



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 459 of 2006

BETWEEN

JOSHUA C. KULEI.....PETITIONER

AND

KENYA ANTI CORRUPTION COMMISSION1ST RESPONDENT

HON ATTORNEY GENERAL/DIRECTOR OF PUBLIC PROSECUTION

(Being sued on his own behalf and on behalf of

THE COMMISSIONER OF POLICE.....2ND RESPONDENT

JUDGMENT

Introduction and background

1. The fact that this case has taken eight years to determine is a discredit to our judicial system.
2. This case concerns the constitutionality of a Notice dated 12th July 2006 issued by the 1st respondent (“the Commission”) to the petitioner seeking certain information under **section 26** of the *Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003)*.
3. This matter was commenced by the petition filed on 17th August 2006. After Justice Nyamu heard an application for conservatory orders, he referred the matter to the Chief Justice for the empanelling of a three judge bench and on 9th March 2007, the Chief Justice nominated Justices Nyamu, Wendoh and Emukule to hear the matter.
4. During the hearing of the petition, Justice Nyamu was promoted to the Court of Appeal and the matter referred back to the Chief Justice to reconstitute the bench. On 7th December 2009, the Chief Justice nominated Justices Gacheche, Wendo and Dulu to hear the matter. Before the matter could proceed, Justice Gacheche was transferred to Kericho and the matter stayed in abeyance until March 2012.
5. On 26th March 2012, I directed the parties to take steps to finalise the matter. I took the position that it was not necessary to refer the matter back to the Chief Justice in view of the practice direction issued in the case of *Stanley Waweru Kariuki v Attorney General Nairobi Petition No. 137 of 2003 (Unreported)*. The parties duly acceded to the directions and I consequently heard the matter (see also

Mumbi Ngugi J in *Intoil Ltd v PS, Ministry of Energy and Others Nairobi Petition No. 156 of 2006* [2012] eKLR).

6. This matter was commenced before the promulgation of the Constitution hence the matter is governed by the former Constitution. Although the petitioner's submissions referred to the present Constitution, it is now well established that the Constitution is not retrospective (see *Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited and 2 Others, SCK Constitutional Application 2 of 2011* [2012]eKLR). Unless otherwise stated, reference to the Constitution in this judgment means the former Constitution.

7. **Article 79** of the Constitution, 2010 empowered Parliament to, “enact legislation to establish an independent ethics and anti-corruption commission, which shall have the statues and powers of a commission under Chapter Fifteen for purposes of ensuring compliance with and enforcement of the provisions of this Chapter.” The Kenya Anti-Corruption Authority established under **section 6** of the *Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003)* (“ACECA”) was replaced by the Ethics and Anti-Corruption Commission established by the *Ethics and Anti-Corruption Commission Act (Act No. 2011)* (“the EACCA”). **Part V** of the *EACCA* particularly **section 33** contains transitional provisions which saves all proceedings commenced under the previous Act and it reads as follows:

(a) any orders or notices made or issued by the Kenya Anti-Corruption Commission shall be deemed to have been made or issued under this Act;

(b) any function transaction, investigation, prosecution carried out by or on behalf of the Kenya Anti-Corruption Commission, civil proceedings or any other legal or other process in respect of any matter carried out under the Anti-Corruption and Economic Crimes Act, 2003 or any other law, before the commencement of this Act, shall be deemed to have been carried out under this Act.

(c) Save as otherwise provided for in this Act any undertaking or responsibility falling on the Kenya Anti-Corruption Advisory Board shall be assumed by the Commission.

The Petitioner's Case

8. The petitioner's case stems from a Notice dated 12th July 2006, titled “Notice to Furnish a Statement of Property pursuant to section 26 of the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003)” (“the Notice”), which stated as follows;

Joshua Kulei

Karen
NAIROBI

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 **JOSHUA KULEI** is reasonably suspected of Corruption and Economic Crime, **NOWTHEREFORE TAKE NOTICE** that you are required to furnish 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 punishable with a fine of imprisonment for a term not exceeding three years, or both such fine and imprisonment.

(Signed)

Justice Aaron G Ringera

DIRECTOR/CHIEF EXECUTIVE

6. The petitioner complains he is being forced under threat of penal consequences to comply with the provisions of **section 26** of **ACECA** retroactively and/or retrospectively in contravention of **section 77(1) (4) and (8)** of the Constitution because the Act came into force on 20th May 2003 while the petitioner was being asked furnish information dating back to 1991. The petitioner's submission is that any alleged or suspected acts of corruption in the respect of property acquired between the year 1991 and 2002 fell within the ambit of the repealed ***Prevention of Corruption Act (Chapter 65 of the Laws of Kenya)*** and not the **ACECA**.

7. The petitioner complains that the said Notice is an intrusion to the privacy of the petitioner, inhumane demeaning and amounts to degrading treatment in contravention of **section 74(1)** of the Constitution.

8. The petitioner's also contends that the Notice read with **section 30** of **ACECA** contravenes and breaches his inherent, inalienable and fundamental legal and constitutional against self-incrimination and the right not to answer any questions that might produce evidence against him and is in contravention of **section 77(2)** of the Constitution. That the Notice also contravenes **section 77(7)** of the Constitution in as far as it purports to compel the petitioner to give evidence against himself or give evidence to the Commission so that evidence so obtained can be used against him contrary to the law including the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** and the **Judges Rules** made there under and contravenes **sections 70(a) and (c), 67(1), 77(2)a, 77(7)** of the Constitution.

9. The petitioner avers that by signing the impugned notice on behalf of the Commission, Justice Aaron G. Ringera, the Director/Chief Executive at the material time, contravened **section 61(6)** of the Constitution by creating the impression that the Notice was given by a judge of the High Court contrary to the rule of law and the principle of separation of powers thereby rendering the said Notice unconstitutional and of no legal effect.

10. The petitioner also took issue with the statement that the he was suspected of "*Corruption and Economic Crimes*" which did not exist between 1991 and 2003 arguing that the Commission, headed by a former Judge, was acting as an accuser and a judge contrary to **section 61(6)** of the Constitution. The Notice, by stating that the petitioner was reasonably suspected of "*corruption and economic crimes,*" and also requiring him to provide evidence against himself was contrary to the provisions of the Constitution, the law and rules of criminal procedure and evidence in an adversarial common law system of the law.

11. The petitioner submitted that he stands condemned by a former High Court Judge without due process of law for alleged acts or omissions which did not and could not constitute an offence at the material time. He argues that in the said Notice the accuser has become the Judge thereby denying him the opportunity to adequately defend himself therefore denying him a fair and impartial trial. The petitioner argued that the Notice contravened **section 77(2)** of the Constitution and **Articles 3 to 7 and 9(1)** of the ***African Charter on Human and Peoples Rights (The Banjul Charter)*** and **Article 11** of the ***United Nations Universal Declaration of Human Rights*** in that it did not afford him equality before the law and equal

protection of the law.

12. The petitioner avers that **section 23** of the **ACECA** which gives the Commission and its officers police powers under the **Police Act (Chapter 84 of the Laws of Kenya)** is an infringement of the petitioner's right to a fair and impartial investigation is contrary to **section 26** of the Constitution.

13. The petitioner submits that at no time has the Commission notified him of the particulars and the grounds of its "reasonable suspicion" of the crimes of corruption or economic crime and the failure to do so in the said Notice or otherwise is not an act as may be authorised by law and contravenes the petitioner's rights under **section 72(1)** of the Constitution.

14. The petitioner alleges that the giving the Notice issued under **section 26** of the **ACECA** is unconstitutional and a contravention or likely contravention of **sections 70(a) and (c), 72(1), (74), 75, 76, 77(1), (4), (7) and (8)** of the Constitution.

15. To support his case, the petitioner relied on the case of **Christopher Ndarathi Murungaru v KACC and the Attorney General Nairobi HC Misc. Civil Appl. No. 54 of 2006 [2006] eKLR**, where the Court quashed a similar notice issued to the applicant on the grounds, inter alia, of vagueness. The petitioner argues that the quashing of the notice means that the Commission cannot mount a prosecution with any prospect of success as the notice fails the test of specificity. The petitioner also relied on the decision of the Court of Appeal in **Christopher Ndarathi Murungaru v KACC and the Attorney General CA Civil Application No. NAI 43 of 2006 (Unreported)** where the Court granted an order of stay of enforcement of the Notice and criminal proceeding pending hearing of an intended appeal from the decision of Justice Nyamu declining an order of stay pending hearing of the substantive application.

16. The petitioner seeks for the following reliefs;

(1)A declaration that section 26 and section 30 and section 23 of the Anti Corruption and Economic Crimes Act 2003, (Act No. 3 of 2003) are ultra vires the Constitution of Kenya and therefore null and void for all purposes.

(2)An order directing the 1st and 2nd respondents to forthwith stop contravening and or violating the fundamental rights of the petitioner in the discharge of its purported mandate under the said Act and permanently stay and or quash the implementation and operation of the said Notice dated 12th July 2006 issued by the 1st respondent.

(3)A declaration that the 1st respondent's Notice that the petitioner furnishes a list of all the petitioner's property and a mode of acquisition amounts to an intrusion into the petitioner's privacy which is not reasonably justifiable in a democratic society.

(4)A declaration that the Anti-Corruption and Economic Crimes Act 2003, (Act No. 3 of 2003) does not and cannot be applied to any acts or omissions of any citizen prior to 2nd May 2003.

(5)A declaration that the 1st respondent's said Notice that the petitioner furnishes a list of all the petitioner's property and mode of acquisition is an inhumane, a demeaning and degrading treatment in contravention of Section 74(1) of the Constitution of Kenya and inconsistent with applicable international treaties.

(6)A declaration that the inherent, inalienable, fundamental, legal and constitutional right against self-incrimination protected by the Constitution applies at all times prior to investigation, during investigations, prior to arraignment in court and during the trial and cannot be eroded by section 26 and 30 of the Anti Corruption and Economic Crimes Act 2003. (Act No. 3 of 2003).

(7)A declaration that the 1st Respondent's Notice to 12th July 2006 contravenes section 61(6) of the Constitution and is therefore null and void.

(8) Such orders as to costs as warrant a constitutional matter.

(9) Any other orders which this Honourable Court shall deem fit.

17. The petitioner's case was also supported by the written submissions dated 17th October 2006 and supplemented by oral submissions made by Mr Katwa.

Respondents' Case

18. The petition is opposed by the 1st respondent, through the affidavit of Ms Fatuma Sichale, the Deputy Director in charge of Legal Services at the material time. In addition, skeleton argument dated 13th October 2006 were filed and supplemented by the oral submissions of Ms Makokha.

19. Ms Sichale deponed that the petitioner's argument that the Commission ought not enforce the Notice under **section 26** of the **ACECA** on the basis of the pending appeal in **Murungaru's case** was erroneous. The Commission argued that **CA Civil Application No. NAI 43 of 2006** did not declare **section 26** of **ACECA** unconstitutional and that the appeal was against the ruling of Justice Nyamu in **High Court Misc. Civil Appl. No. 54 of 2006(OS)** rejecting a stay of proceeding pending hearing and determination of the application and the Court of Appeal was merely exercising its jurisdiction to grant orders of stay pending appeal. Ms Sichale further deponed that the ruling of the Court of Appeal did not in any way stay the operations of the Commission and in particular the exercise of its statutory mandate under **section 26** of **ACECA**.

20. It is the Commission's position that the petitioner cannot invoke the principle against self-incrimination as that this could only be raised during a trial and not during lawful investigations. Ms Sichale also averred that **section 77(4)** of the Constitution does not prohibit investigation of offences that, at the time they were committed constituted offences known in law. Furthermore, she submitted, individual rights and freedoms under **Chapter V** of the Constitution are subject to the rights and freedoms of others and the public interest.

21. Ms Makhoha, counsel for the Commission submitted that **Murungaru's Case** relied on by the petitioner differed from the present case as the Notice was different; it requested specific information on properties within a specific time limit in which properties were acquired. Furthermore, counsel added, the petitioner had not been charged in court thus **section 77** was not applicable.

22. Counsel supported the decision in **Murungaru's Case** where the Court held that **sections 26, 27** and **30** of **ACECA** were not unconstitutional. Relying on the case of **R v El Mann [1969] E.A. 420**, counsel argued that **section 77(7)** of the Constitution was not applicable as the petitioner had not been charged with any criminal offence. Ms Makhoha further submitted that the presumption of innocence still applied to the petitioner but there may be circumstances where evidential burdens is shifted and this is one of the circumstances.

23. Counsel urged the court to dismiss the petition stating that defectiveness of the notice did not amount to unconstitutionality. For this proposition, counsel relied on the case of **Matiba v Attorney General, High Court Misc. Appl. No. 666 of 1990 (Unreported)**.

24. The 2nd respondent has also opposed the petition through the affidavit of Vincent Macharia Ndohho Wohoro, a Senior Principal State Counsel, sworn on 1st February 2007. The 2nd respondent also relied on skeleton arguments dated 31st January 2007.

25. According to the deposition, the Notice was issued in accordance with the law and that there was nothing improper, illegal or oppressive in efforts to require the applicant to comply with the notice as it was based on Commission reasonably suspecting the applicant of corruption and economic crimes. Mr Wohoro contended that the Commission was simply performing its role and it was in the public interest that it investigates corruption, economic crimes and related offences and ensure culprits are well dealt

with in accordance with the law.

26. Mr Wohoro denied the petitioner's claim that the notice in any way amounted to inhumane, demeaning and degrading treatment within the meaning of **section 74(1)** of the Constitution stating that it was the duty of every Kenyan to co-operate with investigative agencies such as the police officers or officers of Commission and the performance of this duty did not therefore constitute self-investigation/incrimination.

27. Mr Moimbo and Mr Oyieko counsel representing the 2nd respondent also opposed to the petition and adopted the submissions made by Ms Makhoha. In urging the court to dismiss the petition, Mr Oyieko urged that the **Murungaru Case** stated that the Notice did not take away the right to self-incrimination but only dealt with the nature and content of the Notice.

Determination

28. The issues raised in this matter were raised and considered in the case of **Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and Another (Supra)**. In an exhaustive decision rendered by Justices Lesiit, Wendoh and Emukule, the Court declined to declare and hold **sections 26, 28 and 58** of the **Anti-Corruption and Economic Crimes Act** unconstitutional. The Court summarized its findings as follows;

(i) All fundamental rights whether described as inherent, inalienable, universal, fundamental, legal and Constitutional whether to be presumed innocent or to life itself are subject to that qualification, that such rights are subject to such limitations that are 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.

(ii) Sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act are investigatory provisions and do not change or reverse the burden of proof, in criminal cases. The burden of proof rests on the prosecution always not on the shoulders of the investigators. An investigation by the Director of the Kenya Anti-Corruption or his Commission under Sections 26, 27 and 28 of the Act is constitutionally permissible pursuant to said section 72 (1) (e). Section 77(2)(a)(h) and indeed 77 (7) of the Constitution are applicable only when a person has been charged with a criminal offence.

(iii) Under the social contract and indeed under the limitations prescribed under Section 70 of the Constitution that the right not only to the Protection of the Privacy of home and other property and deprivation of property without compensation, but to dear life itself, liberty or security of the person and the protection of the law and freedom of conscience, of expression and of assembly and association, the statutory requirement under section 26 in respect of a person reasonably suspected of corruption under sections 27 and in respect of associates), and section 28 (in respect of records books and documents), are a necessary and constitutionally justifiable intrusion of the privacy of home and the property in the interest of the rights and freedoms of others and the public interest.

(iv) The First Defendants statutory requirement that the Plaintiff do furnish a list of all the Plaintiffs property and mode of acquisition is neither inhumane, demeaning nor degrading treatment nor in contravention of Section 74 (1) of the Constitution of Kenya which provisions prohibit torture degrading or inhuman treatment).

(v) Sections 26 (1), 27 and 28 of the Anti-Corruption and Economic Crimes Act are not inconsistent with the provisions of Section 70 (a), 70 (c) 77(2) (a), 76 (1), 77(7) or 82 of the Constitution of Kenya.

(vi) Clearly under Section 77 (7) of the Constitution the Constitutional right against self-incrimination is only available where a person has been charged with a criminal offence. It is not under the clear language of our Constitution available during investigations or prior to being charged.

(viii) In matters of investigation each individual case is in our opinion treated in accordance with its peculiarity giving rise to reasonable suspicion on the part of the Director of the Commission, and every

Kenyan or resident or other person suspected of corruption and economic crime is subject to investigation without regard to his race, tribe, place of origin or residence or other local connection, political opinion, colour, creed or sex. The Plaintiff herein did not adduce any evidence or particulars to show that persons of such description (race, tribe, etc) are subjected to disabilities or restrictions to which persons of another description are not made subject or accorded privileges or advantages which are not accorded to persons of another description. Gazette Notice No. 8587 of 19th October, 2006 showed no less than fifty cases investigated or under investigation by the Commission for the quarter covering 1st July, 2006 to 30th September, 2006. We find and hold that the Plaintiff has not been discriminated in any manner under Section 82 (1) and (2) of the Constitution of Kenya.

(ix) The fundamental right to life, liberty, security of the person and the protection of the law accorded under section 70 (a) of the Constitution is at the same time limited to the extent that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. What the Constitution has itself limited cannot be unconstitutional or be regarded to be contrary to the rule of law the public interest or public policy or public decency. The investigations by the First Defendant are in accordance with the law, are neither arbitrary, high handed nor a witch hunt or for extraneous purposes and are not to gain political mileage and are intended to uphold and enforce the criminal law in so far as Corruption and economic crime.

29. The same arguments have now been proffered by the petitioners and I do not think there is any reason to depart from what was rendered by the High Court although I am entitled to do so. It is also unnecessary to embark on this course in view of the fact that the Constitution has been repealed and that the law under which the notice was issue has been repealed. I will deal with this aspect later in my judgment.

30. The only issue left for determination is whether the Notice issued to the petitioner should be quashed. In the **Murungaru Case**, the Court quashed the notice on the following; **“It [the Notice] is incompetent because the notice under Section 26 of the Act is specific to the person reasonably suspected of corruption and economic crime. It is incompetent because it is not specific of the time when suspected acts of corruption or economic crimes were committed. It is also incompetent because it is vague. To what property or assets does it refer to? Chickens or Chicken farm?, a horse or horse stud? Fundamentally the notice should specify the time frame to which alleged acts of corruption and economic crimes relate. For instance the notice should in the case of this Plaintiff, specify that the information required is for the period he was elected an Hon. Member of Parliament or appointment to Cabinet, and not his private life before he came to power. Arising from this view of the said notice, we hasten to find and hold that the same cannot therefore be a proper foundation of charges against the Plaintiff under Section 26 (2) of the Corruption and Economic Crimes Act.”**

31. A perusal of the notice, which I have set out in paragraph 7 above, shows that although the notice complies with the specificity complained of in the **Murungaru case** to the extent that it sets out the time frame of the information required from the petitioner, it does not set out the basis or grounds upon which the person is reasonably suspected of corruption and economic crimes. The notice is not cured by merely asserting that the Commission believes that the petitioner is reasonably suspected of corruptions and economic crimes without outlining the grounds thereof.

31. During the pendency of this suit, the provisions under which the notice were amended. **Section 26** of **ACECA** prior to the 2007 amendment read as follows;

26.(1) *The Commission may, by notice in writing, require a person reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement –*

(a) *enumerating the suspected person’s property and the times at which it was acquired and*

(b) *stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner and what consideration, if any, was given for the property.*

(2) A person who neglects or fails to comply with a requirement under this section is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.”

32. This section has since been amended to read as follows;

26. (1) If, in the course of investigation into any offence, the Director is satisfied that it could assist or expedite such investigation, the Director may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Director and with regard to such specified property—

(a) enumerating the suspected person’s property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

(2) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(3) The powers of the Commission under this section may be exercised only by the Director.”

33. The amendment effected material changes to **section 26**. First, before the notice is issued there must be an ongoing investigation and the person targeted must be reasonably suspected of corruption or economic crimes. It is the basis of such suspicion that must be set out in the notice. Second, the Director must specify the property targeted for in investigation and in respect of which information is sought. This section required that the Director point to or identify a specific property. The amendment to **section 26** prevents the Commission from proceeding on a fishing expedition without a reasonable basis pointing to specific property implicated in suspected corruption or economic crime.

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 **ACECA**. 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.

Disposition

35. In light of what I have stated, I allow the petition to the extent that I quash the Notice dated 12th July 2006 issued to the petitioner by the Kenya Anti-Corruption Authority.

36. Each party shall bear their own costs.

DATED and DELIVERED at NAIROBI this 25th day of March 2013

D.S. MAJANJA

JUDGE

Mr Katwa instructed by Katwa and Kemboi Advocates for the petitioner.

Ms Makokha, Advocate, instructed by the Ethics and Anti-Corruption Commission.

Mr Moimbo, Litigation Counsel, instructed by the State Law Office for the Attorney General.

Mr Oyieko, Litigation Counsel, instructed by the Directorate of Public Prosecutions.