



**Republic v Ethics and Anti-corruption Commission; Wamukota
& 2 others (Exparte) (Miscellaneous Application E129 of 2024)
[2025] KEHC 2690 (KLR) (Judicial Review) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E129 OF 2024**

**JM CHIGITI, J
MARCH 7, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION RESPONDENT

AND

ENG ANTONY TAWAYI WAMUKOTA EXPARTE

CIVIL BUILD DEVELOPERS COMPANY LIMITED EXPARTE

ALICESON INVESTMENTS COMPANY LIMITED EXPARTE

RULING

1. Before this court for determination is the Respondent’s Notice of Preliminary Objection dated 25th November, 2024 (herein below referred to as “the Objection”). The Preliminary Objection is based on the following grounds:
 1. An investigation, not being an administrative action, cannot be the subject matter of judicial review.
 2. A judicial review application cannot be used to stop the institution of civil proceedings.
 3. This court, sitting as a judicial review court, is being asked to anticipate and conclude on questions that will be determined by the Anti-Corruption Court once forfeiture proceedings are instituted, a jurisdiction which it does not have.



4. As such, this court, sitting as a Judicial Review Court, lacks the jurisdiction to hear and determine this matter.
2. The Respondent's Notice of Preliminary Objection is a response to the Notice of Motion Application dated 19th October, 2024 that sought for the following orders:
 1. An order of Certiorari to remove into this Honourable court and quash the three Notices to Explain all dated the 15th day of January 2024 and the Demand Notices dated the 5th September 2024 as issued by the Respondent against the Applicants.
 2. An Order of prohibition prohibiting the Respondent by themselves, their agents, employees and or anybody deriving authority from the said Respondent from freezing, confiscating, implementing and/or taking any action or punitive disciplinary measures against the Applicants on account of the Notices to Explain and Demand Notices dated 15th January 2024 and 5th September 2024 respectively issued against the Applicants.
 3. An Order of mandamus do issue compelling the Respondent to release and/or return to the applicants all the landed property documents both original and copies and Monies as particularized in the Respondent's Inventory dated 23rd March 2023, 24th March 2023 and 6th June 2023 and further be compelled to remove any caution that they may have placed on any of the said inventorized properties.
 4. A declaration do issue that the Applicants' fundamental right to fair administrative action, fair hearing, equal protection of the law, and legitimate expectation have been infringed and/or threatened by the Respondent on account of the Notices to Explain and Demand Notices dated 15th January 2024 and 5th September 2024 respectively as issued by the Respondent against the Applicants.
 5. A declaration do and hereby issue that the Respondent is constitutionally obligated to act lawfully, fairly and reasonably in the exercise of their Constitutional mandate, which principles have been threatened / violated by issuing / causing the issuance of the Notices to Explain and Demand Notices dated 15th January 2024 and 5th September 2024 respectively against the applicants herein.
 6. An Order permanently restraining any attempt by the Respondent by themselves, their agents, employees and or anybody deriving authority from the said Respondent from freezing, confiscating, implementing and/or taking any action or punitive disciplinary measures against the Applicants on account of the Notices to Explain and Demand Notices dated 15th January 2024 and 5th September 2024 respectively issued against the Applicants.
 7. The Respondent be ordered to pay the applicants the cost of this application.
 8. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.
 3. The objection was canvassed by way of written submissions dated 3rd February, 2025.
 4. The Respondent, on the issue of jurisdiction of this court submitted that the under Section 26 of the *Anti-Corruption and Economic Crimes Act* (hereinafter referred to as ACECA) a notice is to be issued is a product of an investigation process for purposes of granting a person, reasonably suspected to be in possession of assets that are disproportionate to their known legitimate sources of income, an opportunity to explain such disproportion.



5. They invoke section 55 (2) of ACECA which provides:

The Commission may commence proceedings under this section against a person if-

- a. after an investigation, the Commission is satisfied that the person has unexplained assets; and
- b. the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

6. It is contended that the Notice to Explain under Section 26 of ACECA, is not an end in itself, but a procedural requirement in the course of an investigation to determine whether or not the person is in possession of unexplained assets and the issuance of such a Notice cannot be challenged.

7. According to them after issuance of the Notice, where the person does not provide a satisfactory explanation, the Commission then proceeds to file a suit for forfeiture of unexplained assets, and hence the Demand Notices dated 5th September 2024.

8. It is their submission that given the Notice forms the basis of the Application before this court, the application ought to be struck out on a point of law given that it does not constitute an administrative action and therefore cannot be subject to judicial review proceedings.

9. Reliance is placed in the case of Ethics and Anti-Corruption Commission & another v Ojienda, SC t/a Prof Tom Ojienda & Associates Advocates & 2 others {Petition 30 & 31 of 2019 {Consolidated}} [2022] KESC 59 {KLR} (7 October 2022) where the Court stated, in part;

“Does the 1st appellant’s investigative powers fall within the corners of this definition? Part IV of the ACECA specifically provides for the 1st appellant’s investigative powers. The powers granted therein include powers, privileges and immunities of a Police Officer under Section 23(3), to search premises under Section 29, to apply for surrender of travel documents under Section 31, to arrest persons under Section 32 amongst others. Strictly speaking, these powers when exercised cannot be described as “administrative action” within the meaning of Article 47. For example, how can “conducting a house search” or “effecting an arrest” be considered as exercising administrative action? On the contrary, these are special powers conferred by a specific legal regime, to be exercised for a special purpose”

10. It is the Respondent’s submission that the application before this honourable court if allowed to proceed shall oust Commission’s mandate as provided for under the Sections 2, 26 and 55 of ACECA which provide for the procedure for forfeiture of unexplained Assets.

11. Similarly, the Commission is mandated under Section 11 of the Ethics and Anti-Corruption Commission Act to institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

12. The Respondent thus beseeches this court to anticipate and make findings on questions that will be determined by the Anti-Corruption Court once forfeiture proceedings are instituted.



13. They contend that this court lacks jurisdiction to hear and determine the matters raised in this Application.
14. Reliance is also placed in the case of *Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated))* [2023] KESC 6 KLR the Court described the expanded scope of Judicial Review. The Court stated:

“Be that as it may, it is the Court’s firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in Section 11 (1) and (2) of the *Fair Administrative Actions Act*. Third, the Court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in Section 11(1) (e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced”

15. In opposing the Preliminary Objection, the Applicants filed grounds of opposition dated 7th January, 2025 opposing the Objection on the following grounds:
 1. The Preliminary Objection as instituted is an abuse of the court process, has no merit and is not only based on misconception of the law but meant to fritter away judicial economy.
 2. This Honourable Court is clothed with the Jurisdiction to hear and determine the main motion by the Applicants as it relates to the unreasonable, fraudulent, unethical and irrational process adopted by the Respondent in arriving at the impugned Notices to Explain and the Demand Notices.
 3. The entire process of arriving at the impugned Notices to Explain and Demand Notices was marred with malice and ill motive as demonstrated in the fabrication and/or creation of fictitious bank credits by the Respondent and going beyond the directions of the Court as set forth in the Search Warrant.
 4. The entire process of arriving at the impugned Notices to Explain was unconstitutional and offends the Applicants’ right to fair administrative.
 5. The Applicants have not called upon this Court to review the merits of the Respondent’s decision, investigations and/or intended institution of civil proceedings by the Respondents but to look in the process and/or procedure adopted by the Respondent in arriving at the impugned Notices to Explain and Demand Notices.
 6. The alleged investigations had been conducted and completed as expressly indicated in the Respondent’s letter dated 10th November 2023 which letter in part reads “...pursuant to the aforementioned mandate, the Commission conducted investigations into allegations of procurement irregularities, contract mismanagement and fraudulent payments.....”



investigations established that Mr. Antony Wamukota was involved in the execution and processing of fraudulent invoices...”.

16. The applicants canvassed their grounds of opposition by written submissions dated 27th January, 2025.
17. It is submitted that they are challenging the procedure and/or process adopted by the Respondent in arriving at the Notices to Explain issued against them.
18. According to them part of their complaint is that the Respondent has fabricated and created fictitious bank credits in order to paint the applicants as corrupt which process they consider as fraudulent, irrational, unreasonable, illegal, unfair and marred with procedural impropriety.
19. They contend that this Court cannot address the issues of procedural impropriety, unfairness and fraud on the part of the Respondent without calling in evidence and once the issue of evidence arises then a preliminary objection fails from that very basis as an objection must only address a point of law and must not meander into factual questions and/or affairs.
20. It is their submission that Article 47 (1) and (2) on *Fair administrative Action* provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action together with material information to prepare their defense.
21. It is further submitted that the court has jurisdiction to determine the instant suit as provided under Article 165 (3) (b) & (d), (6) and (7) of the *Constitution* of Kenya, 2010.
22. Reliance is placed in the cases of *Natin Properties Ltd vs. Jaggit Singh & Anr* and in *El-Busaidy vs Commissioner of Lands & 2 others* [2002] 1KLR 508 where the court held that a preliminary objection should not raise substantive issues from the pleadings which must be determined by court upon perusal of evidence and the same must be raised only on a point of law.
23. The applicants also place reliance in the case of *El-Busaidy v. Commissioner of Lands & 2 others* [2002] 1KLR 508 where the court stated that:

“The preliminary objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of section 136(1) to it to make the Plaintiff’s pleadings a non-starter But the Defendants defend this suit because they do not accept the Plaintiff’s facts as pleaded. Clearly therefore, the Defendant’s preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction.”

24. It is submitted that the Respondent’s Preliminary objection is fatally defective, pointless and the same should be dismissed with costs

Determination;

25. I have looked at the application and the pleadings and the submissions alongside the authorities cited.
26. The Respondent is contending that this court has no jurisdiction to determine the notice of motion dated 19th October, 2024 as according to them the issues they Applicants are raising concern the Notices to Explain which according to them does not constitute an administrative action and therefore cannot be subject to judicial review proceedings.



27. The Applicants on the other hand argue that they are not contesting the Notices to Explain but they are challenging the process on how the investigations against them and the decision to issue the Notices to Explain was arrived at.
28. Jurisdiction is trite and without it, a court must down its tools.
29. The question that then arises is whether jurisdiction, is a pure point of law that ought to be raised by way of a Notice of a Preliminary Objection.
30. In *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696 the court while addressing same held as follows;

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

... A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
31. The above position was re-affirmed in the Supreme Courts case of *Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, where the court held:

“...that the question of jurisdiction is a “pure question of law,” and should be resolved on a priority basis.”
32. In order to determine the grounds that have been raised in the Notice of Preliminary Objection, the court will have to interrogate and do an analysis of the impugned investigations process.
33. This will no doubt involve looking into the facts and the evidence that is before the court in depth so as to determine what the Applicant has advanced in the grounds of the preliminary objection on points of law.
34. This is particularly the case when it comes to determining the issue whether sitting as a judicial review court this court is being asked to anticipate and arrive at a conclusion on questions that will be determined by the Anti-Corruption Court once forfeiture proceedings are instituted, a jurisdiction which it does not have .In order to answer this issue the court has to consider amongst other issues the powers of the Anti-Corruption Court .This cannot be achieved without divorcing from a factual analysis.
35. The court has to hear rival arguments and filter through the submissions of both parties before it arrives at a conclusion of what goes through the mind of the Respondent in the process of deciding whether or not to institute civil proceedings.
36. This court is of the view that this will defeat the substratum of what amounts to a preliminary objection on points of law.
37. The grounds that have been raised by the Respondents as grounds for the preliminary objection around the issue of investigations call for an in-depth analysis and balancing of facts, documents and evidence



which will ultimately defeat the principles of preliminary objections as enunciated in the *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696 case.

Determination;

38. This court is of the informed view that the Respondent's Preliminary objection is not predicated on pure points of law.

Order;

1. The Preliminary Objection dated 25th November, 2024 is hereby dismissed.
2. Cost shall be in the cause.
3. The matter shall be mentioned on 26th May,2025.
4. Notice to issue
5. Serve the orders

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025

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J. CHIGITI (SC)

JUDGE

