



**Republic v County Government of Bungoma & another; Fastec
Suppliers Limited (Exparte Applicant) (Judicial Review Application
E009 of 2022) [2023] KEHC 23105 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
JUDICIAL REVIEW APPLICATION E009 OF 2022**

REA OUGO, J

SEPTEMBER 21, 2023

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
UNDER SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26,
SECTION 2 (B), SECTION 11 (1) (2) OF THE FAIR
ADMINISTRATIVE ACT 2015 AND ORDER 53 OF THE CIVIL
PROCEDURE RULES, 2010, LAWS OF KENYA**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF THE ETHICS AND ANTI- CORRUPTION ACT

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF BUNGOMA 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

AND

FASTEC SUPPLIERS LIMITED EXPARTE APPLICANT

JUDGMENT

1. Before this court is a Notice of Motion Application dated 16th November, 2022 and filed on 23rd November 2022 that has been brought under Order 53 Rule 3 of the Civil Procedure Rules, Section 8



& 9 of the Law Reform Act and Section 10 & 11 of the Fair Administrative Action Act. The Applicant seeks the following Orders:-

1. An order of certiorari to do issue into this court and quash the decision of the 2nd Respondent cautioning the 1st Respondent to make payments to the Applicants which is not their mandate.
 2. An order of mandamus to compel the 1st Respondent to remit due payments to the Applicant.
 3. The costs of this application be provided for
2. The Application is supported by a Statutory statement and Verifying Affidavit dated 7th October 2022 sworn by Juma Swaleh Juma.

The Applicant's Case

3. The Applicants case is that on 1st November, 2018, the 1st Respondent advertised through the Standard Newspaper for open national tender for the Construction of Kimama Water Supply Bridge Tender No. BGM/CNTY/OT/RPW/185/2018-2019. The Applicant successfully applied for the tender and was issued with a notification award of Tender for construction of Kimama Water Supply Bridge for the sum of Kshs 28,036,501.68/-. On 2nd January 2019, he accepted and confirmed the award of tender. The Applicant and the 1st Respondent entered into a contract agreement on 10th January 2019, for the construction of Kimama Water Supply Bridge Tender No. BGM/CNTY/OT/RPW/185/2018-2019. Consequently, the Applicant successfully executed and delivered in time the construction of the said bridge.
4. The Applicant contends that the 1st Respondent has since partially settled the tender to the sum of Kshs 10,107,935.88/-. However, the 2nd Respondent cautioned the 1st Respondent from advancing any payments to the Applicants on grounds that the award of tender was under investigation. Through a letter dated 5th August 2019, the 2nd Respondent invited the Applicant for interview and recorded his statement concerning the tender. On 15th February 2021 the 2nd respondent further invited several persons questioning them on the said tender. The applicant avers that investigations begun on or about 5th August 2019 yet to date no investigation report has been issued to the Applicant. In addition, the 2nd Respondent has not instituted criminal proceedings against any persons listed in its letter dated 15th February, 2021.

2nd Respondent's Case

5. The 2nd Respondent in opposing the application filed their Replying Affidavit dated 2nd December 2022. It was averred that the Commission is established under section 3 of the Ethics and Anti-Corruption Commission Act ('EACC Act') pursuant to Article 79 of the Constitution and its functions provided under Article 252(1)(a) of the Constitution. Its legal mandate to investigate corruption and economic crime is derived from Article 79 of the Constitution, section 23 of the Anti-Corruption and Economic Crimes Act, 2003 ('ACECA') and section 13 of the EACC Act. Under section 11 (1)(d) of the EACC Act the Commission is mandated to investigate and recommend to the Director of Public Prosecution, the prosecution of corruption or economic crimes under any law enacted pursuant to chapter 6 of the Constitution. Section 11(1)(j) of the EACC Act states that the Commission is mandated to undertake investigations to establish the extent of liability for the loss of or damage to public property, and in any appropriate cases, to institute civil proceedings against the person for recovery or restitution of such property or for the freeze or confiscation of proceeds of corruption or the payment of compensation or other punitive and disciplinary measures. Furthermore, section 25(1)



- (a) and 13 (2) (c) of the EACC Act grants the commission power to conduct investigations on its own initiative or on a complaint made by any person.
6. The 2nd Respondent contends that they received a report on 18th August 2020 on allegations that the Bungoma County Government irregularly awarded tender No. BGM/CNTY/OT/RPW/185/2018-2019 to the ex-parte applicant for the Construction of Kimama Water Supply Bridge at the cost of Ksh.28,036,501.68/-. The investigations into the allegations of irregular award are ongoing. The 2nd Respondent during the course of investigations expanded its scope of investigation to two (2) companies, Nabwala contractors Ltd and Skyman Frighters Ltd which were using brief case companies to secure tenders at Bungoma County Government.
 7. The 2nd Respondents claim that the preliminary findings of their investigations reveal a conflict of interest, in that, the former Governor, through his brothers have been conducting business with the 1st Respondent using the ex-parte applicant and four other companies as a front. The Respondent contended that it has been established that there was overpricing and exaggeration of amounts indicated as contract prices in the tenders awarded to these front companies and negotiations between the 1st Respondent and these companies were at arm's length therefore, the first respondent did not receive value for money. This prompted the 2nd Respondent to write to the 1st Respondent advising against making further payment until investigations were concluded.
 8. The 2nd Respondent further contended that it commenced investigation and collected tender documents, specifically tender no. BGM/CNTY/OT/RPW/185/2018-2019 and obtained warrants to investigate the bank account no. 01148446960200 held at co-operative bank belonging to the Ex-parte applicant.
 9. The 2nd Respondent states that upon analysis of the account, the report revealed that the ex-parte applicant received Kshs 3,847,866.95/- on 25th June 2019 and further Kshs 6,523,872.90/- on 13th May 2020. These were payments made in relation to certificate No. 1 (Ksh. 4,053,800/-) and certificate no. 2 (Kshs 6,595,100/-) from the county government of Bungoma as payment for works. A further analysis of the bank statements revealed that Kshs 6,500,000/- was transferred to Nabwala Construction Company; Kshs 2,100,000/- withdrawn vide cheques by Wafula Chesiti, Kshs 800,000/- transferred to Kelvin Ngure, Kshs 900,000/- withdrawn by Sandra Soita and lastly Kshs 70,000/- withdrawn by Swale Juma Swale. All the beneficiaries of the monies were invited to record statements on 3rd March 2021. On 4th March 2021, the 2nd Respondent wrote to the Managing Director of Nabwala Construction Company Ltd inviting him to record a statement at the Commissions offices at Bungoma. The 2nd Respondent received a letter dated 15th January 2021, for the two companies requesting that the interview and statement recording be postponed for two months to allow the directors and officers of the two companies mourn their mother and that the statements be recorded in the Commissions offices in Mombasa. The directors were invited by the 2nd Respondent for interviews between 23rd May 2022 and 26th May 2022.
 10. The 2nd Respondent contends that the ex-parte applicant changed its directorship to hinder the ongoing investigations. The 2nd Respondent maintains that of importance to this application is the relationship between the Ex-parte applicant, Nabwala Construction and Skyman Freighters Ltd. Preliminary investigations established that the initial directors of the ex-parte applicant were Wakoli Wafula Chesiti and Sandra Nasambu Soita who are employees of Skyman Freighters Ltd as a supervisor and accountant respectively. On 10th January 2018 the applicant was awarded tender for the construction of Kimama Water Supply Bridge. However, the director of the company Wafula Wakoli Chesititi stated that he did not know who had submitted the bid documents or signed the contract. On further interrogation he stated that George Biffan Wekesa signed the contract but he was an employee



of Skyman Freighters Limited. George Biffan Wekesa was also the person who supervised the works and other tenders undertaken by Nabwala Construction Limited. The 2nd Respondent avers that Swaleh Juma Swaleh also confirmed that George Biffan Wekesa was not an employee of the ex-parte applicant but Nabwala Construction Company Ltd. And that he has no subcontracting agreement between Nabwala Construction Company Ltd and the Ex-applicant.

11. The 2nd Respondent held the position that Kelvin Ngure and Moses Waliula were employees of Nabwala Construction Ltd. Moses Waliula was appointed the bank agent of the ex-applicant and Wafula Wakoli Chesititi and Sandra Nasambu Soita its directors. Juma Swale Juma is a director of a briefcase company whose ultimate beneficiary is Nabwala Construction Company Ltd and that there is need to lift the corporate veil for comprehensive investigations.
12. Further preliminary findings established that there was no proper valuation reflecting the actual works done on site by the officers from the 1st Respondent and that the payment certificates amounting to Kshs. 10,371,739.35/- were prepared based on the rates quoted by the supplier and not independent measurements of work done by the 1st Respondents officers. The contract price of this tender was Kshs. 28,036,501.68/- while the value of the works done by the Ex-parte applicant upon valuation was equivalent only to Kshs. 11,053,300/- and not the former as claimed. The 2nd Respondent maintained that the tender no. BGM/CNTY/OT/RPW/185/2018-2019 was overpriced and as a result the 1st Respondent would not receive value for money if it pays the ex-parte applicant as claimed in this application. The 2nd Respondent is investigating how money moved from the accounts of the ex-parte applicant and other four companies to Nabwala Company Ltd. It is further investigating the tender process leading to the award of tenders to these companies and the valuation of work done.
13. The 2nd Respondent is mandated to report to the DPP recommendations on the results of the investigations and the DPP who shall make the decision on whether or not to prosecute. The 2nd respondent contends that an order of certiorari cannot be granted by this court for reasons that the letter sought to be quashed cannot be quashed because it is the tool of investigation and disruption of suspended corruption activities and pursuant to section 11(3) of the EACC Act where the 2nd Respondent co-operates and collaborates with other state organs and agencies in the prevention and investigation of corruption. In addition, an order of certiorari cannot be granted because there is a conflict of interest evidently exhibited by former governor and the 1st Respondent is bound to lose because of overpayment. Furthermore, an order of mandamus cannot be granted because investigations are ongoing and the ex-parte applicant will be notified of the outcome of the investigation once the DPP gives directions. Therefore, it is in the interest of public interest that the orders sought should not be granted.
14. The 2nd Respondent maintains that it is an independent body and not subject to any control or direction. The 2nd Respondent contends that the ex-parte applicant has not proved that the investigations and instructions stopping payments to them were illegal, unreasonable, un-procedural, made in bad faith or that they acted ultra vires to their mandate. The 2nd Respondent contends that the applicants have not met the threshold for grant of judicial review orders.

Rejoinder by the Applicant

15. The applicant in its rejoinder filed a further affidavit dated 19th January 2023. It avers that the ex-parte applicant was never served with any warrants that allowed the 2nd Respondents to access its bank statements and the 2nd respondents have not produced such warrants before court as required under section 118 of the Criminal Procedure Code and Section 180 of the *Evidence Act*.



16. The Applicant also contends that investigative powers of the 2nd Respondent do not include powers to stop any public body from performing their contractual obligations. The applicant argues that the ex-parte applicant duly applied for the tender followed due process and was finally awarded the tender. The engineers that were contracted to do valuation of the tender were certified and were hired by the 1st Respondent.
17. The 1st Respondent has failed to give any evidence to show that the applicant fraudulently participated in the tender and evaluation process. The allegations by the 2nd Respondent that the ex-applicant changed its directorship to avoid investigations are unfounded and untrue, and even so, it is not illegal to make internal changes for efficient operations of the company.
18. The Applicant further avers that the 2nd Respondent has failed to produce before the court, the recorded statement of Wafula Wakoli which it sought to rely on in its Replying affidavit. The 2nd respondent also contradicted itself when it alleged that George Biffan Wekesa is an employee of Skyman Firefighters Limited and at the same time an employee of Nabwala Construction Limited and that he the latter received a total of Kshs 6,670,000/- out of a sum of Kshs 5,523,872.90/-. The alleged sum disbursed is over the amount paid to the ex-applicant, hence contradictory.
19. The ex-parte applicant was also not issued with any notice with regards to the Technical Committee Report or notice by the Committee to present its case and give evidence of performance of contract which breaches the provisions of Article 47 of *the Constitution* and Fair Administration Act. The Technical Audit Report relied on by the 2nd Respondent does not implicate the ex-applicant in any way.

The Applicant's Submissions

20. The ex-parte applicant filed their submissions dated 19th January 2023 filed on 16th February 2023. They submit that two issues for determination:
 - i. Whether the procedure for initiating investigations was irregular?
 - ii. Whether the 1st and 2nd Respondents violated the Applicants rights to Fair Administrative Action
21. On the first issue, the Ex-parte applicants submit that the 2nd Respondent actions contravene section 118 and 120 of the CPC and Section 180 of the *Evidence Act* which provides that which obligates them to apply for warrants. The said warrants referred to by the 2nd Respondent are yet to be produced before this court. They place reliance on the case of Kofinaf Company Limited & Another V Ethics and Anti-Corruption Commission & another; Simon Gicharu & 3 others (Interested Parties) (2020) eKLR where the court held that investigative agencies should apply before Magistrates Courts for warrants as provided for under section 118 & 120 of the CPC and section 180 of the *Evidence Act*.
22. The Ex-parte applicants submit that in the absence of the warrants, the access to their bank accounts by the 2nd Respondents as admitted under paragraph 14 and 15 of the Replying Affidavit amounts to breach of the right to privacy. They place reliance on the case of Gordon Ngatia Muriuki v Director of Public Prosecutions & 2 others where the court held that the purpose of warrants is to protect the right person from unreasonable searches and seizures and unnecessary arrests in light of the protections conferred by article 29 and 31 of *the Constitution*. They also rely on Manfred Walter Schmitt & another v Republic & another Criminal Revision No. 569 of 2012 where the court held that the duty imposed on the judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual.



23. On the second issue, whether the 1st and 2nd Respondents violated the applicant's rights to Fair Administrative Action, the Ex-parte appellants submitted that they were never accorded the opportunity to present their case during the conduct of the technical audit by the 2nd Respondent. The action amounts to a one-sided story and a breach of the ex-parte applicant of the right to Fair Administrative Action under article 47 of *the Constitution*. They cite the Halsbury Laws of England, 5th Edition 2010 vol. 61 para 639 which states that the audi alteram partem rule is a fundamental principle of justice. The ex-parte applicant further submits that it is the duty of the court to look into merits and legality of a decision as well as the process and procedure adopted due to the requirement of following the precepts of natural justice as provided under article 47 and 50(1) of *the Constitution*. On this point they placed reliance on The Management of Committee of Makondo Primary School and another v. Uganda National Examination Board, as cited in Republic v Non-Governmental Organizations Cordination Board Ex-part Evans Kidero Foundation (2017) eKLR, where the court stated that a person against whom there is a complaint must be given a just and fair hearing. In Republic v the Honourable Chief Justice of Kenya & others ex-parte Justice Moijo Mataiya Ole Keiuwa Nairobi HCMCA No. 1298 of 2004 the court held that the right to be heard has two facts intrinsic and instrumental.
24. The ex-parte applicants submitted that the 2nd Respondents actions adversely affected their interests, because the rules of fairness were not adhered to. It relied on the case of Onyango Oloo v the Attorney General (1986) EA 456 as cited in Lucy Wanjiku Gitumbi & another v Dedan Kimathi University of Technology (2016) Eklr where the court stated that denial of the right to be heard renders any decision made null and void ab initio. The ex- parte appellants finally submitted that the 2nd respondent in the excise of its powers ignored the legal requirements with impunity and has exceeded the legal parameters and criteria set out for the exercise of its jurisdiction.

The 2nd Respondent's Submissions

25. The 2nd Respondent submitted various issues for determination namely:
- i. Whether the Commission acted within its legal mandate in conducting investigations and advising the 1st Respondent to hold onto making further payments to the ex-parte applicant until investigations are concluded, the subject matter of this application.
 - ii. Whether the ex-parte applicant has met the threshold for grant of judicial review orders of certiorari and mandamus sought in the Notice of Motion Dated 16th November, 2022.
 - iii. Whether the 2nd Respondents investigation against the ex-parte applicant and asking the 1st Respondent to hold further payments until investigations are concluded was tainted with illegality, unreasonableness, irrationality, procedural impropriety, relevant considerations or bad faith.
 - iv. Whether it is in public interest to grant the orders sought by the ex-parte applicant
 - v. Whether the ex-parte applicants' rights were violated by the 2nd Respondents investigative actions as alleged.

i. Whether the Commission acted within its legal mandate in conducting investigations and advising the 1st Respondent to hold onto making further payments to the ex-parte

26. The 2nd respondent submitted that its legal mandate to investigate corruption and economic is derived from Article 252 (1) (a) & 79 of *the Constitution* of Kenya; the ACECA, the EACC Act and the



Leadership and Integrity Act. The 2nd Respondent submitted that section 11(1)(d) and (3) of the EACC Act vests upon it additional functions:

- 1(d). Investigate and recommend to the Director of Public Prosecution of any acts of corruption or violation of the codes of ethics or other matter prescribed under the act or any other law enacted pursuant to Chapter six of *the Constitution*;
 - (3) subject to article 31 of *the Constitution*, monitor, the practices and procedures of public bodies to detect, corrupt practices and to secure the revision of work methods or procedures that may be conducive to corrupt practices.
27. Section 23 of the ACECA, confers upon the 2nd Respondent the duty and responsibility to investigate all reports of alleged corruption or give reasons for not investigating them. The 2nd Respondent submitted that the routine process was adhered to in accordance with the Anti-Corruption legal framework as well as the rule of law during the investigations in compliance with the Constitutional Provisions on fundamental rights and freedoms. The directors of the ex-parte applicant were accorded a chance to expound on project implementations and payments during interview and statement recording. The investigations revealed that the tender awarded to the ex-parte applicant was unlawful, irregular and unduly costly contrary to article 227 of *the Constitution*, and sections 45(1), 66,80,84,86 and 87 of the *Public Procurement and Asset Disposal Act*.
28. The 2nd Respondent submitted that it assumes different positions depending on the nature of the specific function being carried out in this case, a law enforcement stance. Section 23(4) of ACECA donates to it powers privileges and immunities of a police officer in so far as the same is not inconsistent with the provisions of the Act or any other law. The police powers that had been applied are under relevant provisions to include; section 118,118A, 119,120 and 121 of the Criminal Procedure Code and Section 180 of the *Evidence Act*.
29. The 2nd Respondents submitted that the warrants were obtained through judicial process after the court satisfied itself that the reasons given by the investigators were reasonable and justifiable. Section 27 of the ACECA grants the 2nd Respondent the option to either move directly and obtain the ex-parte orders from the court against an associate of a person suspected of corruption requiring the associate to produce the specified information or it can with notice, require the associate to produce the required information. In this case the Respondent opted for the former.
30. They place reliance on paragraphs 62-76 of the Supreme Court's decision in Ethics and Anti-Corruption Commission & another v Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 others (2022) KESC (eKLR). The 2nd Respondent maintains that investigations are ongoing and at its tail end before a comprehensive report is under section 35 of ACECA is forwarded to the Director of Public Prosecution. Therefore, the prayers sought by the Ex-parte applicant if granted will preclude them from exercising its constitutional and statutory mandate and the same would prejudice the established law and will go against public interest.

ii. **Whether the ex-parte applicant has met the threshold for grant of judicial review orders of certiorari and mandamus sought in the Notice of Motion Dated 16th November,2022.

31. The 2nd Respondent submitted that judicial proceedings are concerned with the process rather than merits of the challenged decision and the court is not permitted to make definitive findings on matters which go to the merit of the decision. Reliance is placed on Commissioner of Lands v Kunste Hotel Limited, Civil Appeal 234 of 1(995) Eklr where it was stated that the purpose of judicial review is to ensure the individual receives fair treatment.



32. The 2nd Respondent submitted that an order of certiorari can only be issued if a decision is made without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with. With regards to the former, the ex-parte applicants have failed to indicate to the court how the investigations by the 2nd Respondent were undertaken out of malice, or that they abused or exercise its powers in a manner contrary to the law. On the latter, for an order of certiorari to be issued it must be demonstrated that the Respondents acted without and/or in excess of its jurisdiction or without adhering to the rules of natural justice, allegations that the ex-parte applicant is yet to prove. They also rely on the case of *Buruburu Farmers Company v Paul Omondi Obonyo & 4 others*(2021) Eklr where the court quoted *Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge and 9 others*(1997) EKL.R.
33. The 2nd Respondent submitted that it acted within its mandate in conducting investigations and collaborating with the 1st Respondent in averting loss of public funds. The 2nd Respondent further submitted that no claim in mandamus lies against it as it is their statutory mandate to collaborate with state organs and agencies in fighting corruption, it cannot be compelled by an order of mandamus to carry out a mandate that it is already carrying out. In the *Buruburu Farmers Co. Ltd v Paul Omondi*(supra) the court stated that an order of Mandamus can only be issued in exceptional situations and particularly, where a public body, organ and/or agency tasked with the execution or performance of a public duty has failed to perform such duty.

iii. Whether the 2nd Respondents investigation against the ex-parte applicant and asking the 1st Respondent to hold further payments until investigations are concluded was tainted with illegality, unreasonableness, irrationality, procedural impropriety, relevant considerations or bad faith.

34. The 2nd Respondents submitted that the ex-parte applicant failed to prove that they conducted investigations tainted with illegality, unreasonableness, irrationality, procedural impropriety, irrelevant considerations or bad faith. It affirms that it is an independent body, independent from any control or direction from any person in the course of executing its statutory mandate as provided under article 249(2) of *the Constitution* and section 28 of the EACC Act. It placed reliance on the case of *Judicial Service Commission v Salaries and Remuneration Commission and Another* (2018) EKL.R.

iv. Whether it is in public interest to grant orders sought

35. The 2nd Respondent submitted that it is the interest of the public that criminal case, particularly those touching on public funds, to be investigated and appropriate action taken expeditiously. Reliance is placed on the case of *Wilfred Karuga Koinange v Commission of inquiry into Goldenburg Commission* (Misc. App. 372 of 2006), the court recognized that it is in public interest criminal cases are expeditiously dealt without unnecessary judicial interventions.

v. Whether the Ex-parte applicant's rights were violated by the 2nd Respondents investigative actions

36. The 2nd Respondent submitted that the right to fair administrative action is not absolute but limited in the terms of article 24 of *the Constitution*. Administrative action envisioned in Article 47 of *the Constitution* referred to powers, functions and duties exercised by authorities or quasi-judicial tribunals, as opposed to law enforcement agencies. The 2nd Respondent submitted that it was conducting a law enforcement operation as opposed to an administrative action to warrant conformity with the requirements of article 47 of *the constitution* and section 2 of the *Fair Administrative Action Act*. Reliance is placed on the Supreme Court Case, *Ethics and Anti-Corruption Commission &*



another v Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 others (2022) KESC (eKlr).

Analysis And Determination

37. The first issue before the court is whether the 2nd respondent acted outside its mandate when it advised the 1st respondent not to make further payment in regards to the construction of Kimama Bridge, pending their investigations. Secondly, the court is tasked with deliberating upon whether investigations can be deemed as an administrative action meriting the initiation of a judicial review process.

38. To settle the first issue, it's necessary to understand the role of the 2nd respondent. Section 11 of the EACC Act provides as follows:

11. Additional functions of the Commission

(1) In addition to the functions of the Commission under Article 252 and Chapter Six of *the Constitution*, the Commission shall—

- (a) in relation to State officers—
 - (i) develop and promote standards and best practices in integrity and anti-corruption;
 - (ii) develop a code of ethics;
- (b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;
- (c) receive complaints on the breach of the code of ethics by public officers;
- (d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of *the Constitution*;
- (e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
- (f) oversee the enforcement of codes of ethics prescribed for public officers;
- (g) advise, on its own initiative, any person on any matter within its functions;
- (h) raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the *Anti-Corruption and Economic Crimes Act*, 2003 (No. 3 of 2003), as to confidentiality;
- (i) subject to Article 31 of *the Constitution*, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and
- (j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of



corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

39. The court in *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR held as follows:

294. In obedience to Article 79, Parliament enacted the EACC Act, establishing the EACC, whose mandate is spelt out in section 11 to include investigation and recommendation to the DPP, the prosecution of any acts of corruption, bribery, economic crimes, violation of codes of ethics or other matters prescribed under the Act, the ACECA or any other law legislated under Chapter Six of *the Constitution*.

295. On the mandate of the EACC, as spelt out in the EACC Act, the court in *Alfred N. Mutua v Ethics & Anti-Corruption Commission & 4 Others* [2016] eKLR, said:

“It is also not contested that the EACC is mandated under Section 11(1)(d) of the Ethics and Anti- Corruption Commission Act to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to Chapter Six of *the Constitution*. Further, under the provisions of Section 35 of ACECA as read with the provisions of Section 11(1) (d) of *Ethics and Anti-Corruption Commission Act*, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not ...’

296. A plain reading of *the Constitution* suggests that the DCI and the EACC have coordinate mandates to investigate economic crimes...

40. The applicant in its submissions extensively made submissions that the 2nd respondents accessed its accounts without a valid warrant. However, an examination of the applicant’s notice of motion, indicates that it is disgruntled by the actions of the 2nd respondent during the initial phase of the investigations, specifically the decision to suspend payments. The 2nd respondent subject to section 11 (d) of the EACC Act is mandated to investigate any acts of corruption. It is therefore expected that if the 1st appellant suspends the payment of monies to the applicant, the 2nd respondent will be afforded ample time to thoroughly probe the alleged instances of economic crimes. Consequently, the money owed to the applicant was withheld, thereby affording the 2nd respondent the opportunity to undertake its investigations, while simultaneously safeguarding public funds from potential loss in the event that the investigations implicate the applicant in economic crimes.

41. The second ambit to be considered by the court is whether investigations qualify as an administrative action suitable for initiating a judicial review process. Judicial review proceedings are limited to examining the decision-making process. In *Republic v Isaac Theuri Githae & Another* [2007] eKLR, it was held that:

“The purpose and purview of judicial review proceedings is confined to the decision-making process. The Court in an application for an order of judicial review is not concerned with the merits or otherwise of the decision or threatened action. It is intended to ensure that an inferior tribunal or authority he has been subjected to has given the individual affected fair treatment. The authority is the one mandated to make a decision on the merits and the



court should not attempt to substitute its decision or opinion in place of that of the tribunal or authority constituted by law to decide the matters in issue.

The court intervenes where the authority has acted in excess of its jurisdiction or without jurisdiction, where there is an error of law on the face of the record, where it has failed to observe rules of natural justice or where the authority has acted unreasonably. In those circumstances the court will call for the decision for purposes of quashing it by an order of certiorari. But normally where there is a threatened breach of any of the foregoing principles the court will issue an order of prohibition to prevent the threatened breach.”

42. The inquiry of whether investigations conducted by the EACC embody an administrative action as defined by Article 47 of *the Constitution* found its resolution within the pronouncement of the Supreme Court in Ethics and Anti-Corruption Commission & another v Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 others (Petition 30 & 31 of 2019 (Consolidated)) [2022] KESC 59 (KLR). The court held that:
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. ...
57. ...
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.
43. Section 7 of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply to court for review of the administrative action or decision. The supreme court in Ethics and Anti-Corruption Commission & another v Tom Ojienda found that the powers exercised by the 2nd respondent during its investigations cannot be described as “administrative action” within the meaning of article 47. Inevitably, the initiation of this present



application, aimed at contesting an administrative action or decision, is thus misconceived. Section 11 of the EACC Act gave the 2nd respondent the authority to conduct investigations, and the 2nd respondent therefore acted within its powers. The investigations conducted by the 2nd respondent and the measures taken to facilitate thorough investigations cannot be described as “administrative action” within the meaning of article 47.

44. In the end, I find that the ex parte applicant has not substantiated its grounds for judicial review, given the lack of an administrative action which they are endeavoring to scrutinize. The notice motion dated 16th November 2022 is hereby dismissed with costs to the 2nd respondent.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF SEPTEMBER 2023

R.E. OUGO

JUDGE

In the presence of:

Miss Seif h/b for Mr. Wangila-For the Ex parte Applicant

1st Respondent- Absent

2nd Respondent- Absent

Okwaro -C/A

