Articles 49 (1) (d), 50 (1) and 50 (2) (c), (j), (k), (l) of the Constitution.

Article 49 (1) (d) falls under the heading of "Rights of an arrested person". It reads thus;

"49. (1) An arrested person has the right -

(d) not to be compelled to make any confession or admission that could be used in evidence against the person."

Article 50 on the other hand provides for the rights to a fair hearing. Sub-Article (2) (e), (j), (k) and (l) read as follows:-

"50 (2) Every accused person has the right to a fair trial which includes the right -

(c) to have adequate time and facilities to prepare a defence.

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

(k) to adduce and challenge evidence.

(l) to refuse to give self-incriminating evidence."

He enumerated the grounds he relied on to file the Petition, the substantive ones being;

- That the Notice issued by the Director Kenya Anti-Corruption Commission (KACC), now defunct, on 12th July, 2006, demanding that he furnishes a statement of his property is vague and uncertain. Suffice it to say, KACC is the predecessor of Ethics & Anti- Corruption Commission (EACC).

- That the said notice was incompetent, invalid and could not form a proper basis for a criminal charge

against him under Article 26 of the Anti-Corruption and Economic Crimes (ACEC) Act, No. 3 of 2003. This is so because the Notice does not specify the time when the suspected acts of commission of economic crimes were committed by him (Petitioner).

- That the legislature, on 15th October, 2007 amended Section 26 of ACEC Act to expressly require that the notice under Section 26 of the Act must specify the property the suspect is required to provide information onto the EACC. He argued that the notice issued to him did not meet this mandatory requirement and he must therefore benefit from this amendment.

- That the said notice is incompetent as it seeks information from the accused, which information infringes on the accused's right to be presumed innocent until proved guilty, and, of his right, to remain silent.

- That the said notice infringes on his rights under the Constitution as were interpreted by the **HIGH COURT IN MISCELLANEOUS CIVIL APPLICATION NO. 54 OF 2006 – CHRISTOPHERNDARATHI MURUNGARU -VS- KACC & THE ATTORNEY GENERAL**, and in **HIGH COURT PETITION NO. 459 OF 2006 – JOSHUA KULEI & 2 OTHERS**.

- That the EACC has now charged the Petitioner in Eldoret Chief Magistrate's Court Anti-Corruption Case No. 3 of 2011 against the spirit of the aforesaid provisions of the Constitution.

The Petitioner swore an affidavit in support of the Petition on 30th April, 2013. This affidavit only expounds on the above summarized points. In addition, he also filed an affidavit titled '*Reply to Replying Affidavit*' sworn on 13th August, 2013.

The latter affidavit raised the following key points:-

- That he did not decline to comply with the notice. Instead, he notified KACC through his lawyers that he was awaiting the outcome of the legal position in the Murungaru case – **APPLICATION NO. 54/2006, CHRISTOPHER NDARATHI MURUNGARU -VS- KACC & ATTORNEY GENERAL**, as the notice sent to the Applicant (Murungaru) was similar to the one he was sent.

- That the High Court in the Murungaru case made it clear that the notice in question was incompetent as it was not clear what it sought to achieve.

- That therefore, the High Court has vindicated his position under the law as was held in both the Murungaru and Joshua Kulei cases.

- That he has admitted having filed Petition No. 1076 of 2007 before the Constitutional and Judicial Review Division of the High Court in Nairobi. But that since then, the issues he had raised in this Petition were confirmed in the holdings of both the Murungaru and Joshua Kulei cases, and subsequently, Parliament has amended the controversial Section 26 of the Anti-Corruption and Economic Crimes Act.

PETITIONER'S SUBMISSIONS

The Petitioner's submissions are dated 28th August, 2013. He singled out the major issue for determination to be, "*whether the Notice issued to him was competent*". In addition he stated that he is not challenging the constitutionality of Section 26 of the Anti-Corruption and Economic Crimes Act but the competence of the said notice issued pursuant to the said section.

He submitted that the notice is incompetent because it did not specify the time when the suspected acts of corruption and economic crimes were committed. He heavily relied on the decision in the case of **NDARATHI MURUNGARU -VS- KACC & ANOTHER (2006) e KLR** and **JOSHUA C. KULEI -VS- KACC & ANOTHER (2013) e KLR**.

He submitted that, Parliament amended Section 26 of the Anti-Corruption and Economic Crimes Act, following the decision in the Murungaru case, and so he is entitled to benefit from the said amendment.

In this respect, he has submitted that, after the amendment to Section 26, the court quashed the notice issued to both Petitioners in the Murungaru and Joshua Kulei cases. That since the notice issued to him is similar to those issued to Murungaru and Joshua Kulei, he is entitled to the orders sought.

The Petitioner has denied abusing the court process as alluded by the Respondents. He said that his case was transferred for trial from Makadara to Eldoret Chief Magistrate's Court after he made an application in this respect before the High Court upon suspecting that there was a likelihood of a miscarriage of justice.

He has submitted that he filed this Petition after the trial court noted that the notice issued to him raised serious constitutional issues.

1ST RESPONDENT'S SUBMISSIONS

The 1st Respondent's submissions are dated 5th August, 2013 and were filed on 6th August, 2013. It is submitted that the Petition is incompetent and an abuse of the court process in that the issues raised by the Petitioner have already been determined previously in **MISCELLANEOUS APPLICATION NO. 1076 OF 2007** in which the court found that the notice issued was not in contradiction with the fundamental rights of the Petitioner.

It is submitted that the Murungaru case was adequately considered in the Miscellaneous Application No. 1076 of 2007. In any event, the notice in respect of Christopher N. Murungaru was quashed because it was vague and it required information of the properties belonging to a relative of Hon. Murungaru.

2ND RESPONDENT'S SUBMISSIONS

The Ethics and Anti-Corruption Commission, vide its Litigation Counsel James Olola Advocate, filed their written submissions dated 8th of August, 2013 raising the following salient issues. The first is **the Constitutionality of Section 26 of ACEA Act.**

In this regard, the 2nd Respondent argued that the Petitioner's contention that his compliance with S. 26 of (ACEA) Act would violate his right to the presumption of innocence, the right of non self-incrimination and a fair trial cannot hold as these are issues which were fully ventilated and finally determined in the case of **DR. CHRISTOPHER NDARATHI MURUNGARU -VS- KENYA ANTI-CORRUPTION COMMISSION AND THE HONOURABLE ATTORNEY GENERAL (2006) e KLR.**

The **Second** issue raised by the 2nd Respondent is the ***Retroactive Application of the Amendment of the Anti-Corruption and Economic Crimes Act and the coming in force of the Constitution of Kenya 2010.*** On this issue the 2nd Respondent argued that the Petitioner has not been charged with an offence retrospectively. That at the time the offence was committed and even when the trial commenced, the amendment to the ACEC Act, of 15th October, 2007 had not come into force. And that the amendment had no effect on the trial that was already in court. To support this argument, the 2nd Respondent relied on section 23 (3) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya which barred the Petitioner from benefiting from the amendment of Section 26.

The 2nd Respondent submitted further that the provisions of the Constitution of Kenya 2010 are not applicable herein. That the Constitution clearly frowns upon retrospective or retroactive criminal statutes. In support of the foregoing argument the 2nd Respondent cited Article 50 (2) (n) of the Constitution and relied on the holding by the Supreme Court of Kenya in **SAMUEL KAMAU MACHARIA & ANOTHER -VS- KENYA COMMERCIAL BANK LTD & 2 OTHERS (2012) e KLR.** The 2nd Respondent further cited the case of **DU PLESSIS & OTHERS -VS- DE KLERK & ANOTHER [(1977) 1 LRC 637]**, in which South African Constitutional court held that, that conduct that

was unlawful before the Constitution came into force could not subsequently be deemed to be lawful.

And therefore, in view of the foregoing proposition of the law, the 2nd Respondent submitted further that it is not appropriate for the Petitioner to hide under the provisions of the Constitution of Kenya, 2010 when the offence was committed in July, 2006 before the Constitution came into force. In effect, S. 26 (1) does offend the provisions of both the old and the current Constitutions.

The **Third** issue that the 2nd Respondent raised was the **Abuse of the Court Process**. On this issue the 2nd Respondent argued that the case before this Court and in Nairobi Constitutional Petition No. 1076 of 2007 are on all fours with the Murungaru Case, (Supra) and that it would be an abuse of the process of the court for the Petitioner to purport to raise new constitutional questions when in fact he is following the same well worn and beaten path, the destination whereof is well known and firmly established.

To emphasize the above point, the 2nd Respondent submitted that his prayers in the Petition No. 1076/2007 were dismissed. His appeal against the orders before the Court of Appeal did not also succeed. He cannot now turn to this court and seek similar orders.

The 2nd Respondent argued that the 2nd Respondent failed to disclose the fact that similar proceedings were filed in another Court of concurrent jurisdiction and that a decision was made touching on the issues substantially brought once more before this honourable Court. In this regard, the 2nd Respondent argued that the Petitioner misled the court as to the true facts and therefore the court ought, for its own protection, and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits.

In support of the foregoing argument, the 2nd Respondent relied on the case of **UHURU HIGH DEVELOPMENT LTD -VS- CENTRAL BANK OF KENYA AND TWO OTHERS (NAIROBI HCCC. NO. 29 OF 1995)** and **THE OWNERS OF THE MOTOR VESSEL 'LILLIAN' -VS- CALTEX OIL (KENYA) LTD. CA. NO. 51 OF 1989** where the principles for disclosure were laid down as follows; *(i) the duty of the Petitioner is to make a full and fair disclosure of the material facts, (ii) the material facts are those which it is material for the Judge to know in dealing with the application as made, materially is to be decided by the Court and not by the assessment of the Petitioner or his legal advisors, (iii), the Petitioner must make proper inquiries before making the application.*

In the premises, the 2nd Respondent submitted further that the Petitioner failed the utmost disclosure test when he chose to deliberately mislead the court and/or to conceal certain very relevant facts and therefore this court must decline to give a hearing in order to safeguard its process from blatant and deliberate abuse.

The **Fourth** issue raised by the 2nd Respondent is the **Inordinate and Unexplained Delay**. Under this head, the 2nd Respondent argued that the Petitioner was served with the contested notice in July, 2006 and that it was not until 24th September, 2007 when he moved to the High Court in Nairobi, vide Petition No. 1076 of 2007 (Supra) after being arraigned in Makadara Law Courts in March, 2007. In the premises the 2nd Respondent submitted that; *“The conclusion unavoidable in the circumstances is either that the Petitioner is intent on delaying the determination of the Anti-Corruption Case ad infinitum, or the instant petition, as was No. 1076 of 2007, are belated afterthoughts undeserving of judicial solicitude”*.

The 2nd Respondent also submitted that the Petitioner seems to have been awakened by the decision in **JOSHUA KULEI -VS- KACC & 2 OTHERS,** (Supra) whereby the learned Judge Majanja, held as follows;

“34. It is then clear that the notice dated 12th July, 2006 to the Petitioner does not meet the specification of the amended section 26 yet by virtue of section 71 the investigation is to be carried out in accordance with Anti-Corruption and Economic Crimes Act. I think it would be unfair to the Petitioner to be required to answer to a notice that does not meet the standard set by the amended provisions when investigations are to be carried out under the new legislative regime. The Petitioner

should also be entitled to the benefit of the amended provisions of the law.”

In view of this holding, the 2nd Respondent's counsel argued that the decision was made per incuriam and did not take into consideration the provisions of section 23 (3) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya. And that the proposition under the said provisions of the Cap 2 are echoed by Article 50 (2) (p) of the Constitution 2010 which permits an offender to retroactively benefit from the less severe punishment prescribed but does not absolve one from the blame.

For purposes of clarity I duplicate Article 50 (2) (p) of the Constitution which states as follows:-

“Every accused person has the right to a fair trial, which includes the right-, ... to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing...”
(Constitution of Kenya Article 50 (2) (p)).”

Whereas Section 23 (3) of Cap. 2 provides as follows:-

“Where a written law repeals in whole or in part another written law, then, unless a contrary intervention appears, the repeal shall not -

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or***
- (b) affect, the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or***
- (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or***
- (d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or***
- (e) affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealed written law had not been made.”***

The 2nd Respondent finally submitted that this court must not allow the Petitioner to re-open a case which was finalised by the High Court merely because a new Constitution has since come into place and/or another court has now made a decision which he finds favourable.

THE 3RD RESPONDENT'S SUBMISSIONS

The Honourable Attorney General vide his counsel Joseph Ngumbi, filed the written submissions dated 23rd October, 2013 and submitted that the notice under section 26 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 was issued on 12th July, 2006 and ought not to be said to be incompetent as it was issued for the purposes of investigations by the 1st Respondent and hence the Petitioner has legal duty to obey the same. The 3rd Respondent also submitted that the (Attorney General) no longer has any prosecutorial powers by dint of Article 156 of the Constitution, and therefore has no mandate to answer to prayers (b) and (c) of the Petition.

DETERMINATION

It is not in question that all the three Respondents agree that the issues raised by the petitioner were conclusively settled in **NAIROBI HIGH COURT APPLICATION NO. 1076 OF 2007 – JOB KIPKEMEI KILACH -VS- KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS.** And so the first question for determination is whether this Petition is Res Judicata.

Under Section 7 of the Civil Procedure Act, the word *Res Judicata* is defined in the following words:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to bring such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The section thereafter explains some key terms. For purposes of this petition, I will only select the relevant explanations.

(1) “Former suit – means a suit which has been decided before the suit in question whether or not it was instituted before it.

(2) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

(3) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

(4) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section be deemed to have been refused.”

On the other hand, the Black's Law Dictionary (7th Edition) at page 1312 defines *Res Judicata* in the following words:-

“Latin 'a thing adjudicated' 1 An issue that has been definitely settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essentials are 1. an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.....”

Before I dive into what was canvassed in Nairobi High Court Petition No. 1076 of 2007, reported as **JOB KIPKEMEI KILACH -VS- KACC & 2 OTHERS (2008) e KLR**, it is important that I trace the background to this petition.

On 12th July, 2006, the Petitioner was issued with a notice pursuant to Section 26 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (hereafter the Act) by the then Kenya Anti-Corruption Commission (KACC) demanding him to furnish a statement of his property.

The notice read as follows:-

“RE: NOTICE TO FURNISH A STATEMENT OF PROPERTY PURSUANT TO SECTION 26 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003

WHEREAS you JOB KIPKEMEI KILACH is reasonably suspected of Corruption and Economic Crime, NOW THEREFORE TAKENOTICE that you are required to furnish to the Director, Kenya Anti-Corruption Commission, within 30 days of service of this notice, a written statement;

1. enumerating all your property, including (but not limited to) the description, location and approximate value of the property; and

2. stating the times when you acquired each of the property; and

3. stating in respect of the property acquired between 1991 and 2002, particulars of how you acquired

the property, whether by purchase, gift, inheritance, or other manner (which you must specify); and

4. stating what consideration or price, if any was given for the property, whether by yourself or by any other person.

TAKE FURTHER NOTICE that neglect or failure to comply with the requirements of this NOTICE is a criminal offence punishable with a fine of up to Kenya Shillings Three Hundred Thousand (Ksh. 300,000/=) or imprisonment of a term not exceeding three years, or both such fine and imprisonment.

JUSTICE AARON G. RINGERA

DIRECTOR/CHIEF EXECUTIVE”

The Petitioner responded to the notice by protesting its issuance, through his lawyer, Mr. Kiplenge. According to him the notice would prejudice the pending criminal cases before the Magistrate's Court, High Court and Court of Appeal. He also protested that the notice contravened the then Section 77 (8) of the Constitution whose interpretation was the subject of Hon. Murungaru's case which was still pending. He also argued that the Act could not act retrospectively, and in any case, the Petitioner was not a civil servant.

This protest is contained in a letter by M/s. Kiplenge, Ogola & Mugambi Advocates to the Director, KACC, dated 1st September, 2006.

It is gain said that, notwithstanding the protest to the notice, the Petitioner took no steps to challenge the notice in a court of law.

On 25th March, 2007, eight (8) months after the date of the notice, he was summoned to attend Makadara Law Courts on 29th March, 2007 to answer charges relating to non-compliance with the notice.

He took plea and denied the charge. The trial was fixed for hearing on 18th September, 2007.

On 24th September, 2007, he moved to the High Court in Nairobi vide the Nairobi High Court Petition No. 1076 of 2007 pursuant to Sections 70 (a) and (c), 74 (1), 76, 77 (1) (4) (7) and (8) and 84 (1) of the old Constitution, alleging contravention or likely contravention of his fundamental rights and freedoms under the above provisions. The Respondents were named as, KACC, Attorney General and the Chief Magistrate Makadara Law Courts (1st, 2nd & 3rd Respondents respectively).

Alongside the Petition, the Petitioner also filed a Chamber Summons application dated 24th September, 2007, which is the subject of the ruling by Hon. Justice R. Wendoh dated 14th March, 2008. The ruling is annexure 'GO2' to the 2nd Respondent's Replying Affidavit.

From this ruling, it is discerned that the following prayers were sought:-

1. That the Hon. Court be pleased to certify this application as urgent and the same be heard ex parte in the first instance.
2. That this Hon. Court be pleased to issue orders restraining the 1st and 2nd Respondent from further prosecuting or in any other manner proceeding with Chief Magistrate Criminal Case No. 21/07 pending before Chief Magistrate's Court Makadara.
3. That this court be pleased to issue orders directed to the Chief Magistrate Makadara or any other judicial officer or whoever from conducting any further action in the Chief Magistrate's Court, Criminal Case No. 21/07 pending the full hearing and determination of this application or with the further orders of the Hon. Court.
4. That this court be pleased to grant the Petitioner interim or conservatory orders of stay pending the

determination of this Petition.

5. That this court be pleased to make such other or further orders as it may deem fit and just to grant.

6. Costs of the application be in the cause.

The foregoing Petition was finally heard and the learned R. P. V. Wendoh J. held as follows:-

“The Applicant is challenging the constitutionality of the notice dated 12th July, 2006. In fact he referred to the Murungaru Case that was awaiting interpretation. That case was determined in December, 2006 where the constitutional court interpreted S. 26.

One of the reasons that the Applicant objected to the notice is that it has a retrospective effect, that Act 3 of 2003 which enacted the Anti Corruption and Economic Crimes Act, was amended in 2003. I think that the Applicant's argument is misplaced because what is in issue here is the notice issued on 12th July, 2006 and the Applicant has been charged in the Makadara case for failure to comply with that notice. The offence that the Applicant faces was created in Act 3 of 2003. The Applicant having been charged with flouting the provisions of that Act in 2006, the Act cannot be said to have a retroactive effect. The offence under S. 26 did not exist before 2003 and it cannot have retroactive effect.

If the Applicant has in mind possible charges that may arise after the compliance with the said notice which seek an inventory of all the Applicants property from 1991-2002, S. 26 of the Act being an investigatory one does not guarantee that one will be charged with an offence as a result of compliance.

To the contrary, the furnishing of the property and explaining how it was acquired might even help exonerate one from suspicion or the charges he may otherwise have faced or he may be called as witness. Further to the above, the Applicant cannot raise the issue of retroactivity because prior to the enactment of Act 3 of 2003 there was the Prevention of Corruption Act, 1991 which was repealed upon commencement of the 2003 Act and the 2003 preserved corruption offences committed before 2003. S. 71 (3) of the 2003 Act prohibits retrospective Application of the Act so that no person can be charged with an offence committed before 2003 which was not an offence in the 1991 Act. S. 77 (4) of the Constitution also offers protection against retrospective application of any law and the Applicant has not shown that S. 26 of Anti Corruption Act has any retrospective effect.

In his reply to the notice of 12th July, 2006, the Applicant acknowledged that they were awaiting the interpretation of S. 26 in the Murungaru Case. The Constitutional Court rendered its decision on 1st December, 2006 and inter alia, held that S. 26, 27 and 28 of the Anti-Corruption & Economic Crimes Act are investigatory provisions and do not change or reverse the burden of proof in criminal cases; An investigation by the Director of Kenya Anti- Corruption or his commissioner under Section 26, 27 and 28 of the Act is constitutionally permissible pursuant to Section 72 (1) (e). Section 77 (2) (a) (h) and indeed S. 77 (7) of the Constitution are applicable only when a person has been charged with a criminal offence. The court therefore held that S. 26, 27 and 28 of the Anti Corruption and Economic Crimes Act 2003 were not consistent with Section 70 (a) and (c), 76, 77 & 82 of the Constitution. Mr. Kiplenge however argued that the Murungaru Case is different from the instant case because in that case the Applicant had not been charged but in this case the Applicant has already been charged and if he complies, he will be prejudiced. Firstly S. 26 being an investigatory Section, there is no evidence that if investigations are carried out, they will in respect of the charges that the Applicant faces in the Magistrate's Court, High Court or Court of Appeal.

Besides the cases before the Magistrate's Court are not yet heard. The Attorney General's office has the right to bring more charges or apply for amendment of the charges if necessary. But as I have

observed earlier compliance with S. 26 does not mean that we will be charged but it may in fact help exonerate the Applicant in the long run or he may be treated as a witness. The constitutionality of S. 26 having been settled by the Constitutional Court. This court cannot change that finding. The Applicant has flagrantly disobeyed the law by not complying with the notice issues under S. 26 and if this court were to stay those proceedings it would be telling the Applicant “you can disobey the law, the court will protect you”. I agree the finding in the LA ROCHE CASE supra Pg. 350 'It is in the public interest that the law should be obeyed. It is in the public interest that resistance to it should be suppressed. Unless some very good reason could be shown, a court would, therefore, accede to an application to enforce the law and to enforce it in the way in which Parliament had prescribed as the appropriate way.'

Section 26 ACEC Act prescribes is the law, until that law amended or repealed it must be obeyed. Whether or not that section contravened the Applicant's rights or it was not good law it was up to the Applicant to obey and challenge it once served with the notice as he had ample time to do so. The Applicant failed to comply and has been charged, for failure to comply. The law should be left to take its course.” (See Wendoh J. in JOB KIPKEMEI KILACH –VS. KENYA ANTI-CORRUPTION COMMISSION AND TWO OTHERS [2008] e KLR, Supra).”

The disposition of the foregoing holding was to the effect that the Petitioner’s petition had been declined and consequently the Criminal Case against the Petitioner at Makadara Law Courts was to proceed to its logical conclusion. However the learned Magistrate, Mrs. Wachira C.M was transferred to Embu Law Courts and by virtue of her being a gazetted Anti-Corruption Court, she apparently moved with the file. As a result, the Petitioner raised an objection in the high Court at Nairobi, vide Criminal Revision No. 314 of 2010 whereby the learned Judge Ombija J. made the following orders:-

“...The file ACC No. 21/2007 be transferred from Embu Law Courts to the Special Magistrate, Anti-Corruption Courts in Eldoret;

The trial of the accused to start de novo before the Special Magistrates, Anti-Corruption Courts at Eldoret ...” (See Annexure marked JJK5, A copy of the Court Order, Order Nos (b) and (c) attached on the Reply to Replying Affidavit).

Following the above order, the Petitioner’s case was transferred from Makadara Law Courts to Eldoret Law Courts. The matter therein started de novo as ordered by the learned Judge Ombija J. It was not until when the Petitioner was put on defence that he filed this Petition.

It is apparent from the prayers sought in this Petition that the Petitioner is challenging the constitutionality of the Notice issued to him – See prayer (b) *“the further trial of the Petitioner based on the said notice be declared unconstitutional and oppressive”*. And specifically prayer (a) states *“The said notice be declared incompetent and unconstitutional.”*

The elaborate ruling of my sister Hon. Justice R. Wendoh comprehensively addressed all the issues the Petitioner had sought in this Petition. She addressed at length, the constitutionality of the said notice (that is subject of this Petition) and its application vis-a-vis the cited sections of the Old Constitution and the Murungaru Case.

It is important that I duplicate once more the specific excerpts that are relevant in this respect. The first is that she noted;

“One of the reasons that the Applicant objected to the notice that it has a retrospective effect, that Act 3 of 2003 which enacted the Anti- Corruption and Economic Crimes Act, was amended in 2003. In my view that Applicant's argument is misplaced because what is in issue here is the notice issued on 12th July, 2006 and the Applicant has been charged in the Makadara Case for failure to comply with that notice. The offence that the Applicant faces was created in Act 3 of 2003. The Applicant having been charged with flouting the provisions of that Act in 2006, the Act cannot be said to have a retroactive effect. The offence under S. 26 did not exist before 2003 and it cannot have a retroactive

effect.”

And in dismissing the Petitioner's contention that the notice was unconstitutional, the court said as follows:-

“If the Applicant has in mind possible charges that may arise after the compliance with the said notice which seeks an inventory of all the Applicants property from 1991-2002, S. 26 of the Act being an investigatory one does not guarantee that one will be charged with an offence as a result of the compliance. To the contrary, the furnishing of the property and explaining how it was acquired might even help exonerate one from suspicion or the charges he may otherwise have faced or he may be called as witness”

“The constitutionality of S. 26 having been settled by the Constitutional Court, this court cannot change that finding. The Applicant has flagrantly disobeyed the law by not complying with the notice under S. 26 and if this court were to stay the lower court's proceedings it would be telling the Applicant “You can disobey the law, the court will protect you.”

Ultimately, this is a clear case of Res-Judicata. If I were to again comprehensively canvass the same issues as my sister Hon. Justice K. Wendoh did, I would be setting as an appellate court on her findings.

Suffice it to say, if the Petitioner was dissatisfied with the findings of the court in the Petition No. 1076/2007, the redress lay elsewhere, in a more superior court but not to turn around, only to file for similar orders in a court of concurrent jurisdiction but couched in different wordings.

It has now dawned on him that he has no alternative but to proceed with the criminal case. It is now, only too late in the day, after being put on his defence, that he has resorted to this court, albeit improperly. His action is obviously suspect, and furthermore, an act orchestrated at delaying the disposal of the pending criminal case.

But having said so, it is important that I get into the nitty gritty relevance of the rule of Res Judicata in this Petition.

Petition No. 1076 of 2007 raised the issues of the propriety of the said notice which was comprehensively addressed. The parties in the said Petition were similar save for the 3rd Respondent therein, being the Chief Magistrate Makadara Law Courts. The 1st Respondent therein was KACC, the Predecessor of EACC which the 2nd Respondent herein.

To also demonstrate that the constitutionality of S. 26 of ACEC Act was adequately canvassed, the court said:-

“Section 26 of ACEC Act prescribes the law, until that law is amended or repealed it must be obeyed. Whether or not Section 26 of the ACEC Act contravened the Applicant's rights or it is not good law, it is upto the Applicant to obey and could challenge it once served with the notice as he had ample time to do so. The Applicant failed to comply and has been charged, for failure to comply. The law should be left to take its course.”

Suffice it to say, it is also important to note here that the ruling in Petition No. 1076/2007 was delivered after the Judgment in the Murungaru Case. And that is why the former court noted that the applicability of S. 26 of ACEA Act had been adequately canvassed in the Murungaru Case.

In the case of **NICHOLAS NJERU -VS- ATTORNEY GENERAL & 8 OTHERS (2013) e KLR** the learned Judges of the Court of Appeal, Alnashir Visram, M. K. Koome & J. O. Otieno while referring to doctrine of Res-Judicata as envisaged in S. 7 of the Civil Procedure Act said:-

“This doctrine has been applied in a number of cases including; Reference No. 1 of 2007, JAMES KATABAZI & 21 OTHERS -VS- THE ATTORNEY GENERAL OF THE REPUBLIC OF

UGANDA EACJ where the court stated that for the doctrine to apply;

*** The matter must be directly and substantially in issue in the two suits.**

*** The parties must be the same or parties under whom any of their claim, litigating under the same title; and**

*** The matter must have been finally decided in the previous suit (see UHURU HIGHWAY DEVELOPMENT LIMITED -VS- CENTRAL BANK & 2 OTHERS – CIVIL APPEAL NO. 3 OF 1996.)”**

In **KOLABA ENTERPRISES LIMITED -VS- SHAN SHADIN HUSSEIN VARVANI & ANOTHER (2014) e KLR**, Gikonyo, J. said:-

“.....the test to determine whether a matter is res judicata was stated in BERNARD MUGO NDEGWA -VS- JAMES NDERITU GITHA& 2 OTHERS (2010) @ KLR, and the Applicant must show that;

- 1. The matter in issue is identical in both suits.**
- 2. The parties in the suit are the same.**
- 3. Sameness of the title/claim.**
- 4. Concurrence of jurisdiction.**
- 5. Finality of the previous decision.”**

There are three (3) cardinal aspects of the doctrine of res-judicata that are similar in the instant case and Petition No. 1076 of 2007. That is, (a) the matters litigated are directly and substantially the same, (b) the parties are similar save for the distinctions I have outlined and (c) the issue for determination herein has been decided in Petition No. 1076 of 2007.

May I add that the importance of the doctrine of Res Judicata is to bring litigation to an end. A party cannot be taken to court twice or more times over the same cause of action. This is what the Petitioner herein has failed to appreciate. This court must therefore be aggressive in preventing the abuse of court process aimed at derailing the cause of justice. It does not matter in what decorative words the petition has been couched under. The fact is, it has duplicated the same cause of action, and canvassed the same issues, as in Petition No. 1076 of 2007. In no uncertain terms, I conclude that this Petition is res judicata, I am therefore barred by this noble doctrine from entertaining the Petition and canvassing its merits or otherwise.

Finally, I concur with the 3rd Respondent that by dint of Article 156 of the Constitution, the 3rd Respondent has no prosecutorial powers. The Attorney General was not therefore obligated to respond to prayers (b) and (c) of the Petition.

In the end, this Petition is dismissed in its entirety with costs to the Respondents. The Petitioner herein is directed to appear before the Anti-Corruption Court, Eldoret on Monday, 23rd June, 2014 for purposes of fixing a date for defence hearing of the criminal trial. This order shall be served upon the Magistrate gazetted to do the Anti-Corruption case for action.

DATED and DELIVERED at ELDORET this 18th day of June, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Cheserem holding brief for Chebii for the Petitioner/Applicant

Mr. Mulati for the 1st Respondent

Mrs. Natome for the 2nd Respondent

Mrs. Natome holding brief for the Attorney General for the 3rd Respondent