



**Kenya Tea Development Agency Holdings Limited & another v Directorate of Criminal Investigations & 2 others (Petition E060 of 2023) [2024] KEHC 8899 (KLR) (Constitutional and Human Rights) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8899 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E060 OF 2023**

**LN MUGAMBI, J**

**JULY 19, 2024**

**BETWEEN**

**KENYA TEA DEVELOPMENT AGENCY HOLDINGS LIMITED .... 1<sup>ST</sup>  
PETITIONER**

**KTDA MANAGEMENT SERVICE LIMITED (KTDA MS) ..... 2<sup>ND</sup> PETITIONER**

**AND**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 6<sup>th</sup> March 2023 is supported by the affidavit of Matthews Odero who is 1<sup>st</sup> Petitioner's Company Secretary. The affidavit was sworn on the same date, the 6<sup>th</sup> March, 2023. Also filed in support of the Petition was a supplementary affidavit dated 27<sup>th</sup> September 2023.
2. The Petitioners are challenging the 1<sup>st</sup> Respondent's request for documentation and information through a letter dated 12<sup>th</sup> January 2023 and the summons to appear sent to them through a letter dated 21<sup>st</sup> February 2023. According to the Petitioners' the actions of the 1<sup>st</sup> Respondent are illegal, irregular and in excess of 1<sup>st</sup> Respondent's authorized mandate. The Petitioners allege that 1<sup>st</sup> Respondent's conduct violates the constitutional rights of the Petitioners, its directors and the Petitioners' employees.
3. Accordingly, the Petitioners seek the following reliefs against the Respondents:



- a. A declaration be issued declaring that the Petitioners and the 1<sup>st</sup> Petitioner's subsidiaries are private companies and beyond the scope and purview of the Respondents jurisdiction to commence investigations pursuant to the 1<sup>st</sup> Respondent's letter dated 12/1/2023 Reference DCI/IB/ECCU /SEC/ 4/ 4/1/VOL.LV /5.
- b. A declaration be issued declaring that the 1<sup>st</sup> Petitioner's Directors are beyond the scope and purview of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' jurisdiction to commence investigations pursuant to the 1<sup>st</sup> Respondent's letter dated 12/1/2023 Reference DCI/IB/ECCU /SEC/ 4/ 4/1/ VOL.LV /5;
- c. A declaration be issued declaring that the 1<sup>st</sup> Petitioner's employees are beyond the scope and purview of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' jurisdiction to commence investigations pursuant to the 1<sup>st</sup> Respondent's letter dated 21/2/2023 Reference DCI/IB/ECCU/SEC/4/4/1/ VOL.LV /131;
- d. A declaration be issued declaring that the 1<sup>st</sup> Respondent's letters respectively dated 12/1/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV/5 and 21/2/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV/131 violate the right of the 1<sup>st</sup> Petitioner's Directors and employees to equality and freedom from discrimination of under Article 27 of *the Constitution*.
- e. A declaration be issued declaring that the 1<sup>st</sup> Respondent's letters respectively dated 12/1/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV/5 and 21/2/2023 Reference DCI/IB/ ECCU/SEC/4/4/1/VOL.LV/131 violate the right of the Petitioners, the 1<sup>st</sup> Petitioner's subsidiaries, the 1<sup>st</sup> Petitioner's Directors and employees to privacy under Articles 31(c) and 31(d) of *the Constitution*.
- f. A declaration be issued declaring that the 1<sup>st</sup> Respondent's letters respectively dated 12/1/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV/5 and 21/2/2023 Reference DCI/IB/ECCU /SEC/ 4/ 4/1/VOL.LV /131 violate the right of the Petitioners, the 1<sup>st</sup> Petitioner's subsidiaries, the 1<sup>st</sup> Petitioner's Directors and employees to protection of their property under Article 40 of *the Constitution*.
- g. A declaration be issued declaring that the 1<sup>st</sup> Respondent's letters respectively dated 12/1/2023 Reference DCI/IB/ECCU /SEC/ 4/ 4/1/VOL.LV / 5 and 21/2/2023 Reference DCI/IB/ ECCU/SEC/4/4/1/VOL.LV /131 violate the right of the Petitioners, the 1<sup>st</sup> Petitioner's subsidiaries, the 1<sup>st</sup> Petitioner's Directors and employees to fair administrative action under Articles 47(1) and (2) of *the Constitution*.
- h. A declaration be issued declaring that the 1<sup>st</sup> Respondent's letters respectively dated 12/1/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV/5 and 21/2/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV /131 violate the right of the 1<sup>st</sup> Petitioner's Directors and employees against self-incrimination guaranteed under Article 50(2) of Constitution.
- i. A declaration be issued declaring that the 1<sup>st</sup> Respondent's letters respectively dated 12/1/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV/5 and 21/2/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV /131 to be illegal, null and void.
- j. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents whether by themselves, their officers, servants, agents and / or otherwise from enforcing the 1<sup>st</sup> Respondent's



letters respectively dated 12/1/2023 Reference DCI/IB/ECCU/SEC/4/ 4/1/VOL.LV /5 and 21/2/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV /131.

- k. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and/ or any other officer from their offices, any other office and/or officer with a similar mandate as that of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from issuing a fresh request for the production and/ or supply of the documents and information requested in the 1<sup>st</sup> Respondent's letter dated 12/1/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV /5.
- l. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and/ or any other officer from their offices, any other office and/ or officer with a similar mandate as that of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from issuing a fresh summons to the 1<sup>st</sup> Petitioner's employees named in the 1<sup>st</sup> Respondent's letter dated 21/2/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV /131.
- m. An order of Certiorari be issued to remove into this Court for purposes of being quashed the 1<sup>st</sup> Respondent's letters respectively dated 12/1/2023 Reference DCI/IB/ECCU/SEC/4/4/1/VOL.LV/5 and 21/2/2023 Reference DCI/IB/ECCU /SEC/ 4/ 4/1/VOL.LV /131.
- n. Any other relief this Court deems fit to grant to meet the ends of justice.
- o. Costs of this Petition.
- p. Interest on relief (o) above at Court rates from the date of filing this Petition until payment in full.

#### **Petitioners' Case**

4. Matthews Odero deposed that the 1<sup>st</sup> Petitioner is a private limited liability company owned by 600,000 small holder tea farmers. The 2<sup>nd</sup> Petitioner is a subsidiary of the 1<sup>st</sup> Petitioner. Further, the 1<sup>st</sup> Petitioner owns other subsidiaries including: KTDA Power Company Limited (KTPC); Green Fedha; Tea Machinery Engineering Company Limited (TEMEC); Kenya Tea Packers (KETEPA); KTDA Foundation; Majani Insurance Brokers Limited; Chai Trading Company Limited and KTDA DMCC (Dubai).
5. On 12<sup>th</sup> January 2023, the 1<sup>st</sup> Respondent issued a letter to the 1<sup>st</sup> Petitioner requesting to be furnished with information and several documents' allegedly relying on the [Access to Information Act](#) and Section 69 of the [Evidence Act](#). This was followed by a similar letter dated 9<sup>th</sup> February 2023 to the Petitioners Advocates. The letters were meant to facilitate an Inquiry against the Petitioners and some of its Board of Directors and employees.
6. Through another dated 21<sup>st</sup> February 2023, the 1<sup>st</sup> Respondent summoned the 1<sup>st</sup> Petitioner's employees whose names it listed in the letter for purposes of interviewing them and recording their statements. The Petitioners Advocates in the letters of 27<sup>th</sup> February and 1<sup>st</sup> March 2023 protested and questioned the relevancy applicability of the legal provisions cited by the 1<sup>st</sup> Respondent as a basis of allowing it to undertake the process.
7. For context, the Petitioner claimed that the genesis of the 1<sup>st</sup> Respondent's actions is a raid that the 1<sup>st</sup> Respondent carried out at the Petitioners' premises on 16<sup>th</sup> April 2021 under the auspices of a multi-agency team that included police officers. The Petitioner stated that the team, using threats and intimidation, forcefully carted away the Petitioners assets that included laptops.
8. As a result, the 1<sup>st</sup> Petitioner proceeded to file High Court Criminal Revision Case No. E133 of 2021 Kenya Tea Development Agency Holdings Limited & 2 others vs The Attorney General & others



seeking orders to restrain the Respondents from enforcing an ex parte order issued by the Chief Magistrates Court compelling the Petitioners to provide documents for the purposes of the alleged investigations.

9. The Petitioner stated that there have been management wrangles between the 1<sup>st</sup> Petitioner's previous Board of Directors and the current Board. The current Board of Directors was elected into office around November and December 2020. The Petitioner claimed that the previous Board has been attempting through intimidation and threats to interfere with the management of the Petitioners. In fact, as a result of these management disputes, the 1<sup>st</sup> Petitioner filed High Court Case Number E378 of 2022 Kenya Tea Development Agency (Holdings) Limited vs Peter Kanyago & 12 Others which is pending determination.
10. With this background, the Petitioners apprehend that the 1<sup>st</sup> Respondent's letters dated 12<sup>th</sup> January 2023 and 21<sup>st</sup> February 2023 are a continuation of the harassment and threats against Petitioners in order in a battle for control of the management of the 1<sup>st</sup> Petitioner.
11. Whilst the Petitioners acknowledge the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to undertake criminal investigations under *the Constitution* and the legislation, they contend that the power is being used to further an ulterior motive of interfering in a management dispute through an illegal criminal inquiry hence is an abuse of the 1<sup>st</sup> Respondent mandate and as such, the 1<sup>st</sup> Respondent's actions are unlawful and unconstitutional.
12. The Petitioners further assert that they are not state corporations within the meaning of the *State Corporations Act* No. 11 of 1986. Equally, that the named Board Members and Directors in the 1<sup>st</sup> Respondent's correspondence are not public officers under the Public Officers Ethics *Act No. 4 of 2003* hence are not subject to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' oversight or supervision.
13. The Petitioners filed this Petition against the Respondents because the request for the information and documentation violates the constitutional rights of the Petitioners. Additionally, it is a violation of the right to internal management under Part VII to XIII of the *Companies Act*, 2015 as a private company. The Petitioners' likewise, take issue with the 1<sup>st</sup> Respondent's failure to name the complainant whom it alleges reported alleged fraudulent activities at the 1<sup>st</sup> Respondent. Moreover, the nature and scope of the fraud is not divulged.
14. The Petitioner further averred that the complainants are former employees of the 1<sup>st</sup> Petitioner. In particular, John Kennedy Omanga, Alfred Njagi, Albert Otochi, Charles Mbui and Guyo Godana challenged their employment termination at the Employment and Labour Relations Court in various suits. The Petitioner thus states that the criminal complaint is as a result of their disgruntlement after they were terminated from employment. The Petitioners also challenged the deponent of the 1<sup>st</sup> Respondents' replying affidavit stating that he lacks locus standi to make that reply.

### **Respondents' Case**

15. The Respondents through a replying affidavit by Police Constable, Francis Mulinga sworn on 9<sup>th</sup> May 2023 deponed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in the process of investigating allegations of fraud, misappropriation of funds, false financial statements and abuse of office at the 1<sup>st</sup> Petitioner.
16. That the genesis of the matter was on 22<sup>nd</sup> December 2022 when the 1<sup>st</sup> Respondent received a complaint letter from one John Kennedy Omanga and seven other persons requesting an investigation to be carried out at the 1<sup>st</sup> Petitioner. A group of detectives was formed to carry out an investigation. A letter was written to the 1<sup>st</sup> Petitioner on 12<sup>th</sup> January 2023 requesting for documents.



17. He avers that the 1<sup>st</sup> Petitioner's advocate Mohammed Muigai LLP responded through the letter dated 27<sup>th</sup> January 2023 stating that the 1<sup>st</sup> Petitioner was in the process of gathering the documents sought and would provide them once they were ready. This letter was followed up with another dated 1<sup>st</sup> February 2023 requesting for 30 days to have the documents furnished. By way of a response dated 9<sup>th</sup> February 2023, the 1<sup>st</sup> Respondent urged the 1<sup>st</sup> Petitioner's advocate to direct the 1<sup>st</sup> Petitioner to issue the documents in default of which it would invoke the provisions of Section 69 of the *Evidence Act*.
18. In pursuit of the criminal inquiry, the investigation team issued summons vide a letter dated 22<sup>nd</sup> February 2023 requiring some of the 1<sup>st</sup> Petitioner's employees to appear for before it for questioning and recording of statements.
19. On 28<sup>th</sup> February, 2023; the 1<sup>st</sup> Petitioner's Counsel wrote indicating that the Petitioners would not comply with the request as the 1<sup>st</sup> Respondent had no locus standi to investigate them. This was followed up by another letter on 2<sup>nd</sup> March 2023 that sought withdrawal of its initial letters failure to which legal action would ensue. Despite the threat of non-cooperation, on 16<sup>th</sup> May, 2023; the 1<sup>st</sup> Petitioner's Counsel turned over a number of the requested documents. On 22<sup>nd</sup> March 2023, the 1<sup>st</sup> Respondent was served with the instant Petition.
20. The 1<sup>st</sup> Respondent deposed that the complainants' allegations relate to the employees named in its correspondence. It is noted that the summons to appear issued to these employees were anchored in Section 52 of the *National Police Service Act*, a discretionary tool used in investigations. The 1<sup>st</sup> Respondent denied involvement in the Petitioners' management wrangles as alleged and stated it was a stranger to the same. Further, contrary to the Petitioners' allegation, the nature of the complaint and identity of the complainant was disclosed as revealed in the 1<sup>st</sup> Respondent's letters to the Petitioner.
21. The 1<sup>st</sup> Respondent asserted that the Petitioners have failed to demonstrate how the Respondents investigations are vexatious and an abuse of the court process. Similarly, there was no demonstration of how the same is a violation of constitutional and statutory provisions.

### **Petitioners' Submissions**

22. The firm of Mohammed Muigai LLP on behalf of the Petitioners filed submissions dated 28<sup>th</sup> December 2023. Counsel sought to discuss a number of issues being: whether Francis Mulinga has the locus standi to depose the Replying Affidavit in response to the Petition; whether the complaint letter dated 21/12/2022 satisfied the requirements of Section 89(3) of the Criminal Procedure Act in so far as to have a statutory basis to warrant investigations; whether the issues raised in the complaint letter dated 21/12/2022 warrant investigations pursuant thereto by the 1<sup>st</sup> Respondent; whether the 1<sup>st</sup> Respondent's letters respectively dated 12/1/2023 and 21/2/2023 violate the rights of the Petitioners under *the Constitution*; whether the 1<sup>st</sup> Respondent's letters respectively dated 12/1/2023 and 21/2/2023 are illegal, null and void; whether the Petitioners are entitled to the permanent injunctive relief; whether the Petitioners are entitled to an order of certiorari to remove into this Court for purposes of quashing the 1<sup>st</sup> Respondent's letters respectively dated 12/1/2023 and 21/2/2023; whether the Petitioners are entitled to the declaratory orders sought in the Petition; and whether the Petitioners are entitled to the costs of this Petition together with interest thereon as pleaded in the Petition.
23. On the first issue, Counsel submitted that the 1<sup>st</sup> Respondent's Deponent lacks locus standi to depose its Replying Affidavit to the Petition. This is based on the argument that Francis Mulinga does not have the capacity and authority to do so on the Respondents' behalf. According to them, the deponent did not adduce any evidence to ascertain whether the deposed information was accurate, whether the



- deponent is truly a police constable and whether he had the Respondents' authorization to file the reply.
24. Reliance was placed on Christopher Mutiambu Machimbo & 3 others v County Surveyor, Trans-Nzoia & 4 others (2022) eKLR where it was held that:
- “Therefore, locus standi means the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard because of that. Locus standi is so important that in its absence, a party has no basis to claim anything before the Court.”
25. Further reliance was also placed on Peter Taracha & another v International Pentecostal Holiness Church & another (2016) eKLR, Daykio Plantations Limited v National Bank of Kenya Limited & 2 others (2019) eKLR and Humphrev Makokha Nyongesa & another v Communications Authority of Kenya & 2 others (2018) eKLR among others.
26. Turning to the Second issue, Counsel submitted that the impugned letter dated 21<sup>st</sup> December 2022 did not satisfy the requirements of Section 89(3) of the Criminal Procedure Act. This is because the same has no legal basis to warrant any investigations by the 1<sup>st</sup> Respondent against the Petitioners. The letter was argued to further lack the Magistrate's signature as required by this provision. For this reason, the complaint is adjudged to be defective for failure to comply with this provision.
27. In the next issue, Counsel argued nonetheless that the issues raised in the impugned complaint letter do not warrant any investigations by the 1<sup>st</sup> Respondent. This is because the substantive complaint is at the behest of third parties who are former employees and further the documents relied upon by these complainants in the letter were not adduced as evidence.
28. On whether the Respondents' vide the impugned letters violated the Petitioners rights, Counsel answered in the affirmative. Counsel although cognizant of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' constitutional and statutory mandate in investigation of crime, submitted that the Respondents are obliged to exercise this function in compliance with the dictates of *the Constitution* as emphasized by the Court in Geoffrey K. Sang vs Director of Public Prosecutions and 4 others (2020) eKLR.
29. Like dependence was also placed in Republic vs Kombo and 3 others Ex parte Waweru Nairobi HCMCA No. 1648 of 2005 (2008) 3 KLR (EP) 478, Muslims for Human Rights (MUHURU) and another vs Inspector General of Police and 5 others (2015) eKLR and Republic v Inspector General of Police and 2 others; Njenga (Ex parte); and Premium Movers Limited and 2 others (Interested Party) (Judicial Review Miscellaneous Application E039 of 2021) (2022) KEHC 604 (KLR).
30. In instances of breach, Counsel submitted that the Court has a duty to interfere. Reliance was placed in Geoffrey K. Sang (supra) where it was held that:
- “The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for



doing so ... The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on...However, if the applicant demonstrates that the investigations that the investigators intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are conferred."

31. In this case, Counsel submitted that the 1<sup>st</sup> Respondent's impugned correspondence was in breach of the Petitioners right under Article 27 of *the Constitution* that grants freedom from discrimination. According to Counsel the impugned letters discriminated against the 1<sup>st</sup> Petitioner as only related to it and not its subsidiaries. In that, although the subsidiaries are mentioned in the letters, no complaint is raised against them. Moreover, that the 1<sup>st</sup> Petitioner's Director and employees had been unfairly singled out. Reliance was placed in *Maina & 4 others v Director of Public Prosecutions & 4 others (Constitutional Petition E106 & 160 of 2021 (Consolidated))* (2022) KEHC 15 where it was held that:

"102. In *Peter K Waweru v Republic* [2006] eKLR, the court defined of discrimination as follows: -Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description ... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."

32. On the right to privacy, Counsel submitted that the 1<sup>st</sup> Respondent's investigations threaten the Petitioners right under Article 31(c) and (d) of *the Constitution*. This is because the documents and information sought in the impugned correspondence is a direct threat to the Petitioners right to privacy as companies. Reliance was placed in *Standard Newspapers Limited & another v Attorney General & 4 others* (2013) eKLR where it was held that:

"It is a necessary incident to democracy that citizens must be protected from unjustified intrusions of privacy and property by agents of the state. Otherwise, arbitrary state actions could severely affect the personal freedoms and associated fundamental rights that are intended to be a predominant feature of democratic society. While I agree that the right to privacy is not absolute and must be balanced against the intended purpose for intrusion, such limitation should not be one that will risk straying off the very core of the right or freedom. The manner in which the search and seizure is carried out must not expose persons to further violation of other rights."

33. On the right to property, Counsel submitted that the Petitioners hold a legitimate interest in their personal, private and confidential life and hence the 1<sup>st</sup> Respondent's attempt to enforce the impugned letters is in breach of this right.
34. Counsel further submitted that the 1<sup>st</sup> Respondent had violated the Petitioners right to a fair administrative action as no reasons were outlined for seeking the said documents and no particulars



of fraud were stated. In support Counsel cited the case of Kenya Human Rights Commission v Non-Governmental Organizations Co-Ordination Board [2016] eKLR where it was held that:

“On the Petitioner's alleged violation of its right under Article 47, it is provided therein that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, 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. These constitutional provisions have been echoed in the Fair Administrative Action Act, 2015 particularly, under Section 4(1) and (2).”

35. On the right to a fair trial and in particular the right to refuse to give self-incriminating evidence Counsel submitted that the 1<sup>st</sup> Respondent had violated this right in their impugned communication. Reliance was placed in Mini Cabs & Tours Company Limited v Attorney General & 2 others (Petition 450 of 2019) (2022) KEHC 11207 (KLR) where it was held that:

“The question of self-incrimination has been dealt with in several cases. In the case of Richard Dickson Ogendo & 2 others v Attorney General & 5 others [2014] eKLR, Majanja J stated as follows:

“To my mind the, the privilege of an accused person not to incriminate himself protects against compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the accused in the commission of the crime. The purpose of protection against self-incrimination was summed up by the US Supreme Court in *Miranda v Arizona* 384 us 436 (1996)” ... The consensus of the existing jurisprudence as seen in the cited authorities is that an accused person's right against self-incrimination constitutes giving oral or documentary evidence that will be used against that person. This right essentially challenges the admissibility of the documents sought to be eventually admitted into evidence if the petitioner is charged.”

36. Counsel moving to the next issue submitted that the impugned letters were null and void for their failure to comply with the provisions of the Access to Information Act and the Fair Administrative Action Act. This is because the provisions of the Access to Information Act apply to public entities and not private entities such as the Petitioners. While with regard to the Fair Administrative Actions Act, the 1<sup>st</sup> Respondent failed to issue written reasons for the request with regard to the impugned letters.

37. On whether the Petitioners are entitled to a permanent injunctive relief as sought, Counsel argued in the affirmative. To be granted such a relief the Court in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR which was relied on held as follows:

“In an interlocutory; injunction application, the applicant has to satisfy the triple requirements to;

- a. Establish his case only at a prima facie level.
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and
- c. Allay any doubts as to (b) by showing that the balance of convenience is in his favour.”

38. According to Counsel, the Petitioners had established a prima facie case as demonstrated that their rights had been violated. Moreover, that if the orders are not granted as expounded in the Petitioners



affidavits they will suffer irreparable loss. Equally Counsel submitted that the Petitioners would suffer a great inconvenience compared to the Respondents if the orders are not granted. Similar sentiments were expressed on granting the Petitioners an Order of certiorari in respect of the impugned letters and the declaratory reliefs.

39. On costs, Counsel was guided by Rule 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 that the award is at the discretion of the Court. In this case, Counsel relying on the arguments herein urged the Court to exercise this discretion in the Petitioners favour as they had established their case against the Respondents. Additional dependence was placed in *Haraf Traders Limited v Narok County Government (2022) eKLR* where it was held that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”

### **Respondents’ Submissions**

40. State Counsel, Eve Mbeda filed submissions dated 30<sup>th</sup> June 2023. Counsel sought to discuss whether the 1<sup>st</sup> Respondent has the legal authority and jurisdiction to initiate investigations and request documents and information from the Petitioners, whether the actions of the 1<sup>st</sup> Respondent infringed upon the Petitioners rights to privacy, fair administrative action and right to privacy and whether a permanent injunction should be granted to restrain the Respondents from enforcing the directions contained within the aforementioned letters.

41. On the first issue, Counsel commenced by establishing that the 1<sup>st</sup> Respondent is an investigative authority by virtue of Section 24 of the *National Police Service Act*. This provision operationalizes Article 243 of *the Constitution*. Additionally, Section 35 of the Act outlines the mandate of the 1<sup>st</sup> Respondent. Courts have discussed the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in a plethora of authorities. Reliance was placed in *Pauline Adhiambo Raget versus Director of Public Prosecutions & 5 others [2016] eKLR* where it was held that:

“... The Respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by *the Constitution*. The investigations may take them to anyone including the Petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the Interested Party in this case. In so doing, it is a legal mandate they would be undertaking.”

42. Like sentiments were also echoed in *Republic v Commissioner of Police & another Ex-Parte Michael Monari & another [2012] eKLR*. Counsel however noted that the Court of Appeal in *Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others (2013) eKLR* issued the following caution:

“...while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith.”

43. Considering this, Counsel argued that it was clear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have the authority and jurisdiction to investigate the matters brought to their attention, including that of the Petitioners.



In fact Counsel stressed that to curtail the 1<sup>st</sup> Respondent's powers in such circumstances would undermine the administration of justice.

44. In the second issue, Counsel submitted that the 1<sup>st</sup> Respondent exercise of its mandate does not amount to violation of constitutional rights as alleged. It was emphasized that constitutional rights are balanced as against other competing rights and the law. For instance, the right to privacy was deemed not to be absolute and so in such a case it is infringed upon for lawful reasons such as an investigation. Further with regard to the right to fair administrative action, Counsel pointed out that the 1<sup>st</sup> Respondent is not obligated by the law to issue any notice before commencing investigations. Equally, the mere access to the Petitioners' property for the investigation could not translate to a violation of property. Accordingly the allegation of violation of the Petitioners rights was argued to be baseless.

45. It is Counsel's argument in the next issue that a permanent injunction should not be granted to restrain the Respondents from enforcing the directions contained in the cited letters. According to Counsel, the prayer seeking injunctive orders is misguided as in any case the Petitioners' injury if any can be compensated by way of damages. Reliance was placed in *Nguruman Ltd (supra)* where it was held that:

“These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.... If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

46. It was contended therefore that the Petitioner has failed to prove the stated exceptional circumstances to persuade the Court to issue the order. Nonetheless it was submitted that the issuance of the order is at the discretion of the Court. In that case the Court must consider the parties balance of convenience and the interests of justice. In support Counsel cited that case of *Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR* where the Court held as follows:

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

47. Lastly on whether the Petitioners should be awarded costs, Counsel answered in the negative. This is because the Petitioners had failed to establish a violation of their rights or the wrongdoing of the



1<sup>st</sup> Respondent in carrying out its duty. Additionally it was submitted that the award of costs is a discretionary matter based on the circumstances of each case. Reliance was placed in Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application no 6 of 2014 where it was held that:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

48. In view of this, Counsel submitted that in such cases the Supreme Court guided as follows in Jasbir Singh Rai & Others versus Tarlochan Rai & Others (2014) eKLR:

“In the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.”

### **Analysis and Determination**

49. In my view, the following issues arise for determination in this Petition:

- i. Whether the 1<sup>st</sup> Respondent deponent had locus standi to file its Replying Affidavit.
- ii. Whether the 1<sup>st</sup> Respondent in issuing the letters dated 12<sup>th</sup> January 2023 and 21<sup>st</sup> February 2023 violated the Petitioners constitutional rights.
- iii. Whether Petitioners are entitled to the relief sought.

### **Whether the deponent of the 1<sup>st</sup> Respondent’s replying affidavit had locus standi to file the said reply.**

50. To begin with, it is important to understand the meaning of the phrase locus standi. This phrase can sometimes be mistaken for ‘authorization to initiate or defend a suit’ that is given by the Party that has sufficient interest in a matter, or rather by the party that possesses/has locus standi in a matter. Locus standi means sufficient interest or legal right in the subject matter of the dispute to enable the person aggrieved institute or commence proceedings in a court of law. A party must demonstrate he has a stake in the subject matter or has suffered from the act complained of or conduct. In other words, the term locus standi determines who has the legal capacity to sue and be sued. In Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR the Court explained the meaning of locus standi as follows:

“...In the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that; -

“Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others Vs City Council of Nairobi ( 1982) KAR 229, the Court also held that;-



“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such proceedings”.

51. It is the South African case of Kena Media (Pty) Ltd versus Mangaung Metropolitan Municipality (Application number:4027/2021) the Court distinguished between locus standi and authority to sue by explaining thus:

“(34) Although the aforesaid challenge of the deponent's authority was also referred to as the said deponent's lack of locus standi, authority and locus standi are two different issues. In this regard the following is stated in Erasmus: Superior Court Practice, D.E. van Loggerenberg, Jutastat at RS 18, 2022, D1 -96:

“It is submitted that authorisation to institute action or motion proceedings should not be conflated with locus standi in iudicio. Authorisation concerns a question whether a party is properly before the court in legal proceedings. Locus standi materially concerns ‘a direct interest of a party in the relief sought’ in the legal proceedings.”

52. The 1<sup>st</sup> Respondent through the Replying Affidavit of one Francis Mulinga stated that he is a police officer involved in the investigations against the 1<sup>st</sup> Petitioner. The Petitioner asserted that deponent of the 1<sup>st</sup> Respondent affidavit does not have the requisite authority to respond to the Petition. However, the Petitioner does not indicate the reason for expressing doubts concerning the authority by the deponent to swear the affidavit on behalf of the 1<sup>st</sup> Respondent replying affidavit yet that replying affidavit in paragraph 1, the deponent states that he is “duly authorized and competent to swear the affidavit on behalf of the 1<sup>st</sup> Respondent.”

53. The Petitioner contests the capacity of the deponent in filing a replying affidavit on behalf of the 1<sup>st</sup> Respondent without providing any evidence of lack of authority. A reading of the said replying affidavit depicts a deponent versed with first-hand account of the relevant facts having directly participated the alleged investigation that is now the subject of this Petition. The Court can only act on evidence by the Petitioner showing that the deponent had no authority to swear the affidavit on behalf of the 1<sup>st</sup> Respondent, not imaginations. Further, remembering that locus standi and authorization are two different things altogether. The 1<sup>st</sup> Respondent has sufficient interest in defending the petition for the orders sought are directed at it, hence has the requisite locus to appear to defend itself against the Petition. In pursuing its right to answer to the allegations made against it, it permitted the deponent versed with the facts complained to swear the replying affidavit on its behalf. On what basis do the Petitioners claim the deponent lacked locus standi? I find no merit in the Petitioner's claim against the deponent of the replying affidavit on behalf of the 1<sup>st</sup> Respondent. The claim by the Petitioner is speculative and lacks any legal basis. I hereby reject and dismiss this argument.

#### **Whether the issuance of the letters dated 12<sup>th</sup> January 2023 and 21<sup>st</sup> February 2023 by the 1<sup>st</sup> Respondent violated the Petitioners' constitutional rights**

54. The 1<sup>st</sup> Respondent's is a creation of *the Constitution* but its specific mandate is more elaborately set out in the *National Police Service Act*. Article 239 and 243 of *the Constitution* speak of the establishment and the general mandate but specific functions are spelt out in the *National Police Service Act* under Sections 24, 28 and 35 of the Act.



55. Article 239 provides for the National Security Organs of which the National Police Service is part of. Article 240 (3) provides for the establishment of the National Police Service. The Office of Inspector General of Police is created under Article 245 (1) and while *the Constitution* allows the Cabinet Secretary to give direction to the Inspector General on policy matters it precludes any person from directing the Inspector General with respect to investigation of any particular offence. The need for independence in matters touching on investigation of crime was emphasized by the Court in Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR where the Court held thus:

“ 24. It is trite that the Court ought not to usurp the Constitutional mandate of the Respondents to investigate any matter that, in the Respondents’ view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the Respondents since the purpose of a criminal investigations conducted bona fide is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid... However, if the applicant demonstrates that the investigations that the investigators intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are conferred.”

56. Further, the Court of Appeal in Commissioner Of Police & The Director Of Criminal Investigation Department & another (supra) held:

“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged... It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process.”

57. Consequently, the only time the court can interfere with constitutional and the statutory mandate of 1<sup>st</sup> Respondent is where there is clear-cut evidence by the Petitioner that the 1<sup>st</sup> Respondent abused or exercised or it mandate arbitrarily to the detriment of the Petitioner.

58. The 1<sup>st</sup> Respondent maintained that it acted lawfully in line with its mandate in demanding the documents and information in question from the 1<sup>st</sup> Petitioner and summoning the Petitioners employees in order to inquire into the criminal complaint it had received.



59. The Petitioner disputed this assertion and maintained that the manner the 1<sup>st</sup> Respondent went about in seeking the information was wrong as it proceeded on the basis of erroneous legal provisions in demanding for the information and summoning its employees. That the 1<sup>st</sup> Respondent was not driven by genuine investigation but ulterior motive of interfering with the internal management dispute of the 1<sup>st</sup> Petitioner hence the action was unlawful and unconstitutional.
60. The Petitioners' grievance therefore is the issuance of the impugned letters, the one demanding for information and documents and the letter summoning the employees for interview and statement recording as being in violation the Petitioner's constitutional rights under Articles 27, 31 (c) and (d), 40, 47 (1) & (2) and 50(2) of *the Constitution*. A Petitioner who alleges violation of rights has a duty to prove the violation of the rights alleged. This was the holding of the Court in *Leonard Otieno vs Airtel Kenya Limited* [2018] eKLR, where it was held thus:

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues.

Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses...”

61. The question thus becomes, has the Petitioner established the alleged violations? One the rights the Petitioners allege was violated is Article 27 which deals with ‘Equality and freedom from discrimination.’ With respect to a claim based on discrimination, the Supreme Court in *Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) guided as follows:

“... [51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.”

(48) Black's Law Dictionary, 10<sup>th</sup> Edition defines discrimination as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” However, it must be appreciated that not all cases of distinction amount to discrimination.”

62. The Court went on further to observe that:

“ [50] In equal measure, we adopt the definition of discrimination in the High Court case of *Peter K Waweru v Republic* [2006] eKLR as follows:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction,



political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification.”

63. With due respect, the Petitioners did not demonstrate there were other persons in similar circumstances as they were of which complaints in the manner described had been lodged with the 1<sup>st</sup> Respondent and were treated differently from them in manner of carrying out such investigations. The allegation of discriminatory treatment under Article 27 of *the Constitution* was not substantiated as against the 1<sup>st</sup> Respondent and thus fails.

64. The other issue raised was the abuse of the Petitioner’s right to privacy. The Supreme Court equally discussed the right to privacy in *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) observing thus:

“122. The Court of Appeal in the instant matter observed that a party requesting information from a private person must place before the court a demonstrable and sufficient link between the right sought to be exercised or protected and the information requested. Once this is done, the onus is on the private person from whom information is requested to show why such information should not be disclosed ...we are inclined to agree with the Court of Appeal that the appellants did not establish a demonstrable link between the rights they intended to exercise or protected and the information requested. We have reached that conclusion because firstly, the right to access to information is not an absolute right.

65. The Court added as follows:

a. “125....the court needs to balance the appellants’ enjoyment of article 35 rights and the 3<sup>rd</sup> and 6<sup>th</sup> respondents’ right to privacy under article 31 of *the Constitution*. Internal working documents, particularly internal investigation reports which may affect the rights of parties not involved in litigation such as BAAM’s and Britam’s clients cannot be wished away in granting access to information held by those parties. More fundamentally, failure by the appellants to establish the connection between the rights to be exercised or protected and the information requested connotes that if they were to be granted that information, unwarranted invasion of the privacy of the BAAM and Britam would be unduly occasioned and may cause substantial prejudice to their commercial interests.”



66. In the present case, the 1<sup>st</sup> Respondent wrote to the Petitioner seeking submission of its private documents and other information for purposes of investigating allegations of criminal conduct. The 1<sup>st</sup> Respondent purported to rely on *the Constitution* citing Article 35 of Access to Information and also the provisions of *Access to information Act*. Article 35 permits disclosure if it can be established that the “information required is for the protection of any right or fundamental freedom.” With due respect, I do not accept Article 35 (1) (b) permits disclosure for purposes of investigating an offence; it only applies only to information sought for purposes of protecting a right or fundamental freedom. To that extent, the 1<sup>st</sup> Respondent’s insistence on obtaining the information from the 1<sup>st</sup> Petitioner on the basis of Article 35 and the *Access to information Act* to undertake an investigation was legally misconceived.
67. Information or documents required to facilitate investigation of crime is governed under different legal regime. Sections 118 and 118 A of the Criminal Procedure Code requires an application to the Court for a warrant to obtain or search for the information. Under Article 24, a right or fundamental freedom may be limited if the limitation is reasonable and justifiable in open and democratic society based on human dignity, equality, freedom and taking into account importance of the purpose of limitation, the nature and extent of limitation. Information required for purposes of investigation of crime forms part of limitation to the right of privacy or property if the investigation is bonafide and is carried out strictly in compliance with the law. In this instant, the 1<sup>st</sup> Respondent sought private documents of the Petitioner without authorization by the Court under section 118 and 118 A of the Criminal Procedure Code. That was a threat of right to privacy as the information was sought without the requisite legal backing.
68. However, as for summons issued to the named employees of the 1<sup>st</sup> Petitioner vide letter of 21/2/2023 for purposes of interviewing and recording their statements as part of the said investigation process; that was proper exercise of the mandate by the 1<sup>st</sup> Respondent. Section 52 of the *National Police Service Act* empowers a Police Officer to, in writing to require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station and if the person without reasonable excuse fails to comply with a requisition, or who, having complied, refuses or fails to give his correct name and address and to answer truthfully all questions that may be lawfully put to him, that person commits an offence. There are however some important safeguards that the law spells out which must be observed per Section 52 (3), (4) which are:
- (3) A person shall not be required to answer any question if the question tends to expose the person to a criminal charge, penalty or forfeiture;
  - (4) A police officer shall record any statement made to him by any such person, whether the person is suspected of having committed an offence or not, but, before recording any statement from a person to whom a charge is to be preferred or who has been charged with committing an offence, the police officer shall warn the person that any statement which may be recorded may be used in evidence, and;
  - (5) A statement taken in accordance with the section shall be recorded and signed by the person making it after it has been read out to him in a language which the person understands and the person has been invited to make any correction he may wish.
69. Concerning the claim that the rights of the Petitioners to fair hearing under Article 50 were violated and also the right to fair administrative action under Article 47 as a result of the alleged investigation process; I do not think this claim is sustainable in view of the holding by Supreme Court and the Court of Appeal whose decisions are binding on this Court. The Supreme Court has held that the power of investigation when exercised cannot be described to be an ‘administrative act’ within the meaning of



Article 47 as these are special powers conferred by a specific legal regime to be exercised for a special purpose. On the other hand, it has been held that the right to a fair hearing exclusively applies to trial and inquiries of judicial or quasi proceedings where final claim is to be made through application of law to facts. The Court in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR expressed itself as follows:

“

“(22) ... Although on the surface, the three principles appear to refer to the same thing, on deeper examination they are of different legal character and their application may not be necessarily the same. Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. “Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.

It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.”

70. Equally, the Supreme Court in *Ethics and Anti – Corruption Commission and another vs Prof. Tom Ojienda and 2 others* (SCP No.30 of 2019 as consolidated with Petition No.31 of 2019) on investigative powers discussed as follows:

“(53) Article 47 of *the Constitution* protects the right to fair administrative action in the following terms:

“47.

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) 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.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall–
  - (a) provide for the review of administrative action by a court or,



if appropriate, and independent and impartial tribunal; and

(b) promote efficient administration.”

(54) So, what constitutes “an administrative action” within the meaning of Article 47(1) of *the Constitution*? Articles 47 and 260 of *the Constitution* do not define an “administrative action”. Section 2 of the FAA Act which was enacted to give effect to Article 47, defines ‘administrative action’ as follows:

“Administrative action” includes—

- (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates”.

(55) Unfortunately, the foregoing definition does not provide an accurate picture of the meaning of an “administrative action” as it simply addresses the elemental aspects of the phenomenon before describing its nature. On the face of it therefore, any power, function, and duty exercised by authorities or quasi-judicial tribunals constitutes an “administrative action”. Likewise, any act, omission or decision of any person that affects the legal rights or interests of any person to whom such action relates constitutes an “administrative action”. Such definition, without more, would bring within the ambit of an “administrative action” just about anything done, or any exercise of power by an “authority” or “quasi-judicial tribunal”.

(56) A close scrutiny of Article 47 of *the Constitution* gives a glimpse of what an “administrative action” entails. Towards this end, the said Article provides that:

“... Parliament shall enact legislation to give effect to the rights in

(3) clause (1) and that legislation shall— ...

(b) promote efficient administration.”

(57) By stipulating that the legislation so contemplated has to among other things, promote efficient administration, *the Constitution* leaves no doubt that an “administrative action” is not just any action or omission, or any exercise of power or authority, but one that relates to the management of affairs of an institution, organization, or agency. This explains why such action is described as “administrative” as opposed to any other action. The Concise Oxford Dictionary (9th Ed) defines the word “administrative” as “concerning or relating to the management of affairs” Black’s Law Dictionary, (11th Ed) defines “administrative action” to mean “a decision or an implementation relating to the government’s executive function or a business’s management”. Burton’s Legal Thesaurus (4th Ed) defines the adjective “administrative” to mean among others, “directorial, guiding, managerial, regulative, supervisory.



(58) 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.”

71. The Superior Court went on to affirm as follows:

“(61) Having already concluded that the investigative actions of the 1st appellant cannot be categorized as “administrative action” within the context of Article 47 of *the Constitution*, we find no basis upon which we can hold, that the 1st respondent’s rights were violated for failure to observe the requirements of the said Article. Therefore, in the absence of proof of violation of his other fundamental rights and freedoms guaranteed by *the Constitution*, the impugned warrants ought not to have been quashed on the basis of this claim.”

72. Guided by the reasoning of the Supreme Court above, it my finding that that the facts in this case are in the circumstances therefore incapable of establishing a violation of right to a fair hearing and/or a violation the right to fair administrative action.

73. The claim by the Petitioner that the 1<sup>st</sup> Respondent was acting out of malice or ulterior motive by interfering with its internal management disputes was not backed by any evidence. The Petitioners made an allegation but did not adduce evidence of malice or ill-will. The other allegation made by the Petitioners was that the 1<sup>st</sup> Respondent was pursuing a complaint without an actual complainant. This contention holds no water in view of the provisions of the *National Police Service Act*. There is no requirement that the 1<sup>st</sup> Respondent must only investigate reported crimes. In fact, Section 51 of the *National Police Service Act* empowers a police officer to among others: collect and communicate intelligence affecting law and order, to detect offenders and to bring them to justice and to investigate crime.

## Conclusion

1. In conclusion, it is the finding of this Court that the Petition has only partially succeeded, the Petitioners have demonstrated that the move by the 1<sup>st</sup> Respondent to demand and attempt to compel the Petitioners surrender their private documents and/or information by invoking Article 35 and/or *Access to Information Act* when it was information meant for purposes of carrying out an investigation was erroneous and unlawful. The said documents/information ought to have been sought under the provisions of law designed to facilitate acquisition of documents for investigation purposes which is the Criminal Procedure Code hence the act by the 1<sup>st</sup> Respondent was a violation of the Petitioners’ right to privacy under Article 31 of *the Constitution*.
2. The summons issued to the petitioners’ employees vide the letter of 21/2/2023 were proper as the 1<sup>st</sup> Respondent is duly empowered to detect and investigate crime and to summon any



person who it believes may assist in regard to subject matter under investigation save that the safeguards provided for in the law must be observed.

3. There was no proof of allegations of the Petitioners rights under Article 27, 47 and 50 of *the Constitution* by reason of the impugned investigation process.
4. There was no proof of malice on the part of the 1<sup>st</sup> Respondent in carrying out the investigations in question.

### **Disposition**

- i. In *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69 cited with approval in the *Isaac Tumunu Njunge* case (supra), the Court guided as follows when it comes to issuance of prerogative orders in cases touching on the criminal justice system:

“ A prerogative order... should only be granted where there is an abuse of the process of law ...an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...’

- ii. In the instant case, save for the 1<sup>st</sup> Respondent proceeding to seek supply of the documents by quoting on the improper legal regime in demanding private documents from the Petitioners for purposes of conducting investigations, there is no demonstrable evidence of malice that was presented against the 1<sup>st</sup> Respondent by the Petitioner. The slip-up by the 1<sup>st</sup> Respondent was caused by failure apply the proper law in this particular assignment thereby missing the critical step of obtaining a Court order to facilitate the acquisition of the information under the relevant provisions of the Criminal Procedure Code. The documents (if obtained) were thus wrongfully taken and may not even be used as evidence in a criminal case in view of Article 50 (4) which provides that:

‘Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.’

74. I would thus order that if any documents were obtained, it was in breach of the right to privacy of the Petitioners hence the same must be returned.
75. Nevertheless, I consider that it would be inappropriate to issue a permanent injunction stopping investigations into the alleged crimes by the 1<sup>st</sup> Respondent as long as the 1<sup>st</sup> Respondent goes to the drawing board and strictly complies with the relevant law. *The Constitution* does not give the petitioners immunity from investigation or prosecution for criminal conduct.
76. Each Party to bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MILIMANI THIS 19<sup>TH</sup> DAY OF JULY, 2024.**

**L N MUGAMBI**

**JUDGE**

