



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**Constitutional Petition 54 of 2012**

**CONSTITUTION/ETHIC AND ANTI-CORRUPTION COMMISSION ACT**

- Gicheru Rules
- Can EACC be sued in their own right
- What information should a suspect obtain?

**JOTHAM KILIMO CHEA.....APPLICANT**

**-VERSUS-**

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

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

**JUDGMENT**

The petitioner filed his petition and simultaneously filed a chamber summons dated 21<sup>st</sup> May 2012. The petitioner by that chamber summons sought preservations of the status quo or in the alternative an injunction directed at the 2<sup>nd</sup> respondent restraining that respondent from arresting, or charging the petitioner of criminal offences which the petitioner claimed to have learnt through the press. When the application came up for hearing on 11<sup>th</sup> June 2012, parties, that is, the petitioner and the 2<sup>nd</sup> respondent agreed to proceed with the hearing of the main petition. The petitioner seeks the following prayers in the petition:

***“(a) A declaration that neither the 1<sup>st</sup> nor the 2<sup>nd</sup> respondent has any right under the Constitution of Kenya 2010, to arbitrarily cause the arrest and charging in court of the Applicant in contravention of his fundamental rights as spelt out in Article 35(1) and (2) of the Constitution, and in particular***

*without first carrying out thorough and comprehensive investigations on any matter affecting any citizen including the Applicant, at which he has been given an opportunity to explain himself.*

*(b) A preservative order/injunction directed against the 2<sup>nd</sup> respondent, barring the said respondent from either arresting and or charging, or causing the Applicant to be arrested and charged, for the yet to be disclosed charges/allegations leveled against the Applicant, either in connection with the allegations in The Star Newspaper or any other matters in connection therewith, until further orders of this court.*

*(c) An order that in the event the 2<sup>nd</sup> Respondent believes or has reason to believe that it ought to carry out any investigations against or in respect of the Applicant, then it, the 2<sup>nd</sup> respondent, do follow the due process of the law, within the safeguards contained in the Constitution of Kenya, 2010.”*

The petitioner's main complaint is that he is likely to be arraigned in court over matters he is unaware of which he says would be in breach of section 29 of The Ethics And Anti-Corruption Commission Act No. 22 of 2011 and also in breach of Article 35 of the Constitution of Kenya 2010. He also stated in his petition that the 2<sup>nd</sup> respondent is required, in having him arraigned before court, to follow the law. The petitioner is a civil servant working in the ministry of lands as an assistant commissioner of lands. He deponed in his affidavit that on 17<sup>th</sup> May, 2012 at 7.30 p.m. he received a call from the senior deputy commissioner of lands who wanted to know his whereabouts, because he had been informed that the petitioner had been arrested. Later that night he received another call from the commissioner of lands who made the same enquiry from him. The petitioner stated that he had no idea of the source of that information that it was not until 18<sup>th</sup> May 2012, he read in the star newspaper his name being mentioned in reference to a criminal case. He quoted from that press coverage as follows:

***“Yesterday the prosecution charged Mkungu alone while the rest who also included the principal lands officer Jotham Kilimo (the petitioner) and lands registrar Mary Ndale may be charged together with Zonga on Monday.”***

After reading that newspaper report the petitioner stated that he recollected that he had previously being questioned, sometimes in the year 2010, by two officers of the 2<sup>nd</sup> respondent regarding a letter of allotment of land. He was questioned about the signature on that letter, which he denied was his signature. He was informed by those officers that he was not the subject of their investigation. He deponed that it is as a result of that assurance that he was surprised by the newspaper report that he was due to be arraigned before a court. He stated that he was unaware of any investigations carried out in relation to him on that matter since no such investigations was brought to his notice. It is for that reason that he alleged that the 2<sup>nd</sup> respondent had breached section 29 of Act No. 22 of 2011 and Article 35 of the Constitution; in so far as it relates to right to information.

Learned counsel for the petitioner submitted that the matter had been brought under Article 22 of the Constitution. That is the Article which provides that every person has a right to institute court proceedings where a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. In that regard, it was argued that the petitioner's right to information were violated when he was left to hear from the grapevine that he was to be arraigned in court. In the opinion of the counsel for the petitioner, the 2<sup>nd</sup> respondent was wrong to have obtained information that led to the investigation relating to the criminal matter from a unanimous person. He also faulted the 2<sup>nd</sup> respondent's replying affidavit for failing to attach the statement obtained from the petitioner when he was questioned by 2<sup>nd</sup> respondent officers. He submitted that such information should have been brought before the court because the petitioner had come to court for protection of his Constitutional rights. The petitioner relied on four authorities. ***R -V- General Council of the Bar Ex parte Percival[1990] 3AII ER 137.*** The court in that case dealt with, amongst others, an issue whether the decision to prosecute or not was reviewable by the court. The matter related to prosecution of a barrister before the Professional Conduct Committee of the Bar Council. The court held in that case that the acts and omissions of the professionals conduct committee were susceptible to judicial review because as a body to whom the bar council prosecuting

functions had been delegated, the committee was required to carry out those functions in accordance with its own rules and was subject to judicial review if it did not. The court in finding that the exercise of discretion to prosecute was amenable to judicial review stated:

***“Each case must be considered with due regard to the powers/functions and procedures of the body concerned and the manner in which it had dealt (or not dealt) with particular complaint or application.”***

**Holgate Mohammed –V- Duke**[1984] 1 AII A.R. 105A; the court found that a police constable had not taken into consideration an irrelevant matter in deciding to arrest a suspect and therefore found that he had not exercised his discretion ultra vires.

**Associated Provincial Picture Houses -v- Wednesbury Corporation**[1948] 1 K.B 223. The petitioner relied on the following passage to show how the 2<sup>nd</sup> respondent is expected under the law to exercise discretion properly:

***“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority, Warrington L.J. in Short v. Poole Corporation (I) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”***

In the case **R -v- chief Constable of Kent County Constabulary “Exparte L” (a minor)** [1983] 1 AII. E.R. 756; the court found that the exercise of discretion is reviewable.

The 6<sup>th</sup> Schedule section 19 of the constitution makes provision for the use of the previous rules in the repealed constitution that is Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (Gicheru Rules). Those rules are to be used until the chief Justice formulates rules as provided in article 22 of the constitution.

The petitioner relied on Rules 11 and 12 of the Gicheru Rules. Rule 11 provides a party the right to approach the High Court rather than approaching it through a reference from the subordinate court as provided in rules 7 to 10.

The 2<sup>nd</sup> respondent in response to the petition relied on a replying affidavit sworn by Mutembei Nyaga an investigator with the 2<sup>nd</sup> respondent. His duties entail investigating all allegations and complaints received by the Ethic Anti-corruption Commission (EACC) and making recommendations on the investigations to the director of Public Prosecutions (D.P.P). On 8<sup>th</sup> of July, 2010, EACC received anonymous report that certain persons had obtained documents of title relating to title Kwale/Diani Beach/151 in collusion with land officers with intention to sell them to unsuspecting members of the public. The petitioner was one person who was under suspicion of being involved in obtaining those documents. Following EACC investigations, the 2<sup>nd</sup> respondent obtained a statement from the petitioner on or about 24<sup>th</sup> August 2010. EACC was satisfied that the petitioner was involved in the transaction and it therefore recommended to the D.P.P that he be prosecuted pursuant to section 35 of Act 22 of 2011. The DPP found that there was sufficient evidence to warrant the prosecution of the petitioner and directed that action be taken against him. The deponent to the replying affidavit stated that on 7<sup>th</sup> May 2012, he went

to the land's office with a view to summoning the petitioner to attend court and to give him an opportunity to make another cautionary statement but the petitioner was not at the office. According to the deponent since then the petitioner has remained elusive. The summons were subsequently served requiring the petitioner to attend court in the case Msa Anti-Corruption Case No. 5 of 2012. Since being served with those summons the deponent stated that the petitioner had obtained knowledge of those proceedings. The petitioner is one amongst nine other suspects in that case. Two of them have already appeared before court and taken plea when they were granted bond. There is a pending warrant of arrest against the petitioner in that case. The deponent stated that the criminal case and the proposed charges were carried out properly and not arbitrary.

Learned counsel for the 2<sup>nd</sup> respondent submitted that if the petitioner had a complaint, he should have raised it before the subordinate court where case No. 5 of 2012 is being heard. That court would then have referred the constitutional issue to the High Court for determination. He also submitted that EACC had complied with the law because it had conducted investigations and had made recommendations for prosecution as per the provisions of section 35 of Act 22 of 2011. He also stated that EACC had no prosecutorial powers but rather that the power to prosecute was bestowed on DPP. That it then follows, that if orders are issue in this matter against EACC, they would not be enforceable against the DPP. That even the inclusion of the Attorney General (AG) was an error because EACC was a body corporate capable of suing and being sued. Learned counsel for 2<sup>nd</sup> respondent relied on section 27 of Act 22 of 2011 which he said limited the right to information. He however, stated that the petitioner would be informed of the case against him by the charge before the criminal court. 2<sup>nd</sup> respondent relied on the following two cases:

**(i) H.C. Nrb. Constitution and Judicial Review Div. Pet. No. 376 of 2011 – Hon James OndichoGesami –v- A.G & Another**

**(ii) H.C. Nrb. Pet. No. 657 of 2009 – Hon. John Michael NjengaMututho –v- A.G & Another.**

In those cases the court found that the rights of the applicants/petitioners had not been violated when recommendation was made for their prosecution.

The broad issues that present themselves for my determination are:

- Which of the Gicheru rules are applicable to this matter?
- Which were/was the correct party/parties to be sued?
- Were the petitioner's rights under the Constitution violated?

### **FIRST ISSUE**

In my view the petitioner at his option could chose to present himself before the subordinate court and then raise a constitutional issue for reference before the High Court as provided under rules 7 to 10 of the Gicheru Rules. Again at his option, where he alleges that his fundamental rights and freedoms are being violated or threatened to be violated, he had the right to approach the High court directly for the determination of those rights. The petitioner therefore in approaching this court and alleging violation of those rights acted within the provisions of the law, that is rules 11 and 12 of the Gicheru rules. His failure to specifically state in his petition which of those rules he relied upon, was not fatal to his petition unless such failure was pre-judicial to the respondent. The respondent did not allege there was such prejudice. Even if there was shown to be prejudice, the court in attempting to administer justice without undue regard to technicalities as provided under article 159 of the Constitution may order for such a petition to be amended to reflect the rules relied upon. It follows that it is only in exceptional and peculiar circumstances that the court would allow a petition to be defeated for failing to indicate the law upon which it is brought under.

### **SECOND ISSUE**

On this issue I refer to article 79 of the constitution. That article provides as follows:

***“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.”***

Under chapter 15 Article 253 (a) (b) and (d) of the constitution EACC ‘is a body corporate with perpetual succession and a seal and is capable of suing and being sued’. That being so, the petitioner was wrong to have sued AG on behalf of the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent was capable of being sued in its own right. It does seem that the petitioner subsequently became alive to that position in law because he did not serve the AG and the AG did not participate in these proceedings. EACC is empowered by Act 22 of 2011, under Section 13, to investigate on its own initiative or on complaints made by any person on any matter relating to Ethics and Corruption. Their powers do not go beyond investigation. That is why in the case of this petitioner, EACC recommended to DPP that the petitioner be prosecuted. From the letter written by the DPP attached to the 2<sup>nd</sup> respondent’s replying affidavit, it does seem that the DPP found sufficient evidence to warrant the prosecution of the petitioner and hence case No. 5 of 2012. The orders that the petitioner seeks for declaration that his rights are being violated by being charged in the criminal case can only rightly be directed to the DPP. Articles 157 (6) (a)(b) (c) of the constitution relate to the powers to prosecute donated to the DPP. I therefore find that the petitioner’s claim for declaration or violation of his rights in regards to his pending charges before the Criminal court is incompetent as directed towards the 2<sup>nd</sup> respondent. Prayers (a) and (c) of the petition relating to the allegation that the 2<sup>nd</sup> respondent has not carried out investigation can however be enforced against the 2<sup>nd</sup> respondent.

### **THIRD ISSUE**

This relates to alleged violation or rights or fundamental freedoms. Article 35 is the Article that the petitioner has laid emphasize on. It provides:

***“(1) Every citizen has the right of access to –***

***(a) Information held by the state; and***

***(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.”***

It is necessary to mention here that attempts by Section 29 (3) Act 22 of 2011 to limit the right to information may find itself running foul of the provisions of Article 35. There is no doubt that a time will come when that limitation will be subjected to litigation. The petitioner failed to clearly state what information had been denied him. If however the petitioner’s prayer is that he ought to have been supplied with all the details of EACC’s investigations, I would say that he has the wrong end of the stick. The right to information to either an arrested or an accused person is provided under articles 49 and 50. Under Article 49 (g) the petitioner is entitled on the 1<sup>st</sup> appearance at court to be charged or be informed the reason for his detention or be released. Article 50 (2) (j), the petitioner has a right to be informed in advance the evidence that the prosecution will rely on. The rights under article 49 & 50 as stated before relates to an arrested or accused person. It is at that stage of arrest or being arraigned in court that the information is supplied as provided under the constitution. That would have been when the petitioner would have been entitled to information as he now seeks. The issue raised by this petition, is an issue relating to conflict between the preservation of individual and public interest. That was discussed in the case Holgate Mohammed (supra) at pg 1059 and it is worth considering in this matter. Lord Diplock had these to say:

***“My Lords, there is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual and the public interest in the detection of crime and the bringing to justice of those who commit it. The members of the organized police forces of the country have, since the mid-nineteenth century, been charged with the duty of taking the first steps to promote the latter public***

*interest by inquiring into suspected offences with a view to identifying the perpetrators of them and of obtaining sufficient evidence admissible in a court of law against the person they suspect of being the perpetrators as would justify charging them with the relevant offence before a magistrates' court with a view to their committal for trial for it.*

*The compromise which English common and statutory law has evolved for the accommodation of the two rival public interests while these first steps are being taken by the police is twofold.*

*(1) No person may be arrested without warrant (i.e. without the intervention of a judicial process) unless the constable arresting him has reasonable cause to suspect him to be guilty of an arrestable offence; and arrest, as is emphasized in the Judges' Rules themselves, is the only means by which a person can be compelled against his will to come to or remain in any police station.*

*(2) A suspect so arrested and detained in custody must be brought before a magistrates' court as soon as practicable, generally within 24 hours, otherwise, save in a serious case, he must be released on bail 9SEE SS 43(1) and (4) of the Magistrates' Courts Act 1980.)"*

Further in support of my finding that the petitioner's rights have not been violated, I wish to borrow the words in the case **H.C. Nrb. Constitution and Judicial Review Div. Pet. No. 376 of 2011** (*supra*) where the court stated:

*"in my view, requiring that the petitioner subject himself to the normal criminal prosecution process mandated by law, where he has all the safeguards guaranteed by the constitution does not in any way amount to an attempt to his human dignity in violation of his constitutional rights."*

On my part in respect of this petitioner, I would repeat and say that for the petitioner to be charged in a criminal court, it would not be in violation of his rights so long as the safeguards, provided for an arrested and an accused person, in the constitution are observed.

In the end, I find that there is no merit in the petitioner's claim and the petition is hereby dismissed with costs to the 2<sup>nd</sup> respondent.

**DATED and DELIVERED at MOMBASA this 13<sup>th</sup> day of June, 2012.**

**Mary Kasango**  
**JUDGE**