



**Ochiel & 4 others v Ethics & Anti-Corruption Commission & another; Waterfront  
Outlets Limited & 4 others (Interested Parties) (Petition E004 of 2023)  
[2024] KEHC 8341 (KLR) (Anti-Corruption and Economic Crimes) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES**

**PETITION E004 OF 2023**

**F GIKONYO, J**

**JULY 8, 2024**

**IN THE MATTER OF: ARTICLES 20(1), (3), 22, AND  
23 OF THE CONSTITUTION OF KENYA 2010,**

**IN THE MATTER OF: CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND  
FREEDOM OF PETITIONERS AS ENSHRINED AND PROTECTED UNDER ARTICLES 10  
(2) (C), 28, 31,40(1)(2)9A), 47,50(1)(A)(B)(C), (D) AND (E) (40 OF THE CONSTITUTION OF  
KENYA 2010. IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT 2015  
IN THE MATTER OF: SECTIONS 26,27,28 AND 29 OF THE ANTI-CORRUPTION AND  
ECONOMIC CRIMES ACT IN THE MATTER OF: THE PUBLIC OFFICERS ETHICS ACT  
IN THE MATTER OF: LEADERSHIP AND INTEGRITY ACT IN THE MATTER OF: THE  
RECORD DISPOSAL ACT IN THE MATTER OF: THE NATIONAL PAYMENT SYSTEM  
ACT IN THE MATTER OF: ETHICS AND ANTI CORRUPTION COMMISSION INQUIRY  
NO EACC/AT/INQ/19/2018 IN THE MATTER OF: NOTICES DATED 30TH OCTOBER  
2019 ISSUED TO THE PETITIONERS BY THE RESPONDENT PURSUANT TO SECTIONS 26  
AND 55(2) OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003.**

**BETWEEN**

**NICHOLAS OWINO OCHIEL ..... 1<sup>ST</sup> PETITIONER  
TERRY VIOLET MUTHONI MAINA ..... 2<sup>ND</sup> PETITIONER  
RICHARD OMONDI OCHIEL ..... 3<sup>RD</sup> PETITIONER  
TERNIC VALUERS LIMITED ..... 4<sup>TH</sup> PETITIONER  
TERNIC ENTERPRISES LIMITED ..... 5<sup>TH</sup> PETITIONER**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT**



**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**  
**AND**  
**WATERFRONT OUTLETS LIMITED ..... INTERESTED PARTY**  
**BARNABAS OGOLA OLOO ..... INTERESTED PARTY**  
**BINYABINYA ENTERPRISES ..... INTERESTED PARTY**  
**CONSOLIDATED BANK LIMITED ..... INTERESTED PARTY**  
**NATIONAL BANK OF KENYA LIMITED ..... INTERESTED PARTY**

## **JUDGMENT**

### **Background of the case**

1. The 1<sup>st</sup> respondent received credible information that the 1<sup>st</sup> petitioner, a senior assistant director, valuation at the Ministry of Lands and Physical Planning through the 4<sup>th</sup> and 5<sup>th</sup> petitioners entered into various contracts with property development rendering services which were in direct conflict with the 1<sup>st</sup> petitioner's full-time occupation as an employee of the ministry.
2. Vide an inquiry no EACC/AT/INQ/19/2018, the 1<sup>st</sup> Respondent commenced investigations against the 1<sup>st</sup> Petitioner on allegations of a conspiracy to commit an offence of corruption and economic crime.
3. The subject investigations covered a period of 16 years from January 2003 to November 2018.
4. In the course of the investigations, the 1<sup>st</sup> Respondent obtained a search warrant on 17<sup>th</sup> October 2018 vide Nairobi Chief Magistrate Court at Milimani Miscellaneous application No. 3427 of 2018.
5. Pursuant to the search warrant, the 1<sup>st</sup> Respondent impounded laptops and a phone from the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner's home in Karen, which were forwarded to the Digital Forensic Analyst of the 1<sup>st</sup> Respondent through an Exhibit Memo Form dated 19/09/2018.
6. According to the memo, the 1<sup>st</sup> respondent desired to conduct a lifestyle audit on the 1<sup>st</sup> petitioner with the impounded gadgets alleged to have been used to commit the corruption offences.
7. Further, the memo state that the offence he was to be charged with was that of conspiracy to commit an offence of corruption and economic crimes contrary to section 47A as read with section 48 of ACECA.
8. The 1<sup>st</sup> Respondent issued the Petitioners with notices dated 30/10/2019, 30/10/2019, 12/11/2019,30/10/2019, and 30/10/2019 respectively under sections 26 and 55 (2) of ACECA.
9. The petitioners were required to explain the disproportion between their assets and known legitimate sources of income. The unexplained assets were summed at Kshs. 436,522,747.53/=, 451,366,085.40/=, 105,863,334.00/=, 125, 530, 437.15/=, and 241,771,404.03/= respectively.

### **The application and petition**

10. The petitioners filed a notice of motion dated 30/05/2023. The petitioners/ applicants have sought the following orders;
  - i. This Application be certified as urgent and heard on a priority basis, with service being dispensed with in the first instance.



- ii. Pending the inter-partes hearing and determination of this application, the honourable court be pleased to issue a conservatory order staying the proceedings in the Anti-Corruption and Economic Crimes Division, ACEC NO E024 OF 2022
  - iii. Pending the inter-partes hearing and determination of the Petition herein, the honourable court be pleased to issue a conservatory order staying the proceedings in the Anti-Corruption and Economic Crimes Division, ACEC NO E024 OF 2022.
  - iv. Respondents to bear the cost of the application.
  - v. Any other reliefs as the court may deem fit.
11. The application is premised under Article 23 (1), (3) (c) of *the Constitution* of Kenya 2010, Rule 23 (1), (2), and (3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.
12. The petitioners vide the petition dated 30/05/2023 sought the following reliefs;
- i. A declaration that the notices dated 30th October 2019 issued to the Petitioners are unconstitutional.
  - ii. An order quashing the Notices dated 30th October 2019 and all the proceedings resultant therefrom.
  - iii. A declaration that the requirement by EACC to provide information and records beyond the statutorily required period for retention of records under various statutes is unconstitutional.
  - iv. A declaration that EACC cannot commence civil proceedings by use of documents obtained through search warrants issued in criminal proceedings.
  - v. An order of mandamus directing EACC to ascertain the changing form of property, consider the applicable accounting principles and use the valuation of the properties at the point of purchase and not the current market value prior to issuance of notices pursuant to sections 26 and 55 of ACECA.
  - vi. An order declaring that EACC cannot double account for the same inflows and also requires respondents to account for assets acquired with the same inflows as this amount to double accounting of the same inflows.
  - vii. An order declaring that EACC cannot double, triple, or quadruple account same inflows, to a respondent bank account, withdrawn by the same respondent from their account to their mobile phone MPESA, and then some used by the respondent to procure goods and services directly or sent to an employee or a spouse.
  - viii. A declaration that Nairobi Anti-Corruption & Economic Crimes Court Civil Suit E024 of 2022 is Unconstitutional.
  - ix. Consequent to (Viii) above, an order Striking out Nairobi Anti-Corruption & Economic Crimes Court Civil Suit E024 of 2022 with costs to the Petitioners.
  - x. Respondents to bear the costs of this Petition.
  - xi. Any other orders as the court may deem fit
13. The notice of motion for conservatory orders and petition is supported by the supporting affidavit of Nicholas Owino Ochiel sworn on 30/05/2023.



14. The petitioners filed a further affidavit sworn by Nicholas Owino Ochiel on 18/07/2023.

### **The gist of the matter**

15. The Petitioners herein among other things are challenging the Constitutionality of the investigation process, the general conclusions actions of the 1st respondent including the filing of an Asset Recovery Civil Suit No E024 of 2022 filed by the 1st Respondent which was due for hearing on 06/06/ 2023.
16. The gist of the petition is that the notices issued by the 1<sup>st</sup> respondent precipitating asset recovery OS 24 of 2022 were unconstitutional and therefore the suit itself is unconstitutional. Additionally, the petitioners aver that the 1st respondent in undertaking a lifestyle audit as per its memo form, subjected the petitioners to an illegal process as there was no law governing or authorizing lifestyle audits at the time.
17. The petitioners are of the view that since the evidence relied on in the asset recovery suit is being challenged via the petition, conservatory orders ought to be issued staying the proceedings of asset recovery OS 24 of 2022.

### **The responses**

18. The 1<sup>st</sup> respondent on its part filed a replying affidavit dated 16/06/2023 sworn by Shadrack Mwenda.
19. According to the 1<sup>st</sup> respondent, they obtained the search warrants legally and procedurally. The evidence obtained by the 1st respondent during investigations is subject to both criminal and civil investigations being conducted at the same time within the mandate of the 1st respondent.
20. The notice issued against the petitioners stipulated the investigation period, properties under inquiry, bank, and Mpesa credits.
21. From the responses, the 1<sup>st</sup> respondent was able to conclusively analyze the disproportion between the value of the petitioner's assets and their known legitimate sources of income and found that they had not satisfactorily explained a total of Kshs. 1,206,851,274.11 thus instituted ACEC No. E024 of 2022. Therefore, the issues being raised by the petitioners are afterthought.
22. The 5<sup>th</sup> interested party filed two replying affidavits sworn by Chrispus N. Maithya on 19/07/2023 and another sworn by Samuel W. Mundia on 23/08/2023.
23. According to the 5<sup>th</sup> interested party the orders sought on the petition owing to the illegalities and procedural flaws of the process leading to the eventual filing of the suit.

### **Directions of the court**

24. This court (Prof (Dr.) Sifuna J) on 31/05/2023 directed that for now, the hearing of NAIROBI H.C. ANTI-CORRUPTION AND ECONOMIC CRIMES COURT CASE NO. E024 OF 2022(the subject matter of this application and the petition herein) scheduled for 6/6/2023 shall proceed uninterrupted and as scheduled, the pendency of this application notwithstanding.
25. The petition and the application both dated 30/05/2023 were canvassed by way of written submission. The petitioners, the 1<sup>st</sup> respondent, and the 5<sup>th</sup> interested party have filed. The other parties did not participate in the matter.

### **The petitioner's submissions**

26. The petitioner's submissions with respect to the application are dated 19/07/2023.



27. The petitioners' submissions with respect to the petition dated 06/09/2023.
28. The petitioners filed supplementary submissions in response to the 1<sup>st</sup> respondent's written submissions dated 08/08/2023. The supplementary submissions are dated 12/09/2023.

**The 1<sup>st</sup> respondent's submissions.**

29. The 1<sup>st</sup> respondent submission dated 08/08/2023 to the application dated 30/05/2023.
30. The 1<sup>st</sup> respondent's submissions are dated 03/10/2023 in respect to the petition dated 30/05/2023.

**The 5<sup>th</sup> interested party's submissions.**

31. The 5<sup>th</sup> interested party's submissions are dated 01/10/2023.

**ANALYSIS AND DETERMINATION**

**Proper utilization of judicial time**

32. The court is determining the main petition in which all issues and rights of the parties will be completely determined, rendering it unnecessary to determine the interlocutory application for conservatory order; it has been overtaken by events. The approach does not prejudice any party and follows after sound policy of proper utilization of limited precious judicial time.

**The petitioners' gravamen**

33. Borne out of the petition and the application dated 30/05/2023, the 1<sup>st</sup> respondent's and 5<sup>th</sup> interested party's replies, and the respective parties' submissions is that the ultimate mission of the petition is contained in prayers No. viii & ix of the petition, to wit:
  - i. A declaration that Nairobi Anti-Corruption & Economic Crimes Court Civil Suit E024 of 2022 is Unconstitutional; and
  - ii. Consequent to (Viii) above, an order Striking out Nairobi Anti-Corruption & Economic Crimes Court Civil Suit E024 of 2022 with costs to the Petitioners.
34. The specific challenges fronted in the petition are on: -
  - i. Whether the search warrants were legally and procedurally obtained by the 1<sup>st</sup> Respondent, and whether the evidence so obtained is inadmissible in the civil recovery suit.
  - ii. Whether the Respondents violated the Petitioner's right to privacy.
  - iii. Whether the Notices served on the Petitioners were defective and therefore null and void.
  - iv. Whether it is lawful for the Respondent to demand from the Petitioners documentary records beyond the document retention periods provided by law.
  - v. Whether it was lawful at the time when the Respondent instituted the relevant investigation for it to conduct a purported Lifestyle Audit of the Petitioners
  - vi. Whether valuations conducted by an unlicensed and ungazetted valuer can premise claims against the Petitioners.
  - vii. Whether the 1st Respondent can use criminal law process and procedures to obtain evidence to prosecute a civil claim (unexplained assets.)



## **Respondents: matters be raised in the trial**

35. The 1<sup>st</sup> respondent submitted that the issues raised in the petition are issues which can only be determined in ACEC suit no. E024 of 2022. According to the 1<sup>st</sup> respondent, the petition is asking this court to pronounce itself on the admissibility of the evidence presented by the 1<sup>st</sup> respondent in ACEC Suit No E024 of 2022 without having the opportunity to weigh the evidence in the trial. The 1<sup>st</sup> respondent relied on the case of Sofia Mohammed Vs Ethics and Anti-Corruption Commission (EACC) & 3 others [2018] eKLR, Lydia Lubanga vs Inspector General of Police & 4 Others [2016] eKLR.
36. The 1<sup>st</sup> respondent submitted that once corruption and economic crimes are conclusively investigated and a forfeiture suit filed in court it is in the public interest that the said matters are expeditiously prosecuted, perpetrators punished and assets recovered. The 1<sup>st</sup> respondent contends that it is in the public interest that ACEC suit no E024 of 2022 against the petitioners should proceed to its logical conclusion.
37. According to the petitioners, the choice to file a petition instead of waiting to raise whatever complaints they might have in ACEC No. E024 OF 2022 is on the basis of the infringements of their rights, and that the said recovery suit is a fruit of the poisoned tree. The petitioner relied on the case of Stanley Munga Githunguri v Republic [1986] eKLR.
38. The 5<sup>th</sup> interested party submitted that to date they are neither a party to the suit nor has the 1<sup>st</sup> respondent secured their interest as chargee over properties 1, 2, 3, 4 and 5. They pushed for the determination of the petition, but, also to be permitted to participate in the recovery proceedings so as to secure their interest on the properties named.

## **Issues**

39. Issues for determination, therefore, revolve around: -
  - i. Whether matters forming the petition should be raised in the NBI ACEC No. E024 OF 2022. In determining this issue, the court will examine each ground and prayer in the petition and make a specific determination thereto. There are also some issues on competence and jurisdiction of the court which should be determined in limine.
  - ii. Whether the 5<sup>th</sup> interested party should participate in NBI ACEC No. E024 OF 2022;
  - iii. Whether the orders sought are merited.

## **Preliminary: Competence and jurisdictional issues**

### **I. Whether the petition complied with the requirements set in Anarita Karimi Njeru**

41. The 1<sup>st</sup> respondent submitted that the petitioners have failed to strictly plead how their rights have been infringed by the 1<sup>st</sup> respondent. They argued that, the petition fails the competency test set out in Anarita Karimi Njeru Vs Republic [1976-80] KLR 1272.
42. The 1<sup>st</sup> respondent contends that the petitioners have not specifically indicated which rights it has infringed by issuing the notices in question.
43. The 1<sup>st</sup> respondent calls for the dismissal of this application and petition on the ground that petitioners have not pleaded with precision about how their constitutional rights were violated. The



- 1st respondent relied on the case of Anarita Karimi Njeru Vs the Republic (No. 1) [1976-80] 1KLR, and Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
44. The petitioners submitted that contravention of *the constitution* or statute cannot be justified on the plea of public interest as public interest is best served by enforcing *the constitution* and statute. The petitioners relied on the cases of Edward Muriga Through Stanley Mobisa Mariga Vs Nathaniel David Shulter & Another [1997] eKLR, Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Another [2014] eKLR, Republic Vs County Government Of Mombasa Ex Parte -Outdoor Advertising Association Of Kenya [2014] eKLR, and Jacqueline Resley V City Council Of Nairobi (2006) eKLR.
45. The petitioners submitted that the 1<sup>st</sup> respondent has not singled out in its replying affidavit any particular claim by the petitioners that has not been pleaded with precision or unsupported by evidence. Therefore, the issues cannot be raised in the submissions. The replying affidavit is the basis of any subsequent submissions and List of Authorities filed in support thereof. The petitioners relied on Gideon Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR, Anarita Karimi Njeru Vs The Republic (No. 1) (1976-80) 1KLR, Mumo Matemu Vs Trusted Society Of Human Rights Alliance & 5 Others [2013] Eklr, Gideon Konchellah V Julius Lekakeny Ole Sunkuli 7 2 Others [2018] eKLR, John Harun Mwau & 2 Others V Independent Electoral And Boundaries Commission & 2 Others [2017] eKLR, Peter Wangai Muriithi V Asset Recovery Agency [2022] eKLR, Bwire V Wayo & Saikoli ( Civil Appeal 032 Of 2021) [2022] KEHC 7(KLR) (24 January 2022)(Judgement), Joash Oindo & Another V Ethics And Anti-Corruption Commission & Another; National Land Commission (Interested Party) (2019) eKLR
46. The petitioners contend at the time when the Anarita Kirimi case was decided, to wit, on 25th May 1979, courts were not expressly mandated by constitutional edict to dispense substantive justice without undue regard to procedural technicalities. Our courts are now constitutionally obligated to do so. The petitioners referred to Article 159 (2) (d) of *the Constitution* of Kenya 2010.
47. On what would constitute a constitutional issue, the petitioners relied on the case of John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR,
48. The petitioner contends that the case of Anarita Karimi Njeru vs. The Republic (No.1) (1976-80) 1KLR, was not dismissed because the petition was imprecise. The Court of Appeal actually heard and determined the case on the merits. The said case was dismissed on the ground that the Court of Appeal had no jurisdiction to hear appeals from the decisions of the High Court exercising its jurisdiction under section 84 of *the Constitution* of 1969. Considering the fact that how the said petition was drafted did not call for a decision, and consequently was not vital to the outcome set out in the final decision of the said case, it is at best, obiter dicta, which is not binding on this court.
49. The petitioner further submitted that the excerpt that the Respondent seeks to rely on in Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR, has been mischievously condensed in the Respondent's submissions to conceal the fact that the relevant paragraph in the said Judgment actually contained a restatement by the Court of Appeal of its previous decision in the aforesaid case of Anarita Karimi. At paragraph 41 of Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR,
50. The petitioners continued that, the case of Peter Wangai Muriithi v Asset Recovery Agency (2022) eKLR, which the Respondent relies on is inapplicable to this case. The facts and circumstances of the said case are not in any way similar to the facts and circumstances of this case and the issues arising in the said case are not in any way similar to the issues arising in this case. Firstly, the said case was not a constitutional petition, and no claims were made therein of the violation or threatened



violation of any constitutional rights. Secondly, the applicants therein sought the recusal of the Judge on grounds of alleged bias. Thirdly, the applicants therein sought the termination of the pending forfeiture proceedings and any other incidental proceedings on the ground that the preservation orders issued in the said suit had already lapsed at the time of the forfeiture suit by the Asset Recovery Agency. The petitioners to buttress the point on applicability of decisions relied on *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)* (2022) KEHC 7 (KLR) (24 January 2022) (Judgment).

51. They also argued that, the case of *Joash Oindo & Another v Ethics and Anti-Corruption Commission & Another; National Land Commission (interested party)* (2019) eKLR, which the respondent also relies on, is likewise inapplicable to this case, for similar reasons. The facts and circumstances of the said case are not in any way similar to the facts and circumstances of this case and the issues arising in the said case are not in any way similar to the issues arising in this case. This petition has not been filed on the basis that the asset recovery suit is causing inconvenience or embarrassment to the petitioners.
52. The 5<sup>th</sup> interested party submitted that the violations of fundamental rights under articles 31,40, 47 and 51(1) of *the constitution* have been sufficiently pleaded. The 5<sup>th</sup> interested party has demonstrated sufficiently that fundamental rights under *the constitution* were violated by the 1st respondent during the process of investigation alleged violation of ACECA and eventual administrative action taken by the 1st respondent to file the suit. The 5th interested party relied on *Anarita Karimi Njeru Vs Republic* [1976-80 KLR 1272, *Mumo Matemo V Trusted Society Of Human Rights Alliance* [2014] Eklr, *Erastus Njonjo Mote & 3 Others V Attorney General & 2 Others* [2017] Eklr, *Judicial Service Commission V Mbalu Matava & Another* [2015] Eklr
53. This court has perused the petition, and is satisfied that, it meets the *Anarita Karimi* case threshold; it has set out their claims with precision and in sufficient particularities to enable the parties understand the case they are faced with and to respond appropriately. But, whether the petition will succeed, is a different thing altogether.

## SUBSTANTIVE ISSUES

### II. Whether the search warrants obtained by the 1st Respondent are defective and all the evidence obtained through the same should be suppressed.

54. The petitioners submitted that Suppression of the evidence obtained through a search warrant is an appropriate remedy where the Magistrate in issuing the warrant was misled by information in an affidavit that the deponent knew was false or would have known was false except for his reckless disregard for the truth
55. They contended that, in the application for the relevant search warrant, the 1<sup>st</sup> Petitioner was falsely accused of inter alia embezzlement, misappropriation, and fraudulent and or wrongful acquisition of public property.
56. The 1<sup>st</sup> petitioner is of the opinion that; the 1<sup>st</sup> Respondent knew or ought to have known that the 1<sup>st</sup> petitioner was not an Accounting and or Authorized officer at the Ministry of Lands and that his official duties and functions do not include the management, control, and or custody of public funds. Similarly, the 1<sup>st</sup> Respondent had no justifiable reason to accuse the 1<sup>st</sup> Petitioner in the said application for wrongful and or fraudulent acquisition of unidentified public property. The 1<sup>st</sup> petitioner stated that, to date, the said fraudulently acquired public property has not been identified and none of the aforesaid claims and or allegations have been raised by the 1st Respondent against the 1st Petitioner in ACEC No. E024 OF 2022.



57. The 1<sup>st</sup> petitioner has taken the view that, the search warrants obtained by the 1<sup>st</sup> Respondent are fatally defective for failure to meet the legal requirements of valid warrants and the evidence obtained pursuant thereto ought to be excluded pursuant to Article 50 (4) of *the Constitution* of Kenya 2010.
58. The petitioners relied on Article 50(4) of *the Constitution*, the Supreme Court of Canada in R V Genest [1989] 1 S C R 59, and South Africa in Minister for Safety and Security V Van Der Merwe and Others (CCT90/10) (2011) ZACC 19: 2011 SA 61 (CC0; [2011 \(9\) BCLR 961 \(CC\)](#); [2011 \(2\) SACR 301 \(CC\)](#) (7 JUNE 2011),
59. The 1<sup>st</sup> respondent urged that, it was not required to give notice and/or seek the consent of the petitioners in enforcing the search warrant obtained vide Nairobi Chief Magistrate Misc. App. No. 3427 of 2018 as settled in Supreme Court Petition No. 30 Of 2019 As Consolidated With 31 Of 2019 EACC & Another V Prof. Tom Ojienda Sc, T/A Tom Ojienda & Associates & Others.
60. In the opinion of the 1<sup>st</sup> respondent, a search warrant is an investigative tool available to the 1<sup>st</sup> respondent in the conduct of its investigations.
61. The 1<sup>st</sup> respondent submitted that the search warrants were obtained legally and procedurally.
62. The petitioners submitted that the averment made by the 1<sup>st</sup> Respondent in its replying affidavit that it was not required to give notice and or seek the consent of the petitioners before obtaining and executing a search warrant is totally misguided as no such claim is contained in the petition. The assertion made by the petitioners is that prior investigations by the 1<sup>st</sup> Respondent are required to provide a legal and factual basis for an application for a search warrant. *Vitu Limited Vs. The Chief Magistrate Nairobi & 2 Others*, Misc. Criminal Application No.475 Of 2004, *Emmanuel Suipanu Siyanga V Republic* Criminal Appeal 124 Of 2009 (2013) eKLR, and *Manfred Walter Schmitt & Another V Republic & Another* (2013) eKLR,
63. The petitioners contend that the 1<sup>st</sup> Respondent did not obtain warrants to inspect the Petitioners' Bank Accounts or MPESA records. The petitioners stated that, the aforesaid averment made in the petition and the supporting affidavit, has not been controverted by the 1<sup>st</sup> Respondent in its replying affidavit. By the mere fact of the petitioners' aforesaid supporting affidavit not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. The petitioners relied on the decision of the Court of Appeal in *Daniel Kibet Mutai & 9 Others v Attorney General* [2019] eKLR, at para 34:
64. The 1<sup>st</sup> respondent claims that it was not legally required to give the petitioners prior notice prior to obtaining and executing search warrants.
65. The petitioners asserted that the said search warrants are improper and unlawful for the 1<sup>st</sup> respondent to seek and obtain a search warrant without having conducted any preliminary investigations into the purported complaint received by the said Commission. The findings of a preliminary investigation provide the basis for an application for a search warrant.
66. The petitioners contend that the 1<sup>st</sup> Respondent sought the Petitioners' wealth declaration forms from the Public Service Commission six (6) months after obtaining and executing the relevant search warrants. Logically, the Public Service Commission should have been the first port of call for the Respondent's investigators who know or ought to know that public officers are legally obligated to file periodic wealth declarations for themselves and their spouses under the provisions of Section 26 of the *Public Officer Ethics Act* 2003, wherein they are legally obligated to disclose their sources of income, assets, and liabilities.



67. To the petitioners, resorting to search warrants where there are other alternatives and less restrictive methods, is an infringement of the petitioners' fundamental rights and freedoms rights under Article 24 (1) (e) of *the Constitution*.
68. This court has considered the arguments for and in opposition to the search warrants. The arguments seek to impeach the propriety and legality of the warrants; the process of obtaining and execution of the warrants.
69. Related thereto is the 1<sup>st</sup> respondent's submission that, pleading issues on the warrants where there is a substantive recovery suit filed on the basis of the material and information obtained through those warrants, is an abuse of the court process.
70. According to the 1<sup>st</sup> respondent, being dissatisfied by the decision of the trial magistrate, the petitioners should have appealed or applied for revision of the said ruling. The petitioners applied for review of the orders issued vide the application for search warrant, the application was dismissed and no appeal has been filed to date. Consequently, by raising these issues, the petitioners are converting the process of constitutional petition into an appeal or a request for exercise supervisory jurisdiction. The 1<sup>st</sup> respondent relied on *Eric Wambua Muli & Another Vs Prime Bank Limited & 3 others* [2017] eKLR.
71. Eminently relevant is the 1<sup>st</sup> respondent's argument that, the petitioners are using these proceedings to circumvent the requirement of filing an appeal on the magistrate's ruling declining review of orders on the warrants of search. Section 118 of the CPC envisages a review of or appeal on orders of warrants of search. The petitioner requested for review which was denied. The law provides for appeal against such order.
72. Whereas availability of other remedies does not take away the right to file a constitutional petition for redress of infringement of a right or fundamental freedoms, it is also true that, the vehicle of constitutional petition is not a default option for a party who deliberately refuses to follow, or circumvents, a clear provision of the law which provides adequate mechanism for a complete resolution of the controversy.
73. In addition, it is this court's view that, warrants of search are provided in law. They serve as judicial tools which aid investigations. They were applied for and obtained as provided in law. There is nothing improper or illegal about the warrants or search herein. The process and procedure of applying for, and granting of warrants of search has inbuilt reporting-back mechanisms for purposes of accountability of court processes. It is doubtful that, the claim that false information was provided to the magistrate issuing the warrants of search is potent ground for a constitutional petition. Similarly, use of the documents seized upon execution of the warrants of search in a civil case are issues of production and admissibility of evidence, falling squarely within the remit of the trial court in the civil recovery suit.
74. In the circumstances of this case, pursuit of issues relating to the warrants of search as constitutional issues in a constitutional petition where there is a substantive civil recovery suit before the High court with jurisdiction to try such issues within the trial of the civil suit. Founding a constitutional petition on these issues which are quite foundational to the civil recovery civil suit, does not evince good faith, and may be an abuse of process.
75. Be that as it may, this court finds that the search warrants were obtained legally and accordingly executed.



### III. Whether the Respondents violated the Petitioner's right to privacy.

76. The petitioners submitted that the 1<sup>st</sup> respondent violated the petitioners' right to privacy. The 1<sup>st</sup> respondent sought, obtained, and executed a search warrant against the petitioners without any prior inquiry into the petitioners' legal sources of income which were reasonably attainable from publicly available information including wealth declaration forms regularly submitted by the 1st petitioner to the public service commission. The 1<sup>st</sup> respondent obtained search warrants vide Milimani magistrate court at Milimani Misc. Application No. 3427 of 2018 on 17/09/2018. Subsequent to obtaining and executing the warrants the 1<sup>st</sup> respondent (6 months later) wrote to the Public Service Commission seeking for the petitioners' wealth declaration forms vide letter dated 09/01/2019. They relied on Articles 31, and 24 of *the Constitution*, Section 180 of the Criminal Procedure Code, Section 180 of the *Evidence Act*, section 26 of the Public Officers Ethics Act, 2003, and the supreme court of Canada in R V Oakes [1986] 1 S.C.R. 103, and Jacqueline Okuta & Another V Attorney General & 2 Others [2017] eKLR.
77. The 1st respondent submitted that the petitioners' allegation that their rights under Article 31 of *the Constitution* were infringed cannot lie as the right to privacy is not absolute and does not fall within the category of non-derogable rights under Article 25 of *the Constitution*. The 1<sup>st</sup> respondent cannot be accused of acting in excess of its powers as it is rightly mandated to carry out investigations which include gathering information pertinent to its investigations. The 1st respondent relied on Ibrahim Wako Boru Vs Ethics & Anti-Corruption Commission & Another [2018] eKLR, supreme court petition no. 30 of 2019 consolidated with Petition No. 31 of 2019 EACC & Another Vs Prof. Tom Ojienda & Others, and Benson Muteti Masila & 5 Others Vs Chief Magistrate Milimani Law Courts & 4 Others [2020] eKLR.
78. The petitioners argued that, the entire process precipitating the issuance of the notices was tainted with irregularity and illegality and further in contravention of Article 24 of *the Constitution*. They urged that, the 1<sup>st</sup> Respondent did not pursue the least invasive method of obtaining information which would have been to first obtain information and documentation from the Public Service Commission. Instead, the 1<sup>st</sup> Respondent obtained a search warrant first, invaded the Petitioner's privacy, and obtained the wealth declaration forms subsequently.
79. The petitioners submitted that, the 1<sup>st</sup> Respondent did not obtain inspection warrants or the Petitioners' consent to enable them to access and inspect the bank accounts, MPESA statements, and wealth declaration forms.
80. The petitioners contend that in this case, the 1<sup>st</sup> Respondent sought, obtained, and executed a search warrant against the Petitioners without any prior inquiry into the Petitioners' legal sources of income which were reasonably ascertainable from publicly available information including from wealth declaration forms regularly submitted by the 1<sup>st</sup> petitioner to the Public Service Commission pursuant to the provisions of Section 26 of the Public Officers Ethics Act 2003.
81. The 1<sup>st</sup> Respondent obtained search warrants vide Milimani Magistrates Court at Milimani Misc Application No 3427 of 2018 on 17/09/2018.
82. Subsequent to obtaining and executing the warrants, the 1<sup>st</sup> Respondent then wrote to the Public Service Commission seeking for the 1<sup>st</sup> Petitioner's wealth declaration forms vide a letter dated 09/01/2019.



83. The evidence aforementioned shows that the Respondent sought the Petitioners' wealth declaration forms from the Public Service Commission six (6) months after obtaining and executing the relevant search warrants. This was a clear violation of Article 24 (1) (e) of *the Constitution*.
84. The limitation of the petitioners' rights to privacy guaranteed under Article 31 of *the Constitution* through the said search warrants was in the circumstances not reasonable and justifiable in terms of the aforesaid limitation Clause under Article 24.
85. The said limitation does not therefore pass the constitutional criteria for the limitation of fundamental rights and freedoms developed by the Supreme Court of Canada in R. v. Oakes, [1986] 1 S.C.R. 103 *Jacqueline Okuta & Another v Attorney General & 2 Others* (2017) eKLR.
86. The petitioners submitted that the 1<sup>st</sup> Respondent's argument that the issue raised by the petitioners touching on the legality of the search warrants obtained by the 1st Respondent is a closed issue is misguided. Accordingly, the issue of the Constitutionality and legality of the search warrant that precipitated all that followed including the filing of this Petition is a matter that the court can and should delve into. The petitioners cited exception to the principle of mootness and relied on *Institute for Social Accountability & Another v. The National Assembly & Others (Petition No. 1 of 2018)* [2022] KESC 39 (KLR) (Civ) (8 August 2022) (Judgment) , *President of the Ordinary Court Martial & 2 Others –v-The Freedom of Expression Institute & 3 Others* (1999) 4 SA 682, which was cited with approval in *Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others* (2016) eKLR, *MEC for Education: KwaZulu-Natal and Others v Pillay* (CCT 51/06) (2007) ZACC 21, *Okiya Omtatah Okoiti & Another vs Council of governors; Attorney General & 2Others* (Interested Parties) [2021]eKLR,
87. This court has considered the points raised by the parties on the intrusion of the 1<sup>st</sup> petitioner's right to privacy contrary to the law. The court has found that the warrants were applied and executed in accordance with the law. It appears that the petitioners seem to suggest that the 1<sup>st</sup> respondent should not have applied for warrants of search before obtaining the wealth declarations forms from the PSC.
88. The 1<sup>st</sup> respondent contended that wealth declaration forms can be obtained at any stage of investigation by the 1<sup>st</sup> respondent.
89. The proposition by the 1<sup>st</sup> petitioner is completely oblivious of the fact that, an investigation takes significant planning and thinking-through on, inter alia, how best to obtain and secure evidence. Investigators, then, employ best and effective methods of securing and collection of evidence. The steps to be taken or the sequence that an investigation follows, are informed by the nature of the investigation and the attendant peculiar circumstances of each case. A financial investigation, for example, may demand quick and razor-targeted measures of collection and preservation of financial evidence.
90. Sources of information may also be multiple providing such relevant evidence or information to a particular aspect of the investigation.
91. Accordingly, there is no legal requirement that, the 1<sup>st</sup> respondent should, in this case, have first obtained wealth declarations forms from the PSC before applying for warrants of search.
92. Search warrants herein were applied for and issued under section 118 of the CPC, which is granted; 'Where it is proved on oath... 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...'



93. The court agrees with the petitioners that there should be some basis for applying for warrants of search. The 1<sup>st</sup> respondent stated in the filed affidavit that there was reasonable suspicion of commission of an offence and that the documents sought were necessary for the conduct of investigations. The allegation by the 1<sup>st</sup> petitioner that the affidavit contained false information on commission of the offences stated, is neither here nor there.
94. This court has also held that the procedures employed in applying for, and executing the warrant were lawful. In the circumstances, this court, finds that the petitioners have not proved a violation of the rights enshrined in Article 31 of [the Constitution](#)

#### **IV. Whether the Notices served on the Petitioners were defective and therefore null and void.**

95. The petitioners submitted that the notices served on the petitioners are fatally defective as they do not specify the property that was suspected to have been corruptly acquired. The petitioners contend that the 1<sup>st</sup> respondent listed all the assets owned by the petitioner, bank, and Mpesa statements requiring them to explain how each was acquired, which does not meet the criteria set in law. The petitioners relied on the cases of Christopher Ndarathi Murungaru V KACC and The Attorney General Nairobi Hc Misc Appl No. 54 of 2006 [2006] eKLR and Joshua C Kulei V Kenya Anti-Corruption Commission & Another [2013] eKLR, Ethics And Anti-Corruption Commission V Moses Kasaine Lenokulal & Another [2019] eKLR, Christopher Ndarathi Murungaru V Kenya Anti-Corruption Commission & Another [2006] eKLR, and Petition No. 30 of 2019 as consolidated with Petition No. 31 of 2019 between Ethics And Anti-Corruption Commission & Another V Prof. Tom Ojienda T/ A Prof. Tom Ojienda & Associates & 2 Others Edward Muriga Through Stanley Mobisa Maria Vs Nathaniel David Shulter & Another [1997] eKLR.
96. The petitioners contend that Civil Suit E024 of 2022 is in itself Unconstitutional in that the 1st Respondent herein used a criminal law process to obtain evidence that it was well aware it intended to use in a civil process.
97. In the notices and indeed Civil Suit E024 of 2022 the 1<sup>st</sup> Respondent included assets that are in the names of the 1<sup>st</sup> to 3<sup>rd</sup> Interested Parties despite the fact that the Interested Parties were neither participants in the administrative process nor were they included in the suit.
98. Furthermore, the 1<sup>st</sup> Respondent did not disclose to the court the fact that some of the properties had been charged in favour of the 4<sup>th</sup> and 5<sup>th</sup> Interested Parties thereby denying the court the benefit of crucial evidence necessary to make its orders.
99. The Petitioners herein have now challenged the constitutionality of the said notices. They opine that, once this court finds the Notices and the entire process against the Petitioners by the 1<sup>st</sup> Respondent to be unconstitutional, the entire body of evidence in the Anti-Corruption case No E024 of 2022 becomes inadmissible by reason of unconstitutionality.
100. The Notices to explain served on the petitioners are fatally defective as they did not specify the property that was suspected to have been corruptly acquired. Listing in the Notices to explain all the assets owned by the petitioners and requiring them to explain how they acquired each and every one of the said assets does not meet the criteria set in the aforesaid cases of Christopher Ndarathi Murungaru v KACC and the Attorney General Nairobi HC Misc Appl. No. 54 of 2006 (2006) eKLR; and Joshua C. Kulei v Kenya AntiCorruption Commission & Another (2013) eKLR.
101. Annexing to the aforesaid Notices to explain, the petitioners' bank and Mpesa statements and or records for a period of almost Sixteen (16) years, and branding each deposit contained therein as an



- unexplained asset and demanding that the petitioners explain all of the said financial transactions is oppressive and a fishing expedition
102. The petitioners submitted that the 1st Respondent erred in law in labeling the deposits into the petitioners' bank and Mpesa accounts as assets, which is contrary to accounting practice. Not all deposits are assets. For example, advance payments and or deposits made by clients before services are rendered are liabilities. Furthermore, all transactions must include two entries under the double entry rules of accounting. The 1st Respondent ignored the related outgoings.
  103. The petitioners submitted that the Notices to explain served on the petitioners do not specify the grounds and or the basis upon which the petitioners are reasonably suspected of corruption and economic crimes. The petitioner relied on *Joshua C. Kulei v Kenya Anti-Corruption Commission & Another* (2013) eKLR, *Ethics and Anti-Corruption Commission v Moses Kasaine Lenokulal & Another* (2019) eKLR, *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another* [2006] eKLR, *Petition No. 30 of 2019 as Consolidated with Petition No. 31 OF 2019 Between Ethics and Anti-Corruption Commission & Another v Prof. Tom Ojienda T/A Prof. Tom Ojienda & Associates Advocates & 2 Others*,
  104. The petitioners argued that, the requirement that the 1<sup>st</sup> Respondent identify a specific suspected property or properties in the Notice to Explain cannot be interpreted to mean that the 1<sup>st</sup> Respondent ought to simply list therein everything that is owned or has ever been owned by the suspect. There must be a basis for suspecting that a particular property was corruptly acquired or is above the legitimate means of the suspect.
  105. The petitioners further found fault in the Notices to explain served on the petitioners, for they listed all the assets that the respondent believed were owned by the petitioners and demanded that the petitioners explain with documentary evidence how they had acquired each and every one of them.
  106. The petitioner also complained that, the said Notices to explain also listed all the deposits made into the petitioners' bank accounts over a period of sixteen (16) years and demanded that they explain with supporting documents each and every deposit made into the said bank accounts. Similarly, they urged that, the said Notices to explain also listed all the deposits made into the petitioners' Mpesa accounts over a period of sixteen (16) years and demanded that they explain with supporting documents each and every one of them.
  107. According to the petitioners, there is no evidence that there was any prior effort on the part of the respondent to distinguish between the petitioners' legitimate assets and financial transactions and what is reasonably suspected to be suspect property and illegitimate financial transactions.
  108. Further to the foregoing, the Respondent wrote a Notice to Explain dated 30th October 2019 addressed to the 1<sup>st</sup> Petitioner, wherein the Respondent only recognized his salary at the Ministry of Lands as his lawful income. On the same date, the Respondent wrote two other Notices to Explain addressed to Ternic Valuers Limited and Ternic Enterprises Limited, the 4th and 5th petitioners herein, all marked to the attention of the 1st Petitioner, wherein it is indicated that he is a registered Director of the said companies. The petitioner sees this as irrational as it clearly indicates that contrary to the contents of the Notice addressed to the 1<sup>st</sup> petitioner, the Respondent was all along aware that he had more than one sources of income.
  109. Similarly, the Respondent wrote a Notice to Explain to the 2<sup>nd</sup> Petitioner on the same date wherein it claimed that she has no known legitimate source of income and wondered how she acquired the assets registered in her name. On the same date, to wit, 30th October 2019, the Respondent wrote the aforesaid two Notices to explain addressed to the 4th and 5th petitioner companies wherein it is clearly



indicated that the 2nd petitioner is a registered Director of the 4th and 5th petitioner companies. This is clearly irrational. The 2nd petitioner either has no legitimate income or she is a registered director of two registered operating companies. The Respondent cannot have it both ways.

110. The petitioners were of the view that, the respondent did not identify the petitioners' lawful sources of income or ascertain what the petitioners had earned from their aforesaid lawful sources of income over the period of investigation over the purported investigation period prior to its issuance of the relevant Notices to explain to the petitioners.
111. The 1<sup>st</sup> respondent submitted that the commission was not required to give a written notice prior to commencing an investigation in all situations. The 1<sup>st</sup> respondent relied on the case of Supreme Court Petition No. 30 Of 2019 As Consolidated With 31 Of 2019 EACC & Another V Prof. Tom Ojienda Sc T/A Tom Ojienda & Associates Advocates & Others and Dr. Christopher Ndarathi Murungaru Vs Kenya Anti-Corruption Commission & Another [2006] eKLR.
112. The 1<sup>st</sup> respondent contends further that, the notice stipulated the investigation period, properties under inquiry, bank, and Mpesa credits. They therefore met the threshold set out in Dr. Christopher Ndarathi Murungaru Vs Kenya Anti-Corruption Commission & Another [2006] eKLR.
113. As per the 1<sup>st</sup> Respondent, it filed asset recovery proceedings against the Petitioners in the Anti-Corruption and Economic Crimes Division vide ACEC NO E024 OF 2022 on the premises of the Statutory notices.
114. Contrary to the submissions by the petitioners, the notice stipulated the investigation period and properties and transactions under inquiry.
115. Further, the respondent has stated the value of the petitioners' assets or wealth and disproportion thereof during the period of investigation.
116. Forfeiture of unexplained assets arises out of unexplained disproportion between the value of assets and the known legitimate sources of income for the specified period. The correctness of the net-worthiness analysis by the 1<sup>st</sup> respondent is a matter of evidentiary evaluation by the court in the forfeiture proceedings upon hearing the parties. Therefore, such factual-based contentions by the petitioner on value analysis are fit for trial in the forfeiture proceedings rather than in a constitutional petition.
117. Thus, for purposes of the petition, nothing shows that, the notices herein were not issued in accordance with the law.

**V. Whether it is lawful for the Respondent to demand from the Petitioners documentary records beyond the document retention periods provided by law.**

118. The petitioners contend that the 1<sup>st</sup> Respondent exceeded its statutory mandate and limits of the search warrant by basically not limiting their investigations to the period when they suspected the 1<sup>st</sup> Petitioner to have engaged in corrupt activities and extended their search to the beginning of the 1<sup>st</sup> Petitioner's employment in 1996 contrary to the requirement of law that the 1<sup>st</sup> Respondent limits themselves to the time frame and specific allegations as was held in Mombasa Constitutional Petition No 15 of 2017 Hassan Ali Joho vs The Inspector General of Police & 3 Others (2017) eKLR.
119. The petitioners contend that the notices were incompetent and fatally defective in that they did not delimit the time frame of the investigations, nor did they specify the property targeted for investigations with respect to which the information was sought as required under section 2 as read together section 26 of Anti-Corruption and Economic Crime Act No 3 of 2003. And further upheld in Dr



Christopher Ndarathi Murungaru vs Kenya Anti-Corruption Commission & Hon Attorney General (2006) eKLR.

120. The petitioners contend that the notices further did not specify the reasons for suspicion precipitating the investigations as required under the law as was held in Nairobi High Court Petition 459 of 2006 Joshua C Kulei vs Kenya Anti-corruption Commission & The Hon Attorney General (2013) eKLR.
121. Furthermore, there was no reporting to the Central Bank of Kenya (CBK) or the Financial Reporting Center (FRC) of suspicious transactions to designate authorities to warrant the 1<sup>st</sup> Respondent to require the Petitioners to give their financial transactions history as contemplated under Section 44 (2) of the [Proceeds of Crime and Anti-Money Laundering Act](#) 2009.
122. Additionally, they argued that, there was no report made to the Financial Reporting Center (FRC) within 7 days, of suspicious activities or transactions by the Petitioners mobile payment service providers as required under The National Payment System (Anti Money Laundering Guidelines For the Provision of Mobile Payment Services) Guidelines 2013 issued by the Central Bank of Kenya pursuant to The [National Payment System Act](#) No 39 of 2011 to warrant the 1<sup>st</sup> Respondent to require the Petitioners to issue explanations regarding their MPESA transactions.
123. The petitioners stated that, they are entitled under Article 50 (2) (k) of [the Constitution](#) to adduce and challenge evidence. However, prejudice can safely be inferred where the 1<sup>st</sup> Respondent demands from the petitioners', through the aforesaid Notices to Explain, explanations and supporting documents for financial transactions carried out over a period of sixteen years. It is an accepted fact that over time memories fade, witnesses may die or become untraceable for one reason or the other, and documentary records may be lost
124. The petitioners submitted that as regards a Notice to Explain under Section 26 of the [Anti-Corruption and Economic Crimes Act](#) 2003, they relied on the Supreme Court of Kenya in Petition No. 30 of 2019 as Consolidated with Petition No. 31 OF 2019 Between Ethics and AntiCorruption Commission & Another v Prof. Tom Ojienda T/A Prof. Tom Ojienda & Associates Advocates & 2 Others,
125. The 1<sup>st</sup> Respondent demanded that the petitioners support with documentary records any response to the issues or queries raised by the 1<sup>st</sup> respondent in the Notices to explain that it served on the petitioners. According to the Respondent's replying affidavit, the relevant Period of Investigation was a period of sixteen years, to wit, from the year 2003-2018.
126. The petitioners have asserted in their petition that they are only bound by the following statutory document retention periods and pray that this Court Orders that the Respondent cannot go beyond the said period in its claims in ACEC NO. E024 OF 2022.
  - a. Section 630 (2) of the [Companies Act](#), No. 17 of 2015 requires companies to retain their accounting records for a period of seven (7) years.
  - b. The law as set out under the Central Bank of Kenya Prudential Guidelines of January 2013 only requires Commercial Banks to retain their records for a period of Seven (7) years.
  - c. As regards mobile money transfers, money transfer operators are authorized to act as payment service providers under the [National Payment System Act](#) 2011 and National Payment System Regulations 2014. Section 29 of the said Act provides for a record retention period of seven (7) years.
  - d. As regards tax records, a person is required under Section 23 (1) (c) of the [Tax Procedures Act](#) No.29 of 2015, to maintain any document required under any tax law tax for a period of five



years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law.

- e. The record retention period provided under Section 43 (1) of the VAT Act No. 35 of 2013 is also five (5) years.
  - f. The record retention period provided under the *Income Tax Act* (CAP 470) is also five (5) years.
127. The petitioners submitted that it is logical that the petitioners cannot be in a position to produce for instance bank deposit slips (for cash deposits), bank withdrawal slips, cheque images, RTGS/SWIFT Transfer requests from their banks, or tax records from the Kenya Revenue Authority, or supporting documents for their Mpesa records, for a period of sixteen years when banks, the KRA and providers of mobile money transfer services are not legally obligated to keep records for sixteen years. even the 4th and 5th petitioner companies are also not legally obligated to keep records for such a period of time.
  128. The petitioners contend that the 1<sup>st</sup> Respondent has not denied through its replying affidavit that the applicable statutory documentary retention periods are as averred by the petitioners in their supporting affidavit. Further, the 1<sup>st</sup> Respondent has not pleaded in its replying affidavit a legal basis for its aforesaid unlawful demands. The averments in the petitioners' supporting affidavit are therefore uncontroverted and deemed to have been admitted. The petitioners relied on *Edward Muriga through Stanley Mobisa Mariga vs. Nathaniel David Schulter & Another* (1997) eKLR.
  129. The petitioners contend that it is oppressive and unconstitutional for the petitioners to be deprived of their assets as contemplated by the respondent in ACEC NO. E024 OF 2022, merely because they have been unable to produce some documentary records for a period of sixteen years when there is no law that requires them to retain documentary records for such a period. It is akin to charging them for having committed a crime that was not a crime at the time it was committed.
  130. The 1<sup>st</sup> respondent contends that the exhibit memo is not a sole tool that informs the period of investigation of an offence if any.
  131. The 1<sup>st</sup> respondent contends that the notices were not excessive and/ or oppressive. Section 74 of ACECA on limitation of time excludes proceedings under section 55 ACECA.
  132. The 1<sup>st</sup> respondent submitted that the notices issued to the petitioners under section 26 ACECA were specific to the person reasonably suspected of corruption, the period of interest of investigations, and the properties and assets under inquiry. The petitioners in their responses did not raise any preliminary issues. Therefore, the issues herein are an afterthought. Further, the 1<sup>st</sup> respondent is not limited by any law on the period stated in the complaint received. The 1<sup>st</sup> respondent relied on Article 50(4) of *the constitution*, *Njonjo Mue & Another Vs Chairperson Of Independent Electoral And Boundaries Commission & 3 Others* [2017] eKLR, and *David Ogolla Okoth Vs Chief Magistrate Court, Kibera & 2 Others* [2016] eKLR.
  133. Upon consideration of the arguments herein, the notices issued to the petitioners under section 26 ACECA, stated the person reasonably suspected of corruption, the period of interest in the investigations, and the properties and assets under inquiry.
  134. The court has also considered the petitioners argument that, it is unlawful to require them to produce supporting documents whose legally permitted retention period has expired. These are the explanations and evidence the petitioners should provide to the trial court in the forfeiture proceedings of the unexplained assets. Under section 55(4)(b) of ACECA, 'the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence



adduced by the Commission...’ This is in perfect harmony with the constitutional and due process requirements.

135. Doubtless, the retention period of documents requirement is of evidentiary value, which should be tendered to, for consideration together with other evidence, by the trial court in determining whether the assets concerned are unexplained assets in the sense of section 55 of ACECA.
136. These contentions may not per se or by themselves, found a violation of right for adjudication as a constitutional issue.
137. In any event, the 1<sup>st</sup> respondent stated that, the petitioners did not, in their responses, raise any preliminary issues especially on the retention period. They termed the raising of these issues in a constitutional petition as mere afterthoughts and intended to pull the rag under their feet.
138. Therefore, the contentions fail in so far as they are packaged as constitutional issues.

#### **VI. Whether it was lawful at the time when the Respondent instituted the relevant investigation for it to conduct a purported Lifestyle Audit of the Petitioners**

139. According to the petitioner, the notices were equally incompetent and fatally defective in that the 1<sup>st</sup> Respondent purported to undertake a Lifestyle Audit on the Petitioners without a legal framework for the same as the Lifestyle Audit Act was not a law then and still is a Bill currently.
140. The petitioners are convinced that, the investigation conducted by the 1<sup>st</sup> Respondent was actually a lifestyle audit disguised as an investigation into alleged unexplained assets since the 1<sup>st</sup> Respondent did not ascertain the petitioners’ lawful sources of income and legitimate assets before serving the petitioners with the aforesaid notices to explain which included all the assets acquired by the petitioners since they began working. This was unlawful since no law provided for a lifestyle audit at the commencement of the 1<sup>st</sup> Respondent’s aforesaid purported investigation.
141. Exhibit Memo to the Digital Forensic Analyst dated 19th September 2018, the 1<sup>st</sup> Respondent asserts that it desired to “Extract all data pertaining to Lifestyle Audit.”
142. In their petition, the petitioners’ averred that the Respondent was not at the relevant time legally empowered to conduct what it purports to be a lifestyle audit of the petitioners. They stated that, this averment was not controverted by the Respondent in its replying affidavit. The petitioners relied on Daniel Kibet Mutai & 9 Others v Attorney General [2019] eKLR Edward Muriga through Stanley Mobisa Mariga vs. Nathaniel David Schulter & Another (1997) eKLR.
143. The petitioners argued that, in its written submissions, the 1<sup>st</sup> respondent seeks to justify its aforesaid unlawful act by hiding behind the emotive plea of public interest. To them, it is trite that contravention of *the Constitution* or a statute cannot be justified on the plea of public interest as public interest is best served by enforcing *the Constitution* and statute. The petitioners relied on Republic vs. County Government of Mombasa Ex-parte-Outdoor Advertising Association of Kenya (2014) eKLR, Jacqueline Resley v City Council of Nairobi (2006) eKLR,
144. They also took issue with the manner the Respondent attempted to respond through its submissions to the issues raised in the petitioners’ supporting affidavit. The petitioners relied on the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR
145. A lifestyle audit refers to a specialized investigative audit of a person’s living standards to ascertain whether they are consistent with the person’s lawful income. It is also referred to as an accountability tool. It is different from ordinary criminal or asset tracing investigation to establish commission of an offence or proceeds of crime, respectively.



146. The argument by the petitioners that suggests that, lack of procedure or legal framework for, prevents enforcement of a constitutional relief or remedy, is old thinking whose remains were eternally interred with the retired Constitution.
147. Be that as it may, whether the term lifestyle audit may have been used in the exhibit memo, the totality of the evidence adduced show that, the 1<sup>st</sup> Respondent was not carrying out a Lifestyle Audit on the Petitioners, but an investigation on suspicion of commission of corruption or economic crimes and possibility of unexplained assets. The forfeiture suit filed attests to this. So, the court finds.

**VII. Whether valuations conducted by an unlicensed and ungazetted valuer can premise claims against the Petitioners.**

148. The petitioners contend that valuations of the petitioners' assets are also unlawful and inadmissible in evidence as they were carried out by an unlicensed valuer. The valuation officer who undertook the valuation of the properties was not licensed at the time and therefore the valuation officer was not Gazetted. He could therefore not be construed as a "valuation officer within the context of section 59 of the *Anti-Corruption and Economic Crimes Act* 2003 and therefore the valuations are void. The petitioners relied on sections 6, 7, and of the *Valuers Act* Cap 532, Section 59 of the *Anti-Corruption and Economic Crimes Act* 2003.
149. The 1<sup>st</sup> respondent submitted that the valuer who undertook the valuations of assets was properly licensed in line with section 59 ACECA. The issue of the valuation of properties has only been raised at the submission stage denying the 1<sup>st</sup> respondent the right to rebut. Further, the issue can be addressed at the trial in ACEC No. E024 of 2022.
150. This court agrees with the 1<sup>st</sup> respondent that, the challenge on the competence of the valuation officer and objection to production and admissibility of a valuation report made by the said officer, should be raised in the forfeiture proceedings for determination in accordance with section 59 of the ACECA.
151. Again, by asking this court to evaluate evidence before a court of concurrent jurisdiction is against applicable procedural as well as substantive law; this court does not have supervisory jurisdiction upon a court of concurrent jurisdiction; and the right site for adjudication of the issue is the forfeiture proceedings.
152. This court, therefore, finds the issue has not been proved.

**VIII. Whether the 1st Respondent can use criminal law process and procedures to obtain evidence to prosecute a civil claim (unexplained assets.)**

153. The petitioners submitted that the use of criminal law processes and procedures such as search warrants and warrants to inspect accounts, to obtain evidence to prosecute a claim for the recovery of unexplained assets, which is supposedly a civil claim under Section 55 of the *Anti-Corruption and Economic Crimes Act* 2003, violates a core element of a fair trial, namely the Principle of equality of arms, as it places the petitioners at a substantial disadvantage, and is consequently unconstitutional.
154. They argued that, if the said claim is civil, as alleged, evidence ought to be obtained by the parties in the manner provided under the Civil Procedure Rules 2010.
155. The petitioners submitted that it is unconstitutional for the 1st respondent to prosecute allegations through a process that allows for criminal allegations to be tested against the civil standard of proof. The petitioners contend that the use of criminal law processes and procedures such as search warrants and warrants to inspect accounts to obtain evidence to prosecute a claim for unexplained assets, which



is a civil claim violates a core element of fair trial, the principle of equality of arms, and consequently unconstitutional. The 1<sup>st</sup> respondent ought to have issued notices under ACECA and are precluded from using the CPC. The petitioners relied on section 3(1) and (2), 118 of the Criminal Procedure Code, Section 47 A and 48 of the ACECA, 2003, section 55 of the *Anti-Corruption And Economic Crimes Act*, sections 26, 27 and 28 of CECA, sections 118 and 120 of the CPC, Director of Public Prosecutions Vs Tom Ojienda T/A Prof Tom Ojienda Associates Advocates & 3 Others [2019] eKLR, Michael Kamu Kuria & Another Vs Ethics & Anti-Corruption Commission [2020] eKLR, *Institute For Social Accountability & Another V The National Assembly & Others (Petition No. 1 of 2018)* [2022] KESC 39 (KLR) (Civ) (8 August 2022) (Judgment), president of the ordinary court martial & 2 others v the freedom of expression institute & 3 others (1999) 4 SA 682 which was cited with approval in Wanjiru Gikonyo & 2 Others V National Assembly of Kenya & 4 Others (2016) eKLR, MEC For Education; Kwazulu- Natal And Others V Pillay (CCT 51/06) (2007) ZACC 21, Okiya Omtatah Okoiti & Another Vs Council of Governors; Attorney General & 2 Others (Interested Parties) [2021] eKLR.

156. The 1<sup>st</sup> respondent submitted that there is no law prohibiting the 1<sup>st</sup> respondent from carrying out parallel investigations and using the evidence obtained in both civil and criminal proceedings. The 1<sup>st</sup> respondent is mandated to institute civil proceedings for civil forfeiture and recommend to the DPP charges of a criminal nature. Section 23 of ACECA grants the 1<sup>st</sup> respondent police powers necessary for the investigation of corruption and economic crimes. Therefore the 1<sup>st</sup> respondent is not precluded from suing sections 118 and 120 of the CPC. No law prohibits the 1<sup>st</sup> respondent from carrying out parallel investigations. The 1<sup>st</sup> respondent relied on section 2 of ACECA and section 193A of CPC.
157. The petitioners submitted that it is unconstitutional for the 1<sup>st</sup> Respondent to prosecute allegations through a process that allows for criminal allegations to be tested against the civil standard of proof.
158. The petitioners submitted that the use of criminal law processes and procedures such as search warrants and warrants to inspect accounts to obtain evidence to prosecute a claim for unexplained assets, which is a civil claim, as per the provisions of Section 55 of the *Anti-Corruption and Economic Crimes Act* 2003, violates a core element of a fair trial, namely the Principle of equality of arms and is consequently unconstitutional.
159. They argued that, the spirit and intention of the procedure prescribed in Section 55 (1) *Anti-Corruption and Economic Crimes Act* 2003 whereby notice is required to be given to an “affected party” before ex-parte proceedings to obtain search warrants was, “intended for a person of interest to first be given a chance to voluntarily comply with the notice before any action is taken against him as was held by the Court of Appeal in the case of Director of Public Prosecutions vs Tom Ojienda t/a Prof Tom Ojienda Associates Advocates & 3 others (2019) eKLR.
160. The petitioners contend that the powers of the 1<sup>st</sup> Respondent under the *Anti-Corruption and Economic Crimes Act* 2003 are limited. The 1<sup>st</sup> Respondent was mandated to issue notices under sections 26, 27 and 28 of the Act and it is precluded from using sections 118 and 120 of the Criminal Procedure Code and section 180 of the *Evidence Act* as was buttressed in Michael Kamau Kuria & Another vs Ethics & Anti-Corruption Commission (2020) eKLR.
161. The 5<sup>th</sup> interested party submitted that the proceedings of corruption and economic crimes such as the suit instituted by the 1<sup>st</sup> respondent pursuant to section 55 of ACECA are civil in nature and not criminal in nature. Further, the procedure followed by the 1<sup>st</sup> respondent to obtain information used against the petitioners was illegal and unlawful. The 5<sup>th</sup> interested party relied on section 55 (1) of ACECA, Director of Public Prosecutions V Tom Ojienda T/A Prof Tom Ojienda & Associates



- Advocates & 3 Others [2019] eKLR, and Michael Kamau Kuria & Another V Ethics & Anti-Corruption Commission [2020] eKLR.
162. This court has considered the arguments presented by the parties as well as the law.
163. The petitioner submitted that whatever the nature of the investigations the 1<sup>st</sup> Respondent may be undertaking, it must do so within the confines of *the Constitution* and the law. The petitioners relied on Petition No. 30 of 2019 as Consolidated with Petition No. 31 OF 2019 Between Ethics and Anti-Corruption Commission & Another v Prof. Tom Ojienda T/A Prof. Tom Ojienda & Associates Advocates & 2 Others.
164. The petitioner did not, however, identify the kind of investigation is expected in law or for purposes of forfeiture of unexplained assets under section 55 of ACECA, making a discussion thereto critical. At some point they seem to allude to notice under section 55(2) of ACECA before investigation, without substantiation or proper situating of the argument within the context of the section which talks of;
- ‘..the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income...’
165. The ‘reasonable opportunity to explain’ is in the course of investigation.
166. Be that as it may, in many cases, corruption and economic or financial crimes involve proceeds of crime or illicit flows. Thus, investigation for these offences inherently incorporates asset tracing investigation for purposes of forfeiture of proceeds of crime.
167. Under section 55(2) of ACECA: -
- ‘The Commission... commence proceedings under this section against a person if—
- (a) after an investigation, the Commission is satisfied that the person has unexplained assets...’
168. The investigation under section 55 of ACECA is in respect of ‘corrupt conduct’ which means: -
- a. conduct that constitutes corruption or economic crime; or
- b. conduct that took place before this Act came into operation and which—
- I. at the time, constituted an offence; and
- II. if it had taken place after this Act came into operation, would have constituted corruption or economic crime.
169. Contrary to the submission by the petitioners, forfeiture of proceeds of crime draw, inter alia, upon the evidence at the trial or gathered in the investigation. It is also important to understand that, even criminal forfeiture or confiscation, may be conducted in a proceeding subsequent to conviction but before sentence by the trial court. And, the law considers such criminal forfeiture proceedings as civil proceedings to which the rules of evidence applicable in civil proceedings shall apply. This procedure is not strange to, but is part of law of Kenya.
170. First, it is anchored in international conventions such as the United Nations Convention against Corruption (UNCAC) and the United Nations Convention on Transnational Organized Crimes (UNTOC) which are; ‘...treaty or convention ratified by Kenya...’ and ‘shall form part of the law of Kenya’ (art. 2(6) of *the Constitution*).



171. Second, the procedure has been adopted in PART VI of ACECA and PART VII of the [\*Proceeds of Crime and Anti-money Laundering Act\*](#) (POCAMLA).
172. Therefore, application of a different standard of proof in forfeiture proceedings cannot be the basis or a justification for the argument by the petitioners that evidence obtained through judicial tools such as search warrants should not be used in civil forfeiture proceedings.
173. More knowledge hurts not; A search warrant may also be issued in alleged infringements of trademark, copyright and patent in what is commonly known as Anton Piller order- an extraordinary form of injunctive relief which compels a defendant to permit a complainant to enter its property to search for and seize evidence and records, including electronic data and equipment for use in the civil claim.
174. The petitioners merely submitted that the use of criminal law processes and procedures such as search warrants and warrants to inspect accounts to obtain evidence to prosecute a claim for unexplained assets, which is a civil claim, as per the provisions of Section 55 of the [\*Anti-Corruption and Economic Crimes Act\*](#) 2003, violates a core element of a fair trial, namely the Principle of equality of arms and is consequently unconstitutional.
175. Other than making generalized statements, the kind of prohibition alluded to by the petitioners on the use in a civil forfeiture proceeding, of evidence which has been obtained lawfully in an investigation, and how it violates his rights, was not grounded in law or proved.
176. The 1<sup>st</sup> respondent is mandated in law to conduct investigations and, inter alia, to seek forfeiture of assets it has established to be unexplained assets in the manner prescribed by law. The 1<sup>st</sup> respondent relied on sections 2, and 55(2) of ACECA and article 252 of [\*the constitution\*](#).
177. This court also finds that, evidence that has been lawfully obtained in an investigation for ‘corrupt conduct’ under section 55 of ACECA, will be lawfully used for purposes of forfeiture of proceeds of crime including unexplained assets.
178. Therefore, the argument by the petitioners on this point fails.

### **Third party participation in the forfeiture suit**

179. The 5<sup>th</sup> interested party submitted that to date they are neither a party to the suit nor has the 1<sup>st</sup> respondent secured their interest as chargee over properties 1,2,3,4 and 5.
180. The 5<sup>th</sup> interested party averred that the bank's credit team confirmed that the properties listed on the notices issued by the 1<sup>st</sup> respondent to the petitioners were charged in favour of the bank. The 1<sup>st</sup> and 4<sup>th</sup> petitioners applied for a loan facility which was approved through letters of offer dated 12/02/2020 and 27/07/2020 respectively. 1<sup>st</sup> and 4<sup>th</sup> petitioners are in default of repayment of the above credit facilities which total to an aggregate sum of Kshs. 52,860,000/= which is due and remains in arrears to date.
181. The 5<sup>th</sup> interested party averred that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners presented copies of title to properties 1,2,3,4, and 5 to be used as security to the bank upon request by the bank for purposes of conducting due diligence on the said properties by conducting official searches at the relevant land registries to ascertain that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners hold a good title to the same. The various land registries confirmed that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners hold a good title to the properties causing the bank to approve various facilities. In the suit filed by the 1<sup>st</sup> respondent, they seek forfeiture of property 1,2,3,4 and 5 to the state.
182. The 5<sup>th</sup> interested party averred that it would be greatly prejudiced if the proceedings in the suit were allowed to continue without the participation of the bank in light of the revealed interest of the bank



- in the properties 1,2,3,4 and 5. The bank is apprehensive that it will lose the said properties to the state since the same were used as collateral and risk not realizing its securities and recover the great sum of credit facilities amounting to Kshs. 52,860,000/= advanced to the 1<sup>st</sup> and 4<sup>th</sup> petitioners.
183. The 5<sup>th</sup> interested party submitted that the 5<sup>th</sup> interested party has property rights to property 1,2,3,4 and 5 as a charge. The 1<sup>st</sup> respondent's omission to register a caveat over property 1,2,3,4 and 5 prejudiced the 5<sup>th</sup> interested party's rights. The 1<sup>st</sup> respondent instituted proceedings to recover and forfeiture of property 1,2,3,4 and 5 which were charged in favour of the 5<sup>th</sup> interested party and defeated the 5<sup>th</sup> interested party's proprietary interest in the properties. The 1<sup>st</sup> respondent failed to register a caveat notifying third parties such as the 5<sup>th</sup> interested party of the claim over the properties thereby causing the 5<sup>th</sup> interested party to proceed to charge the properties without notice. The 1<sup>st</sup> respondent instituted administrative action seeking to have the properties forfeited without giving reasons to the 5<sup>th</sup> interested party. The 1<sup>st</sup> respondent also obtained injunctive orders in a suit where the 5<sup>th</sup> interested party was not a party. The 5<sup>th</sup> interested party relied on articles 40(1)(2), 47, 50(1), 51(1)260, of *the Constitution*, section 56 of the *Land Registration Act*, and section 87 of the *Land Act*,
184. The 1<sup>st</sup> respondent contends that nothing stops the interested parties from applying to join the proceedings in ACEC No, E024 of 2022. Forfeiture proceedings under section 55 ACECA are an action in rem against the petitioner's properties whose legitimate acquisitions have not been satisfactorily explained, making such property tainted property as was determined in Stanley Mombi Amuti V Kenya Anti-Corruption Commission [2019] eKLR.
185. This court takes the view that, there is nothing that prevents the 4<sup>th</sup> and 5<sup>th</sup> interested parties from applying in the forfeiture proceedings to be joined as interested parties so that they may seek the court to secure their interests in some of the properties subject to forfeiture. They did not show that they applied to join the proceedings. Their saddle upon this petition may not yield anything given the findings of the court on the petition, which make it clear the direction the court is taking. Big notes rarely fall by the way side. However, their request in the petition will fall by the wayside in these proceedings. Nonetheless, their option to apply to join in the civil forfeiture proceeding is unscathed.
186. In passing, the practice of, and constitutional imperative in forfeiture is that, third parties with an interest in the property subject of forfeiture, are given an opportunity to protect their interest in the proceeding, either, by joining the suit as interested parties or being notified of all proceedings undertaken in respect thereto.

### **Challenge on factual basis of the forfeiture proceedings**

187. The petitioners have also stated that the 1<sup>st</sup> Respondent has not identified and or highlighted even one specific incident or land transaction that would show that the 1<sup>st</sup> Petitioner used his official position to the advantage of the family business, to wit, the 4<sup>th</sup> Petitioner, or to the advantage of a client of the said family business, to justify the claim of conflict of interest which appears to be the only justification for the asset recovery case against the petitioners in ACEC No.E024 OF 2022.
188. They took a swipe at the forfeiture proceedings that, the case against the petitioners lacks a factual and legal foundation and is based on mere assumptions.
189. But, whereas a party may invoke this Court's jurisdiction under Article 165 (3)(b) of *the Constitution* to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, attack upon the factual and legal basis of a proceeding before a court of concurrent jurisdiction should be made in the particular proceeding.



### Challenge of ex parte order

190. Before concluding, this court has noted the petitioners' claim that, their rights to fair administrative action as enshrined under Article 47 of *the Constitution* and the Fair Administrative Actions Act 2015 were violated when substantive orders were issued against them on a mention date on 24<sup>th</sup> October 2022 in ACEC No. E024 OF 2022 without affording them a hearing. They cited *Daniel Maingi Muchiri v Jubilee Insurance Co. Ltd (2017) eKLR, (Civil Appeal 175 of 2014)*.
191. Again, it is this court's view that, the matter should be handled within the civil suit rather than in a constitutional petition. The trial court is competent to deal with and possesses unfettered discretion in dealing with an application of such nature.

### Conclusions and orders

192. Borne out of the petition and the arguments ably presented by the parties, the controversies are about the propriety of ACEC SUIT NO 24 OF 2022. The petitioners have challenged the legality and constitutionality of the notices issued under section 26 of ACECA, the legality of the warrants of search issued by the magistrate, production and admissibility of evidence procured through the notices and warrants of search, orders issued in their absence in the said civil case. Although, according to the petitioners, these matters amount to infringements of rights, they are matters which should be litigated in the forfeiture proceedings rather than in a separate constitutional petition.
193. The civil suit is pending before a court of concurrent jurisdiction which stands in horizontal relationship with this court; meaning, this court has no supervisory jurisdiction over the court trying the civil forfeiture suit. Some of the requests made in the petition are an invitation to issue supervisory directions to the court trying the civil suit especially on the production and admissibility of evidence. The court presiding over the civil suit has the competency and constitutional authority to determine issues to do with the manner the evidence was procured, production and admissibility of the evidence so procured.
194. Therefore, the challenge of the manner the evidence was procured- notices and warrants- are issues for determination by and fall squarely within the remit of the High court sitting as the trial court in the civil suit. Packaging these issues as constitutional issues in a constitutional petition, diminishes the value of constitutional resolution and remedies. It is also a perfect way of delaying or stalling a forfeiture proceeding; delay is always the ally of the defaulter.
195. This court noted that, Prof. Sifuna J, had ordered the forfeiture proceedings to continue despite the pendency of this constitutional petition. This court suspects the wisdom behind the order is exactly the realization that the issues forming the petition, should be raised and determined in the civil suit which is before the High Court as opposed to filing a separate constitutional petition.
196. Also eminently relevant, is the 1<sup>st</sup> respondent's argument that, the petitioners are using these proceedings to circumvent the requirement that they ought to have appealed the magistrate's ruling declining review of orders on the warrants of search. Section 118 of the CPC envisages a review of or appeal on orders of warrants of search. The petitioner requested for review which was denied. The law provides for appeal against such order.
197. Whereas availability of other remedies does not take away the right to file a constitutional petition, it is also true that, the vehicle of constitutional petition is not a default option for a party who deliberately refuses to follow, thereby, circumventing, a clear provision of the law which provides adequate mechanism for a complete resolution of the controversy.



198. In the circumstances of this case, and the findings of the court, the filing of the petition, does not evince good faith, and may be an abuse of process. The petitioners have not also proved any infringement of their rights and fundamental freedoms.
199. Accordingly, the petition has no merit and is dismissed.
200. Given the nature of these proceedings, each party shall bear own costs.
201. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8<sup>TH</sup> DAY OF JULY, 2024.**

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**HON. F. GIKONYO M**

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**JUDGE**

In the Presence of: -

C/A: Raymond

Mr. Waudo/Madono for Petitioners – Present

Mr. Maina & Mr. Wambugu for 1<sup>st</sup> Respondent – Present

Mr. Mwangi for Mr. Remul for 5<sup>th</sup> Interested party – Present

N/A for the other Interested Party

