



**Buigut v Ethics and Anti-Corruption Commission (Constitutional  
Petition 5 of 2023) [2024] KEHC 4536 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4536 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CONSTITUTIONAL PETITION 5 OF 2023**

**JRA WANANDA, J**

**APRIL 12, 2024**

**IN THE MATTER OF ARTICLES 31 AND 258 OF THE CONSTITUTION OF  
KENYA AND IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10(1), (A), (B),  
47, 48, 50, 159 & 249 OF THE CONSTITUTION OF KENYA AND IN THE MATTER  
OF CONTRAVENTION OF SECTIONS 23(4) OF THE ANTI-CORRUPTION AND  
ECONOMIC CRIMES ACT AND IN THE MATTER OF CONTRAVENTION OF  
SECTION 11(D)(J) OF THE ETHICS AND ANTI-CORRUPTION ACT AND IN THE  
MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**ALEX BUIGUT ..... PETITIONER**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. Before this Court for determination is the Petition dated 22/05/2023 filed through Messrs Mukabane Kagunza & Co., the Advocates for the Petitioner. The same is supported by the Affidavit sworn by the Petitioner and seeks a raft of orders premised as follows
  - i. A Declaration that the Respondent acted prematurely and illegally and abused the processes of the Court by applying for authority to enter into and search the Petitioner’s office and premises from the Chief Magistrate’s Court in Eldoret (hereinafter referred to as “the said authority to search”) on the basis of misrepresentations, fabrications and unsubstantiated and baseless rumours.



- ii. An order of Certiorari quashing the said authority to search as the same was produced illegally and unprocedurally and also amounts to an abuse of the process of this Court besides violating the Petitioner's fundamental rights and freedoms
  - iii. An order of injunction restraining the Respondent from taking any/or further action, whether in purported compliance with the said authority to search or howsoever otherwise, in violation of the Petitioner's fundamental rights and freedoms as secured and protected under the Constitution based on the said authority to enter and search or in any manner whatsoever.
  - iv. A Declaration that the Respondent violated Article 31 and other provisions of the Constitution by forcibly entering and searching the Petitioner's house in Langas Estate in Eldoret and also his private office at the said estate and consequently seizing therefrom his documents and other valuable items including cash and firearm.
  - v. A Declaration that the acts of the Respondent of going to Court prematurely and based on unsubstantiated allegations and rumours and as such obtaining the said authority to search the Petitioner's homes and office contravened Section 52 of the National Police Service Act, the Criminal Procedure Code among other provisions of the law.
  - vi. A Mandatory Order compelling the Respondent to return to the Petitioner all the documents and other valuable items including his cash and firearm which they illegally seized and took from the Petitioner whence they undertook their forcible entry and search of the residence and office in Eldoret.
  - vii. An order for general damages to compensate the Petitioner whose fundamental rights and freedoms were infringed upon by the Respondent contrary to Article 31 of the Constitution among other provisions of the Constitution and the law.
  - viii. A Mandatory Order compelling the Respondent to release to the Petitioner all the information they have against him as he is entitled to the same under Article 35(1)(b) which provides that every citizen has the right to access information held by another person and required for the exercise or protection of any right or fundamental freedom.
  - ix. The Costs consequent upon this Petition be borne by the Respondent.
  - x. Any other or further order(s) or relief(s) that this Honourable Court may deem for to grant.
2. Together with the Petition, the Petitioner also filed an Application seeking interlocutory orders. However, upon urging by the Court geared towards saving precious judicial time and to prevent duplication, the parties agreed to hold the Application in abeyance, and instead proceed directly to canvassing the main Petition. I therefore so ordered.
3. In the quite lengthy Affidavit, the Petitioner has deponed that he is a farmer and formerly worked for the County Government of Nandi as a Chief Officer for Transport and Infrastructure between October 2014 and April 2018, that he previously worked with National Irrigation Board, that his farming and business activities have had tremendous success and he had acquired a lot of assets before joining the County Government, that during his stint at the County Government, he was never summoned to shed light, clarify or answer any questions or respond to issues touching on their mandate, that on 19/05/2017, he was shocked when his private office as well as his home in Langas Estate were simultaneously invaded by officers, employees and/or agents of the Respondent at 3 pm purportedly acting on some authority to enter and search allegedly given to them by the Chief Magistrate's Court in Eldoret in Miscellaneous Application No. 72 of 2017, that a further search was conducted on 7/06/2018 on the strength of further warrants given to the Respondent by the Chief



- Magistrate's Court in Eldoret in Miscellaneous Application No. 2047 of 2018, and that this was almost 1 year since the first search and the Respondent had not communicated to the Petitioner the reason for the first search and neither had they called him to record any statement on the same.
4. He deponed further that the Respondent took from the premises documents and other valuables as is evidenced by the inventory exhibited, that the Petitioner established that the Respondent conducted the search to advance investigations against the Petitioner for alleged involvement in corruption at the County Government of Nandi, that the Respondent never contacted the Petitioner in an endeavour to inform him of the wild and malicious allegations nor afford him an opportunity to be heard and respond to the same if at all, before launching investigations thereon, that *the Constitution* in Article 31 sets the standard that must be followed by any law or person including when conducting an investigation, Section 52 of the National Police Service requires that where an allegation of involvement in a criminal offence is alleged, the police, including the Respondent, are required to bring the matter to the attention of the person concerned and seek his comment thereon before summoning him for further questioning and it is only when he fails or refuses to co-operate that the police or investigator may seek authority to search from a Court of law.
  5. The Petitioner contended that under Article 50(2)(b), (j) & (k) of *the Constitution*, the Petitioner has the right to be informed of the charge against him, to be informed in advance the evidence the prosecution intends to rely on and to have reasonable access to that evidence and also to adduce and challenge the evidence before any action can be taken against him in Court including an application seeking authority to invade his premises, that the moment allegations of corruption were made against him it was only fair and in line with the rules of natural justice, specifically audi alteram partem that he be afforded the opportunity to be heard and to respond before any adverse actions involving violation of his constitutional rights could be commenced, that the Respondent did not afford him the right to be heard and to respond to the allegations levelled against him before going to Court to seek authority to enter and search his premises and office or invading the same and home thereby violating his right to privacy, among other rights, that the Respondent acting on wild and malicious allegations proceeded to Court and secured a warrant to enter, search and seize his property yet there was no credible or rational basis for the warrants, that it is now 6 years since the illegal search was conducted and the Respondent has continued to act with impunity by refusing to return his property despite several requests, that vide a letter dated 6/09/2021, the Respondent issued the Petitioner with a notice asking him to explain the disproportion between assets owned and his known legitimate sources of income and he responded to the notice, and that the said notice was the first formal communication from the Respondent since the search was conducted and which was after a period of 4 years,
  6. He added that the notice served on him clearly indicated that the Respondent was investigating acts of corruption between 1/01/2015 and 8/04/2018, that despite a clearly defined period of interest the Respondent confiscated and restricted title deeds for properties acquired way before the period aforesaid, that some of the titles had loans and had been charged to banks to support his business activities and as a result of the restrictions, efforts to seek re-finance have hit a snag, that some of the titles confiscated belonged to his siblings and that of ancestral land which had been entrusted to the Petitioner for safe custody, that the continued withholding of his property including cash has greatly impaired and grounded him economically and he continues to suffer loss and damages, that in light of Article 259(8) of *the Constitution* which prescribes that where no timeline is provided to conduct a particular act, the act shall be done without unreasonable delay and hence the delay by the Respondent to conclude the investigations for over 6 years is unjustifiable, unreasonable and inexcusable.
  7. He deponed further that the Respondent has misdirected and unlawfully applied Section 23 of the *Anti-Corruption and Economic Crimes Act* 2003 which gives the Respondent powers as under the



provisions of the Criminal Procedure Code, Evidence Act, National Police Service Act and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crimes, that the powers to compel attendance of witness at a police station as provided under Section 52 of the National Service Police Act 2011 also apply to the Respondent in light of Section 23 of the Anti-Corruption and Economic Crimes Act 2003 which gives the Respondent investigatory powers, that refusal to co-operate as under the said Sections is an offence and this is when the Respondent can move in on a property, search and seize, that the Petitioner has constitutionally protected rights in relation to privacy and property as under Articles 31 and 40 of the Constitution, respectively, that the Respondent's actions are in violation of Article 10(2) of the Constitution which behoves it to respect human rights and be accountable in the conduct of its affairs, that an individual's fundamental rights and freedoms cannot be limited or infringed upon except in accordance with the law and cannot be contravened merely on suspicion and rumours, that under Article 249 of the Constitution, Commissions and independent offices should promote constitutionalism and are subject to the constitution and the law, and that Article 258 provides for enforcement of the Constitution as every person has a right to institute Court proceedings claiming that the Constitution has been contravened.

### **Response**

8. The Respondent opposed the Petition vide the Replying Affidavit filed on 20/06/2023 through Juma Kisaka, an Advocate at the Respondent and sworn by one Justus Wangia who described himself as an Investigator with the Respondent and appointed under Section 23 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA). He deponed that the Respondent is established under Section 3 of the Ethics and Anti-Corruption Commission Act 2011 (EACC Act) pursuant to Article 79 of the Constitution, that the Respondent's mandate is broadly set out under Articles 79 and 252 of the Constitution and Section 11 of the EACC Act, that in or about 2017, the Respondent received an anonymous report that the Petitioner, while serving as the County Executive Committee Member for Roads, Nandi County Government sanctioned embezzlement of public funds belonging to the County Government through irregular procurement and award of tenders to companies associated with him and his relatives and/or kin and falsified and/or forged payment documents to have the companies paid.
9. He deponed that in the process of investigation, the Respondent applied for and obtained search warrants relating to the residences, offices and business premises of the Petitioner in Milimani Miscellaneous Criminal Application No. 72 of 2017 and Miscellaneous Application No. 2047 of 2018, that orders 1, 2, 4, 5 and 7 in the Petition insofar as they seek to quash the ex parte search warrants are not merited because the said warrants were lawful and issued by the Court pursuant to Sections 23 and 29 of the Anti-Corruption and Economic Crimes Act, Sections 118, 118A and 119 of the Criminal Procedure Code and Section 24(e) of the National Police Service Act, that the Supreme Court authoritatively and conclusively resolved the issue whether the Respondent should have notified the Petitioner before applying for search warrants in Ethics and Anti-Corruption Commission & Another v Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 Others, Petition No. 30 and 31 of 2019 (Consolidated) [2022] KESC 59 (KLR), that the Supreme Court authoritatively held that the Respondent has a wide and critical mandate under the Constitution and the law to combat corruption and economic crime in our society and when the Respondent is carrying out a police operation or an intelligence gathering or asset tracing exercise, it cannot be required to issue a prior mandatory notice to the intended targets, that the search warrants obtained on 19/05/2017 and 7/06/2018 have never been previously lifted and/or set aside and cannot be set aside and cannot be belatedly challenged or sought to be quashed through this Petition long after the lapse of the stipulated 6 months contrary to Order 53 of the Civil Procedure Rules.



10. He contended further that pursuant to the said warrants, the Respondent on 19/05/2017 and 11/06/2018 entered into the Petitioner's residences, offices and business premises, searched and seized voluminous documents to aid in the investigation, that orders 3 and 6 of the Petition insofar as they seek to restrain the Respondents from taking further action and return of the seized documents are not merited because the Respondent has a constitutional mandate to investigate and recommend to the Director of Public Prosecutions (DPP) the prosecution of any acts of corruption, bribery or economic crimes, 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 any other punitive or disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya, that prayer No. 8 in the Petition insofar as it seeks to compel the Respondent to release to the Petitioner the information it has against him is not merited as the right of access to information is limited under Section 6 of the [Access to Information Act](#) 2016 where the disclosure of the information is likely to significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration and where the information is obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime and enforcement of any law.
11. It was his further contention that it is not true that the Respondent has taken 6 years in the investigation, taking into account the prevailing circumstances and supervening events since the investigation began, that the emergence of the COVID-19 pandemic slowed down the operations of the Respondent in the years 2020 and 2021, that the Respondent is investigating the complaint by analysing the documents collected from the Petitioner in two dimensions, namely, the criminal aspect and the civil aspect, that the documents seized from the Petitioner and the County Government were voluminous and which require time to be analyzed before a decision is made on whether the Petitioner should be charged in Court and whether any suit should be filed for recovery of unexplained assets or proceeds of corruption, that investigations are at an advance stage and the Respondent is analyzing and evaluating the seized documents, interviewing witnesses and recording their statements, and that the Respondent intends to forward to the DPP its recommendations for the DPP's independent review and concurrence or otherwise and the Respondent will, if the evidence so discloses, also institute recovery proceedings upon conclusion of its investigations.
12. He added that the Respondent receives over 5,000 complaints each year, that in the financial year 2017/2018 alone, the Respondent received a total of 6,235 complaints and after processing the complaints, took up 2,898 of them for investigations under the various categories and which indicated that 13.5% (approximately 375 complaints) fell within the category of embezzlement and misappropriation of public funds, that complaints under that category under which the subject complaint is placed are complex in nature and to unearth the corrupt scheme, the investigation requires time, expertise, financial and human resources which must be employed in each of these cases, that new investigations join in the queue, that aside from the challenges of backlog, the Respondent has Standard Operating Procedures (SOPs), an internal process that guides its investigations from receipt of a complaint to submitting a file with findings and recommendations to the DPP as well as instituting recovery proceedings, that the investigative process is a progression of activities that is time consuming and can be protracted depending on several factors including the level of co-operation during the information gathering phase.
13. Finally, the deponent stated that the suspects in a corruption investigations are the same ones who generate, create and are the custodians of the documentary evidence required to establish the corrupt



conduct, that in this regard, an investigations into corrupt conduct cannot be time-bound, that *the Constitution* and/or statute does not prescribe a time limit within which the Respondent must conclude investigations neither does the law dictate the pace of investigations, that given the covert nature of offences of corruption and economic crimes, investigations in relation to such offences are intricate, costly, multifaceted and possibly with cross-border aspects, that it would therefore be impractical to cage the Respondent to undertake investigations within specific timelines, that the orders of mandamus sought in prayers 6 and 8 of the Petition are misconceived because the Commission independence is guaranteed under Article 249(2)(b) of *the Constitution* that it shall not be subject to direction or control by any person or authority, and because this Court has a constitutional obligation pursuant to Article 3(1) of *the Constitution* to respect, uphold and defend *the Constitution*, that this would include safeguarding and securing the independence of Constitutional Commissions and independent offices as guaranteed therein, and that the investigations are at an advance stage and the documents which were found in the possession of the Petitioner shall be used in Court as exhibits or evidence and security for any Judgment that may be obtained against the Petitioner upon instituting civil or criminal proceedings in Court.

### **Hearing of the Petition**

14. It was then agreed, and I directed, that the Petition be canvassed of by way of written submissions. Pursuant thereto, the Petitioner filed his Submissions on 20/07/2023 while the Defendant had filed its Submissions earlier on 11/09/2023.

### **Petitioners' Submissions**

15. Counsel for the Petitioner submitted that the Petitioner was never informed of the reasons for the search until after 4 years on 6/09/2021 when he received a notice from the Respondent requiring him to explain the disproportion between his known income and the assets owned, that the notice indicated that the Respondent was investigating acts of suspected corruption against the Petitioner during the period he served at the County Government being the year 2015 to April 2018, that despite that clear and definite period of interest, the Respondent confiscated title deeds for property acquired long before that period and proceeded to restrict the same, that the Respondent has not instituted any case in Court against the Petitioner and has continued to hold the property confiscated for over 6 years now, and that the Respondent's workload is not a panacea to breach of the Petitioner's constitutional rights.
16. He submitted further that a Petitioner seeking relief for violation of rights or a fundamental freedom must show the constitutional provisions alleged to have been infringed/breached, the manner of infringement and the jurisdictional basis for it as was held in the case of Anarita Karimi Njeru v Republic No. 1 [1979] 1 KLR 54, that it is not in dispute that the search warrants obtained by the Respondent were lawful, that he is in agreement that based on the nature of the investigations that the Respondent has to conduct, issuance of a notice of search would invalidate the purpose of conducting the search in the first place, that what is disputed is the manner in which the Respondent conducted its investigations after being lawfully issued with the search warrants by the Court. Counsel then posed the questions whether the Respondent was supposed to search and seize property beyond the scope applied for in the warrant or to seize property belonging to people that are close to the suspect not privy to or mentioned in the warrants or to search the premises of the suspect's relatives?
17. On "right to privacy", Counsel referred to Article 31 of *the Constitution* and submitted that the right can only be limited within the confines of *the Constitution*, that the search warrant is not is not a blank cheque for one to do as he pleases as the search and seizure ought to be limited to what the warrant allows. He also cited the Article 12 of the Universal Declaration of Human Rights (UDHR), Article 17(1) of the International Convention on Civil and Political Rights (ICCPR) and Article 8(1)



of the European Convention on Human Rights and submitted that these international instruments were ratified by Kenyan and by virtue of Article 2(5) of *the Constitution* form part of the law of the country, that instead to adhering to the indicated, the Respondent rummaged through the entire home of the Petitioner searching through his personal documents such as medical and health insurance records, diaries and titles of property acquired long before the period he worked for the County, that the Respondent also rummaged the Respondent's sibling's property and indiscriminately seized their title deeds which had no bearing whatsoever on the investigations, that the Respondent also seized the Petitioner's licensed firearm and cash which are out of the scope of the search warrants, that the Respondents also proceeded to the Petitioner's mother and rummaged it despite having knowledge that the warrants were issued against the Petitioner only, that the Respondent's action may have contributed to the worsening of the Petitioner's mother's health, that it was unnecessary for the Respondent in a show of might to descend on the hapless mother in the disguised execution of the warrant. He cited the case of *Bernstein and Others v Bester NO and Others* (CCT23/950 [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 and also the case of *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* [2015] eKLR.

18. On the "right to fair administrative action", including the right to be heard, Counsel cited Halsbury's Laws of England, Judicial Review (Volume 61 (2010) 5<sup>th</sup> Edition) Paragraph 639 and also Articles 47 and 232 of *the Constitution* and submitted that it is now 6 years since the Respondent conducted its first search and seized properties, that in disregard to the need for expeditiousness in administrative acts and decisions, no action has been taken since 2017, that the Respondent has written several letters to the Respondent and visited the Respondent's offices to request that the investigations be expeditiously handled but the Respondent has neglected to take any further steps to steer the matter forward, and that the Petitioner has at all materials been willing and co-operative to provide any information needed. He cited the case of *Ernst & Young LLP v Capital Markets Authority & Another* [2017] eKLR and also the case of *Republic v Non-Governmental Organizations Co-ordination Board & Another ex parte Transgender Education and Advocacy & 3 Others* [2014] eKLR and submitted that the fact that the Respondent is an independent body that shall not be controlled by any person or authority does not mean that the Court has no power to intervene where there is abuse of discretionary powers since any tribunal or body exercising judicial or quasi-judicial discretion has to exercise that discretion judicially and not whimsically. He also cited the case of *Republic v National Police Service Commission Ex parte Daniel Chacha Chacha* [2016] eKLR and also the case of *Pastoli v Kabale District Local Government Council & Others* [2008] 2 EA 300 and submitted that the Respondent illegally holds the Petitioner's property and has even gone further to restrict his quiet use and enjoyment of his land by lodging restrictions on it, that the Respondent has decided to be the investigator, judge and prosecutor in its own cause which goes against the rules of natural justice. He also cited the case of *Republic v National Land Commission & 2 Others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West)* [2018] eKLR.
19. On the "right of access to information", Counsel cited Article 35 of *the Constitution*, Section 4 of the *Access to Information Act*, Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the African Charter on Human and People's Rights (Banjul Charter). He submitted that the Petitioner is entitled to be given information by the Respondent concerning the progress of the case and whether the Respondent will prosecute it, that the Petitioner has written several letters to the Respondent seeking the information and visited the Respondent's offices in connection thereto but the Respondent has neglected to provide any such information, that although access to information may be limited, the limitation envisioned under Section 6 of the *Access to Information Act* is to the extent specified therein, that Section 29 of the EACC Act, No. 22 of 2011 also provides the circumstances under which the information may be limited and that the information sought does not



- fall among the list of the information limited under the Acts cited. He also cited the case of Nelson O. Kadison vs Advocates Complaints Commission & Another [2013] eKLR and submitted that blanket refusal by the Respondent to give the Petitioner information is in violation of his right under *the Constitution*.
20. Regarding the “right to property”, Counsel cited Article 40 of *the Constitution* and submitted that the Respondent has placed restrictions on the Petitioner’s title to property which has deprived him of the right to peaceful possession and quiet enjoyment of his property, that upon conducting the search, the Respondent carted away title deeds, cash and other valuables which have been retained by the Respondent, that some of the property was acquired long before the Respondent’s period of interest of investigation, that the Respondent has never sought the Court’s authority to restrict the property or to retain the cash, and that for 6 years the Respondent has denied the Petitioner without any explanation, his constitutional right to property.
  21. On the “right to fair trial” without unreasonable delay, Counsel referred to Article 50(2) of *the Constitution* and submitted that the Respondent has already adjudged the Petitioner guilty and contends in its Replying Affidavit that it is holding the Petitioner’s property as security for any judgment that may be entered, that the Respondent is now purporting to be the investigator, the prosecutor and the judge, that while the Respondent has failed to proffer any charges against the Petitioner, it illegally clothes itself with judicial powers, that where security for costs is required to be deposited, it is the Court in which security is deposited and not with a party, that the right to fair trial is non-derogable by dint of Article 25 of *the Constitution*, that *the Constitution* was never suspended during the COVID-19 pandemic. He cited the case of Salkas Contractors Limited v Kenya Petroleum Refineries Limited [2004] eKLR.
  22. Regarding the “right to human dignity”, Counsel cited Article 28 and 19(2) of *the Constitution* and submitted that the Respondent subjected the Petitioner to humiliation before the public when it raided his home and office to conduct the search and proceeded to his mother’s home, that the Petitioner was treated with opprobrium when he was paraded before the media that he was corrupt and yet 6 years later no tangible steps have been taken to afford him an opportunity to defend himself before a Court of law, that instead the Respondent is carelessly waving independence as part of the reason for not acting, that the Petitioner has the investigations hanging over his head as the proverbial sword of Damocles with no apparent end in sight, that having worked for the County Government, the Petitioner is a well-respected man and held highly by the public.
  23. Counsel submitted further that the Respondent is not justified to continue withholding the Petitioner’s property, that after conducting the search and seizing the property, the Respondent has disobeyed the orders of the Magistrate’s Court by not returning the warrant together with an endorsement certifying what it has done upon execution and giving the Court a full account and inventory of what was seized. He cited Section 118 of the Criminal Procedure Code and also the case of Abubakar Shariff Abubakar v Attorney General & Another [2014] eKLR.
  24. Regarding the Court’s power to intervene, Counsel cited Article 2 and 249 of *the Constitution*, the case of Keroche Breweries Limited & 6 Others vs Attorney General & 10 Others [2016] eKLR and also the case of Githunguri vs Republic KLR (1986) 1 and submitted that state organs, state officers, public officers and all persons are bound by Article 10 of *the Constitution* on national values and principles of governance. He also cited the case of Ridge v Baldwin [1963] 2 ALL ER 66 on giving of decisions without the principals of natural justice being followed, Halsbury’s Laws of England, Judicial Review (Vol. 61 (2010) 5<sup>th</sup> Edition regarding the duty to give reasons as a component of procedural fairness and the case of General Medical Council vs Spackman [1943] 2 ALL ER 337 cited in the case of R vs Chancellor JKUAT Misc Appl. No. 30 of 2007.



25. On whether the Petitioner is entitled to damages and other reliefs, Counsel submitted that the Petitioner has demonstrated the actual violation and infringement of his fundamental rights and freedoms and is thus entitled to an award of general damages as well as the other reliefs sought. He cited the case of *John Atelu Omilia & Another v Attorney General & 4 Others* [2017] eKLR, the case of *Nancy Makokha Baraza v Judicial Service Commission & 9 Others* [2012] eKLR and also Article 23(3) of *the Constitution*.

### **Respondent's Submissions**

26. On his part, Counsel for the Respondent submitted that the prayers made in the Petition herein are a replica of the prayers sought in the case of *James Aggrey Oswago v Ethics and Anti-Corruption Commission* [2014] eKLR, and which was dismissed.
27. He submitted further that this Court has no jurisdiction to determine the Petition and should down its tools. He cited the case of *Owners of the Vessel "Lilian S v Caltex Oil (Kenya) Ltd* [1989] eKLR and contended that this Court has no jurisdiction because there is an alternative remedy or forum for determining the dispute, and that the Petition was filed in violation of the doctrine of "constitutional avoidance". He cited the Supreme Court case of *Communication Commission & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR, Petition No. 14 of 2015 and submitted that a Court will not determine a constitutional issue when a matter may properly be decided on another basis, that the main prayers in the Petition are for return of items seized during the search and quashing the search warrants, that these are orders that could properly be made by the Court which issued the orders or by invocation of the revisionary jurisdiction of the High Court, that nothing prevents a party from raising constitutional issues while seeking alternative remedies. He also cited Section 121(3) of the Criminal Procedure Code (CPC) and submitted that the Court which issued the search warrants has jurisdiction over the seized items and can make appropriate orders upon application. He also cited the case of *Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others* [2018], Petition No. 109 of 2016, the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, the case of *George Onyango Oloo v EACC* [2019] eKLR ACEC Misc Criminal Application No. 29 of 2019 and also the High Court's revisionary powers under Section 362 and 364(1)(b) of the CPC and submitted that the Petition was filed as an afterthought as the Petitioner's grievances needed not to be turned into a constitutional Petition.
28. On whether the search warrants were valid, Counsel cited Section 23(3) of ACECA and submitted that the provision empowers the Respondent to carry out investigations in the same way the police do carry out investigations, that part of the function of the Kenya Police Service under Section 24(e) and (g) of the *National Police Service Act* is investigation, prevention and detection of crime which functions the Respondent is also empowered to carry out. He also cited Section 29 of ACECA and submitted that the same empowered the Respondent to apply for a warrant to search the premises of the Petitioner. He also cited Section 118 and 118A of the CPC and submitted that the same allows the Application for search warrants to be made ex parte the rationale being to prevent the suspect from dissipating or destroying the evidence. He again cited the case of *James Humphrey Oswago v Ethics and Anti-Corruption Commission* (supra) and the case of *Ethics and Anti-Corruption Commission & Another v Tom Ojienda* (supra) and submitted that the application for the search warrants to aid in investigations was not an administrative action and the Petitioner did not need to be notified prior to applying for the search warrants.
29. On whether the Respondent violated the Petitioner's "right to privacy" and "right to human dignity", Counsel submitted that the rights were not infringed, that the rights are not absolute and can be limited in a democratic society in accordance with the law as was held in Constitutional Petition No. 82 of



- 2012: Abubakar Shariff Abubakar v Attorney General & Another [2014] eKLR, that the Court in the said case held that the existence of a valid search warrant provides a valid justification for limitation of the right to privacy or human dignity, that the search was conducted within the law, that further, the Respondent could properly search other houses within the Respondent's compound pursuant to the said warrant. He also cited the case of George Oloo Onyango v EACC & Another (supra) and also the case of Evans Odhiambo Kidero & 9 Others v Chief Magistrates of Milimani Law Courts & 6 Others [2020] eKLR and submitted that if the search warrant limited the Petitioner's rights to privacy and human dignity the limitation was justifiable in the public interest of investigating crimes which is reasonable and justifiable in an open and democratic society as provided under Article 24 of [the Constitution](#).
30. Regarding the Petitioner's "right to property", Counsel submitted that the Respondent has not infringed on the same, that the right to property does not extend to illegally acquired property as provided in Article 40(6) of [the Constitution](#), that in any event, the property was seized pursuant to valid search warrants and there exists mechanism for return of any properties seized during a search which the Petitioner has not explored. He again cited Constitutional Petition No. 82 of 2012: Abubakar Shariff Abubakar (supra) in which, he submitted, the Court held that the Respondent, in the course of searching premises, may also seize items not covered by the warrant but reasonably believed to be evidence in any other charge against the person in possession of the items. He also cited the case of Director of Public Prosecutors v Tom Ojienda t/a Prof. Tom Ojienda & Associates Advocates & 3 Others [2019] eKLR, Civil Appeal No. 109 of 2016 and submitted that if indeed the other persons who are alleged to be the owners of the titles were aggrieved, then they would be the right persons to complain. He added that the Respondent did not infringe on the Petitioner's rights by placing restrictions on the land/real properties since this action is provided in law and the restrictions were placed pursuant to Section 76 of the [Land Registration Act](#) 2012 (LRA). He also cited Section 78 and submitted that indeed the Respondent applied to lift restrictions on 7 parcels of land.
31. Regarding the "right of access to information", Counsel submitted that the same is limited under Section 29(3) of the EACC Act and Section 6 of the [Access to Information Act](#), 2016 where the information is at deliberative stage by the Respondent as is the case herein, and that further, the Petitioner has not requested for information pursuant to the procedure set out under Section 29(2) of the EACC Act. He again cited the case of James Aggrey Oswago v Ethics and Anti-Corruption Commission (supra).
32. On whether there is delay in the investigations, Counsel submitted that there is none and reiterated the explanation that the investigations are complex and multi-faceted, that the documents are voluminous and require time to be analyzed, the effects of the emergence of COVID-19, and the Respondent's huge workload, among others. He then added that [the Constitution](#) does not prescribe a time limit within which the Respondent must conclude investigations neither does the law dictate the pace of investigations. He cited the case of Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 Others [2017] eKLR where, he submitted, the Court of Appeal emphasized the need for quality investigations which can be achieved when the Respondent is allowed to conclude investigations within feasible and reasonable timelines having regard to the circumstances of the complex nature of corruption and economic crimes investigations. He also cited the case of Mohamed Okashi Mohamed v Ethics and Ant-Corruption Commission & 2 Others [2022] eKLR.
33. On whether the seized items can be released to the Petitioner, Counsel submitted that the items were seized pursuant to a lawful search warrant and that if the Petitioner wanted to have the items released, he should have applied to the Court that issued the warrants. He cited the case of Samson Mumo Mutinda v Inspector General National Police Service & 4 Others [2014] eKLR. Counsel then stated that the



Respondent has instituted civil proceedings against the Petitioner for recovery of unexplained assets in the Anti-Corruption and Economic Crimes (ACEC) Division, Nairobi, that the ACEC Division will determine whether the explanation provided by the Petitioner is sufficient and that therefore, it is not for this Court to determine whether the explanation provided by the Petitioner is sufficient, that the Respondent, by its letter dated 18/03/2019 informed the Petitioner that the documents and money were being held for purposes of ongoing investigations and that the items will be used in Court as exhibits or further investigations.

### **Analysis & Determination**

34. Upon carefully considering the record including the Affidavits, Submissions and authorities presented, I find the issues arising for determination to be the following:
- i. Whether this Court has the jurisdiction to entertain the Petition herein.
  - ii. Whether the search warrants obtained by the Respondent from the Magistrate’s Court were unlawfully issued and whether the same should be quashed.
  - iii. Whether the Respondent violated the Petitioner’s “right to privacy” and “right to human dignity” under Article 31 and 28 of *the Constitution*, respectively, by forcibly entering and searching the Petitioner’s house and also his private office and seizing his documents, cash and firearm.
  - iv. Whether the Respondent’s acts violated the Petitioner’s “right to property”, under Article 40 of *the Constitution*
  - v. Whether the Petitioner’s “right to fair administrative action” and “right to fair trial” without unreasonable delay under Article 47 and 50(2) of *the Constitution*, respectively, were violated.
  - vi. Whether an order should be issued compelling the Respondent to return the seized items to the Petitioner
  - vii. Whether the Respondent should be ordered to release to the Petitioner all the information it has against the Petitioner under Article 35 of *the Constitution*.
  - viii. Whether the Petitioner should be awarded general damages for violation of his fundamental rights and freedoms.
35. Before I delve into determination of the issues identified above, I may comment that this Court’s jurisdiction to hear and determine Constitutional Petitions arising from allegations of violation or infringement of fundamental freedoms enshrined in the Bill of Rights is donated under Articles 22 as read together with Article 23 and also Article 258 of *the Constitution*.
36. Article 22(1) of *the Constitution* provides as follows;
- “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
37. On its part, Article 23(1) of *the Constitution* states that:
- “The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.



46. Article 258(1) then provides as follows;

“Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

38. The foregoing constitutional provisions are complemented by Rule 4 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, commonly referred to as “the Mutunga Rules which provides as follows:

“Contravention of rights or fundamental freedoms

“Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules”.

39. On interpretation of constitutional provisions, Article 259(1) of *the Constitution* then provides that “this Constitution shall be interpreted in a manner that- (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; and (c) contributes to good governance.”

40. I also agree with the Petitioner that although the Respondent is an independent body and *the Constitution* stipulates that it shall not be controlled by any person or authority, that independence does not at all mean that the Court has no power to intervene where the Respondent engages in actions that amount to abuse of its discretionary powers. This is because any public body must exercise its powers judicially and not whimsically.

41. I now proceed to analyze and determine the said issues.

i. Whether this Court has the jurisdiction to entertain the Petition herein

42. The Respondent has submitted that this Court has no jurisdiction to determine the Petition and should down its tools because there is an alternative remedy or forum for determining the dispute, and that the Petition was therefore filed in violation of the doctrine of “constitutional avoidance”. It was submitted that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

43. In regard to this issue, a 3-Judge Bench of the High Court (Kimondo, Limo and Mrima JJ) in Nairobi Constitutional Petition No. 254 of 2019, Kiriro wa Ngugi & 19 Others v Attorney General & 2 others [2020] eKLR stated as follows:

“

“96. The Black’s Law Dictionary, 9th Edition, Thomson Reuters Publishers at page 943-944 defines justiciability as follows:

“proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”

97. A Court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine. The doctrines are crosscutting and closely intertwined. We shall however endeavour to as far as possible delimit the operation of each doctrine in isolation.



.....  
[105] We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black’s Law Dictionary, 10th Edition at page 377 defines it as:

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

[106] The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:

.....  
(256) The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

44. In this case, I find that the Petition comprises of omnibus issues the bulk whereof raises pure constitutional questions and some do not. It would therefore be more convenient to deal with the issues in one suit. The few issues that may not be proper constitutional issues should not affect the entire Petition. Where necessary therefore, I shall sever or isolate the issues and only deal with those that can be determined here. I find refuge in the a 5-Judge Bench decision in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR. The Court in analyzing and appreciating the doctrine of exhaustion, stated as follows:

“

“ 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya’s decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the



suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.
  62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."
45. Guided by the above holding, I find that the Petition herein raises constitutional issues that can to be adequately litigated before the High Court.
- ii. Whether the search warrants obtained by the Respondent from the Magistrate's Court were unlawfully issued and whether the same should be quashed
46. Regarding the powers of the Respondent to apply for and obtain search warrants, Section 23(4) of *Anti-Corruption and Economic Crimes Act* (ACECA) provides as follows;
- "(4) The provisions of the Criminal Procedure Code (Cap. 75), the *Evidence Act* (Cap. 80), the Police Act (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator."
47. It is therefore generally agreed that the foregoing provision assigned to the Respondent the power, privileges and immunities under the Criminal Procedure Code, the *Evidence Act* and the Police Act relating to detention, prevention and investigation of corruption and economic crime-related offences. The provision therefore, read together with Section 118A of the Criminal Procedure Code and Section 180 of the *Evidence Act* enables the Respondent to apply for and obtain search warrants to carry out investigations and criminal proceedings if the evidence discloses criminal culpability. In regard thereto, Section 118 provides as follows:
- "Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named



or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.”

48. On its part, Section 118A provides that “an application for a search warrant under section 118 shall be made ex parte to a magistrate”.

49. In regard to the legality of the search warrants the subject of this Petition, I note that in his Submissions, the Petitioner’s Counsel has made an apparent climb-down by submitting that the Petitioner does not challenge the legality of validity of the search warrants issued by the Magistrate’s Court and that he is only disputing the manner in which, upon being obtained, the search and seizure were conducted and the subsequent conduct of the Respondent to date. Counsel now concedes that it is not in dispute that the search warrants obtained by the Respondent were lawful, and that he is in agreement that, based on the nature of the investigations that the Respondent has to conduct, issuance of a notice of search would invalidate the purpose of conducting the search in the first place.

50. Prayers 1-5 of the Petition basically flow from the challenge to the legality of the search warrants. This climb-down accordingly means that the prayers 1-5 are basically no longer in contention and can basically be presumed to have been abandoned. In any event, I am not persuaded nor has it been demonstrated by the Petitioner that the Magistrate in any way acted mala fides and/or injudiciously in the exercise of his discretion to grant the search warrant. In the circumstances, I will not belabour this issue.

iii. Whether the Respondent violated the Petitioner’s “right to privacy” and “right to human dignity” under Article 31 and 28 of *the Constitution*, respectively, by forcibly entering and searching the Petitioner’s house and also his private office and seizing his documents, cash and firearm

51. It must always be recalled that although *the Constitution* grants certain rights, these rights are not absolute. Any right can be lawfully curtailed for the common good or to prevent or expose crime. To this extent, Article 24(1) of *the Constitution* places a limit on the rights and fundamental freedoms in the following terms:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.....”

52. Regarding “right to privacy”, Article 31 of *the Constitution* states as follows;

“Every person has the right to privacy, which includes the right not to have—

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed.

53. Regarding “human dignity”, Article 28 provides that:

“Every person has inherent dignity and the right to have that dignity respected and protected.”



54. As aforesaid, the Petitioner is no longer challenging the legality of the search warrants issued by the Magistrate’s Court but is now only challenging the manner in which the Respondent conducted the search after being issued with the search warrant. The Petitioner therefore had the burden of demonstrating in clear terms how exactly the manner in which the search was conducted violated his rights.
55. The Petitioner’s grievance is that the Respondent rummaged through his entire home searching through his personal documents such as medical and health insurance records, diaries and titles of property acquired long before the period he worked for the County, rummaged the Respondent’s sibling’s property and indiscriminately seized their title deeds which had no bearing whatsoever on the investigations, seized the Petitioner’s licensed firearm and cash which are out of the scope of the search warrants, that the Respondents also proceeded to the Petitioner’s mother and rummaged it despite having knowledge that the warrants were issued against the Petitioner only, that the Respondent’s action may have contributed to the worsening of the Petitioner’s mother’s health condition, and that it was unnecessary for the Respondent in a show of might to descend on the hapless mother in the disguised execution of the warrant.
56. In regard to grievances of the above nature, I am persuaded by the holding of M. Odero J in the case of Abubakar Shariff Abubakar v Attorney General & Another [2014] eKLR, in which she stated as follows:

“As stated earlier, Article 31 of *the Constitution* does indeed guarantee the right to privacy. However, this right is not absolute. Article 24 of the same Constitution places a limit on the rights and fundamental freedoms guaranteed by *the Constitution*. Article 24(1) provides:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors .....

The existence of a valid search warrant and probable cause (as has been shown to be the case here) provides valid justification for the limitation of a person’s right to privacy. P. Kiage [Now Hon. Justice of Appeal P. Kiage] in *Essentials of Criminal Procedure in Kenya*, Law Africa, 2010 at page 24 cites the English Judge Lord Denning in the case of *CHIC FASHIONS (WEST WALES) LTD. – VS – JONES (1968)2 QB 299* in which he stated:

“No man’s house is to be used as a hiding place for thieves or receptacle for stolen goods. If there is reasonable ground for believing that there are stolen goods in the house, information can be laid before the magistrate on oath and the magistrate can then issue a warrant authorizing a constable to enter the house and seize the goods.”

Therefore, although it is a general principle that a man’s house is his castle, and a policeman is never in principle allowed to enter and search a man’s house, certain lawful exceptions to this general rule do exist. Where there exists a lawful search warrant issued by a court of law then any search and seizure in pursuance of that warrant cannot be said to amount to a violation of a person’s constitutional rights and freedoms. Therefore. the search by police of the petitioner’s residence having been properly sanctioned by law did not amount to a violation of his fundamental rights and freedoms. I therefore dismiss prayer (v) of the Petition.”

57. I am in full agreement with the above reasoning and logic and on whether, in conducting the search, the Respondent violated the Petitioner’s “right to privacy” and “right to human dignity”, my view is



that the Petitioner has not sufficiently demonstrated how such rights were infringed. It has not been shown to my satisfaction that the Respondent mishandled or mistreated or humiliated the Petitioner in any way or to the extent that it can be concluded that there was violation of the Petitioner's rights.

58. In connection to the seizure of items over and above those expressly mentioned in the warrants, I again refer to the same decision of M. Odero J in the case of *Abubakar Shariff Abubakar v Attorney General* (supra) in which she held as follows:

“The power to seize is generally limited to articles named in the search warrant, articles which are either involved in, used during or may provide proof of the commission of an offence or may provide proof of the fact that the commission of an offence was planned. In the case of *CRAZIER – VS – CUNDEY*, 108 ER 49 it was held that a policeman could properly seize goods other than those mentioned in the warrant if the seized goods provided useful evidence to substantiate the charge for which the warrant was issued. In the earlier cited case of *CHIC FASHIONS* Lord Denning MR reviewed cases relating to the power of a constable entering a house in possession of a search warrant to seize goods not covered by the warrant but which he reasonably believed to have been stolen and to be material evidence on a charge of stealing or receiving against the person found in possession. In the Scottish case of *PRINGLE – VS – EREMNER & STIRLING* (1867)5 Macph HC55 a constable was authorized by a search warrant to search a house for pieces of wood and fuse used to cause an explosion, had also taken away private books and papers found inside the house. Lord Chelmsford LC recognized that though the constable had no right to go beyond the terms of the warrant he added a rider that:

“But supposing that in a search which might have been improper originally, there were matters discovered which showed the complicity of the pursuer in a crime, then I think that the officers, I can hardly say would have been excused by the result of their search.”

The conclusion from these cases is that when a policeman enters a house by virtue of a search warrant, he may seize not only the goods which he reasonably believes to be covered by the warrant, but also any other goods which he believes on reasonable grounds to contain material evidence on any other charge against the person in possession of the items. It was explained that the computer and electronic equipment seized were to be taken for forensic analysis by the Cyber Crime Unit in Nairobi. The court takes judicial notice of the fact that many crimes (including fraud and terrorism) have now gone high-tech. There is much that can be gleaned from the analysis of computers, hard drives, discs as well as electronic equipment. It was therefore not totally illogical, unreasonable or unjustified for police to seize these items for analysis even though they were not specifically covered in the search warrant. My own view is that the existence of the warrant allowed police to seize any article which they reasonably believed could be used to commit, perpetuate or conceal crime. Therefore, I find that the police did not act unlawfully in seizing the items not named in the certificate of search. I therefore dismiss prayer (iv) of this Petition.”

59. Again, I am persuaded by the above reasoning. As aforesaid, the rights guaranteed under *the Constitution* are not absolute and can indeed be limited in a democratic society in accordance with the law. The existence of a valid search warrant provides a valid justification for limitation of the right to privacy or human dignity. Although the Petitioner did not state whether the houses searched were within the same compound, there is indication that this was so. I agree that it may not be always be the case that a search warrant will justify search and seizure of items beyond what has been expressly listed in the search warrant, however in the circumstances of this case, I find that the Respondent could properly search other houses within the Respondent's compound pursuant to the said warrants.



- iv. Whether the Respondent's acts violated the Petitioner's "right to property", under Article 40 of the Constitution
60. The Petitioner has submitted that some of the titles confiscated belonged to his siblings and some for ancestral land which had been entrusted to the Petitioner for safe custody, that the continued withholding of his property including cash has greatly impaired and grounded him economically and he continues to suffer loss and damages, that the Respondent confiscated title deeds for property acquired long before the period under investigations and proceeded to restrict the same, that the Respondent has not instituted any case in Court against the Petitioner and has continued to hold the property for over 6 years now, that the Respondent had no right to seize property belonging to people that are close to the Petitioner and not privy to or mentioned in the warrants, that the Respondent seized their title deeds which had no bearing whatsoever on the investigations, that the Respondent also seized the Petitioner's licensed firearm and cash which are out of the scope of the search warrants, that the Respondent continues to illegally hold the Petitioner's property and has even gone further to restrict his quiet use and enjoyment of his land by lodging restrictions on it, that some of the titles had loans and had been charged to banks to support his business activities and as a result of the restrictions, efforts to seek re-finance have hit a snag.
61. On my part, I agree with the Respondent that the "right to property" under Article 40(6) of the Constitution would not extend to suspected illegally acquired property and that the property was seized pursuant to valid search warrants. In any event, I have already held that the Respondent, in the course of searching premises, may in deserving cases, also seize items not covered by the warrant but reasonably believed to be evidence in any other charge against the person in possession of the items. I also agree with the Respondent that as regards the other properties said to belong to other parties, indeed those other persons were aggrieved, it is them who would be the right persons to complain.
62. Regarding the placing of restrictions on land, I also do not find that the Respondent infringed on the Petitioner's rights since this action is allowed in law and the restrictions were registered pursuant to Section 76 of the Land Registration Act 2012. In any evidence, evidence has been produced demonstrating that by its letter dated 18/05/2021, the Respondent already applied to lift restrictions on 7 of parcels of the land in which the Respondent is no longer investigating.
63. The only issue I have is the seizure and continued detention of the Petitioner's licenced firearm. I wonder how the firearm would have any bearing in investigations touching on suspected embezzlement of funds from the County Government. In the absence of any explanation why the firearm is still being held, I do not think that there is any good reason for detaining the same. However, for reasons that shall become apparent, hereinbelow, I am of the view that the prayers for release thereof should be made before the Magistrate's Court that issued the search warrants pursuant to which the firearm was confiscated.
- v. Whether the Petitioner's "right to fair administrative action" and "right to fair trial" without unreasonable delay under Article 47 and 50(2) of the Constitution, respectively, were violated
64. On the "right to fair administrative action", including the right to be heard, the Petitioner submitted that it is now 6 years since the Respondent conducted its first search and seized properties, that in disregard to the need for expeditiousness in administrative acts and decisions, no action has been taken since 2017, that the Respondent has written several letters to the Respondent and visited the Respondent's offices to request that the investigations be expeditiously handled but the Respondent has neglected to take any further steps to steer the matter forward.



65. In its response, the Respondent alleges that the investigations are complex and multi-faceted, and that the documents are voluminous and require time to be analyzed. The Respondent has also cited the adverse effects of the COVID-19 which it alleges slowed down the progress of the investigations, and also the Respondent's huge workload, among others. The Respondent also argues that *the Constitution* does not prescribe a time limit within which the Respondent must conclude investigations neither does the law dictate the pace of investigations.
66. On this issue, I am full agreement with the Petitioner. The Respondent's workload or internal challenges cannot be a panacea to permitting breach of citizens' constitutional rights. 6 years without any firm decision being made on whether the case shall ever move forward is such a long time and is unacceptable in an investigation of this nature. I agree with the Petitioner that the investigations have been hanging over his head like the proverbial "sword of Damocles" with no apparent end in sight or certainty. This is understandably nothing but pure agony for the Petitioner. *The Constitution* itself has a provision for reasonable time at Article 259 (8) as follows:
- “If a particular time is not prescribed by this constitution for performing a required act, the act shall be done without unreasonable delay, .....”
67. Similarly, the *Interpretation and General Provisions Act* at Section 58 states as follows:
- “Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, .....”
68. Contrary to the Respondent's submissions therefore, it is the constitutional position in Kenya that where no timeline is provided for conducting a particular act, the act shall be done without unreasonable delay. Although I do acknowledge the Respondent's huge workload and also the need for sufficient time to “crack” complex corruption and economic crime related offences, I also remind the Respondent that this Court has to balance such challenges with the Petitioner's fundamental rights as guaranteed by *the Constitution* and which this Court is obligated to protect. In the circumstances, I find that the delay by the Respondent to conclude the investigations for over 6 years is unjustifiable, unreasonable and inexcusable.
69. However, like in the finding relating to the continued detention of the Petitioner's firearm, I also find that regarding this particular issue, the proper Court to make any final orders would be the same Court that issued the warrants. I will say more about this in determining the next issue.
70. On a different point, and although the parties have not seriously addressed me on the issue, and while no evidence has been produced, there is indication in the Respondent's submissions that the Respondent has already instituted civil proceedings before the Anti-Corruption and Economic Crimes (ACEC) Division, Nairobi, against the Petitioner for recovery of unexplained assets. If this is the correct position, then the issue of delay may have already been cured.
71. In any event, I note that in the Petition, the Petitioner has not made any express prayer for a declaration that his “right to fair administrative action” and “right to fair trial” without unreasonable delay under Article 47 and 50(2) of *the Constitution* have been violated. It is only in the Submissions that the Petitioner appears to have touched on the same.
72. For the above reasons, I will be hesitant to make any final orders arising from the above finding of the Respondent's inordinate delay. As aforesaid, I shall leave that to the Magistrate's Court that issued the search warrants.



- vi. Whether an order should be issued compelling the Respondent to return the seized items to the Petitioner
73. Regarding seizure and detention and/or release of items confiscated or seized during search conducted under a search warrant, Section 121 of the Criminal Procedure Code (CPC) provides as follows:
- “(1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.
- (2) If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.
- (3) If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise. [Emphasis mine]
74. From the foregoing, it is evident that under Section 121(3) of the CPC, it is contemplated that it is the Court which issued the search warrants that should also deal with the issue of release of the items seized during that search. In appreciating this procedure, Mumbi Ngugi J (as she then was) while dealing with a similar application in the case of *James Aggrey Oswago v Ethics and Anti-Corruption Commission* [2014] eKLR, held as follows:
- “49. Similarly, I can find no basis for impugning the warrants on the basis that the execution thereof extended beyond the purview of the warrants. The basis of this contention is that the warrants authorised the seizure of documents, while the respondent also seized electronics such as iPads. While it can be properly argued that ‘documents’ may extend to documents held in electronics such as iPads and computers, that is also, in my view, an issue that properly fell for determination or interpretation by the Court that issued the warrant, and to the High Court by way of revision.” [Emphasis mine]
75. I therefore agree with Counsel for the Respondent that grant of release orders or refusal thereof are matters that should be placed before the Court which issued the orders. The same should only be brought before this Court on appeal or by invoking the revisionary jurisdiction of the High Court.
- vii. Whether the Respondent should be ordered to release to the Petitioner all the information it has against the Petitioner under Article 35 of *the Constitution*
76. The importance of the right of access to information was appreciated by the drafters of *the Constitution* and they included Article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic society. *The Constitution* therefore grants citizens access to information as a constitutional right and only the same Constitution can limit that access (see decision of Chacha Mwita J in *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR)
77. Article 35 provides as follows:
- 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.



- 2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- 3) The State shall publish and publicise any important information affecting the nation.”

78. The *Access to Information Act* (Act No. 31 of 2016) was then enacted to give effect to Article 35 of *the Constitution*. It provides a framework for public entities and private bodies to disclose information that they hold and to provide information on request. Section 4 thereof provides that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost, that the Act shall be interpreted and applied on the basis of a duty to disclose and that non-disclosure shall be permitted only in circumstances exempted under Section 6. Regarding the scenarios whereof access to information can be limited, Section 6 provides as follows:

“Limitation of right of access to information

- (1) Pursuant to Article 24 of *the Constitution*, the right of access to information under Article 35 of *the Constitution* shall be limited in respect of information whose disclosure is likely to—

.....

- (g) Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

.....

- (2) For purposes of subsection (1)(a), information relating to national security includes—

.....

- g) information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;

.....

79. Section 29(3) and (4) of the *Ethics and Anti-Corruption Commission Act* also provides as follows:

“(3) Subject to Article 35 of *the Constitution*, the Commission may decline to give information to an applicant on the following grounds -

- b) The information requested is at a deliberative stage by the Commission; and
- (4) The right of access to information under Article 35 of *the Constitution* is limited to the nature and extent specified under this section”

80. It is therefore evident that under Section 6 of the *Access to Information Act*, 2016, the right to access information can be limited in the two situations highlighted above which situations, I find do apply herein. I say so because in this instance, no final decision has been taken by the Respondent on whether to forward its investigations file to the DPP for possible prosecution. This means that the



- investigations remain the subject of active consideration. Secondly, in this case, there is also no doubt that the information sought is obtained or prepared by a government institution (Respondent) that “is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime and enforcement of any law”.
81. Further, under Section 29(3) of the *Ethics and Anti-Corruption Commission Act*, the information requested is also still at a “deliberative stage” by the Commission, the Respondent’s investigations file not having been yet forwarded to the DPP for action.
82. In the circumstances, I find no material to justify compelling the Respondent to release the information. I find no evidence to suggest that the failure or neglect by the Respondent to release the information to the Petitioner amounts to violation of his rights as envisaged under Article 35 of *the Constitution*.
83. In any case, as was observed by Mumbi Ngugi J (as she then was), in the case of Nairobi Law Monthly vs Kengen and Another High Court Petition No. 278 of 2011, [2013] eKLR, what is required is for the person seeking information to make a request for such information. A violation of the right to information cannot be alleged before a request for information has been made. In this case, I have not seen any formal requests from the Petitioner seeking the information from the Respondent. I am therefore also not satisfied that the Petitioner has complied with the express procedure set out under Section 29(2) of the EACC Act.
- viii. Whether the Petitioner should be awarded general damages for violation of his fundamental rights and freedoms
84. I trust that is now evident that among all the alleged violations or infringement of rights cited by the Petitioner, I have only upheld the one relating to the Respondent’s inordinate 6 years delay and/or indecisiveness to decide whether or not to have the Petitioner prosecuted. However, although I have found that under Article 47 and 50(2) of *the Constitution*, the delay violates the Petitioner’s “right to fair administrative action” and “right to fair trial”, I have declined to make any final orders on the grounds that the Magistrate’s Court which issued the warrants of arrest is the proper Court to make any appropriate orders and because also, there is indication that the Respondent has since commenced a civil suit against the Petitioner.
85. For these reasons, I decline to make any award on damages or compensation.

### **Final Orders**

86. In the premises, the Petition dated 22/05/2023 only partially succeeds to the following extent:
- i. This Court finds that there has been an inordinate and/or unreasonable 6-7 years delay by the Respondent in making a decision on whether to recommend prosecution of the Petitioner with a criminal case in Court or in any other way to move the matter forward. Regarding the effect of his delay, coupled with the continued detention of the Petitioner’s property and/or other items seized during the searches conducted on 19/05/2017 and 11/06/2018, respectively, the Petitioner is at liberty to approach the Magistrate’s Courts which issued the respective search warrants and seek any appropriate orders from that Court.
  - ii. In making any appropriate orders flowing from (i) above, should an application be preferred before it, the said Magistrate’s Courts shall verify or confirm whether, as per the indication given herein by the Respondent, a civil suit has now indeed been commenced by the Respondent against the Petitioner for recovery of unexplained assets. If so commenced, the said Magistrate’s Courts shall, in making the appropriate orders, consider the effect of that



commencement or institution of such civil suit on the orders that it may make in relation to the delay cited in (i) above.

- iii. The Petitioner is also given liberty to approach the said Magistrate's Courts which issued the respective search warrants and seek any appropriate orders arising from or relating to the Respondent's apparent omission to make and/or file a return before the said Magistrate's Courts which issued the respective search warrants and/or produce the seized items or articles before that Court as expressly required under **Section 121** of the **Criminal Procedure Code** and as also expressly stated on the face of the Warrants so issued.
- iv. The Petitioner is also given liberty to approach the said Magistrate's Courts which issued the respective search warrants and move that Court to consider the legality of or justification for the continued detention of the Petitioner's firearm seized during the search, and make any appropriate orders.
- v. To the above extent, the prayers made in the Petition are declined.
- vi. No order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 12<sup>TH</sup> DAY OF APRIL 2024

.....

**WANANDA J. R. ANURO**

**JUDGE**

**Eldoret High Court Constitutional Petition No. 5 of 2023**

