



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 124 OF 2015

OKIYA OMTATAH OKOITI1ST PETITIONER

NYAKINA WYCLIFFE GISEBE.....2ND PETITIONER

-VERSUS-

THE COUNCIL OF GOVERNORS.....RESPONDENT

-AND-

THE HON. ATTORNEY GENERAL.....1ST INTERESTED PARTY

THE ETHICS AND ANTI-CORRUPTION COMMISSION

THE CLERK OF THE SENATE.....2ND INTERESTED PARTY

THE CLERK OF THE NATIONAL ASSEMBLY.....3RD INTERESTED PARTY

JUDGEMENT

1. The petitioners, Okiya Omtatah Okoiti and Nyakina Wycliffe Gisebe, are members of the Kenyans for Justice and Development Trust (KEJUDE) which is a legal trust incorporated in Kenya with the objective of promotion of democratic governance, economic development and prosperity.

2. In their initial petition dated 30th March, 2015 the petitioners named the Council of Governors as the 3rd Interested Party. The Council of Governors (hereinafter simply referred to as the COG) is a body that brings together county governors. The original petition states that the COG was sued owing to a public pronouncement by governors challenging the constitutional validity of the President's Executive Order No. 6 of 2015.

3. The petitioners named the Attorney General as the 1st Interested Party. Pursuant to Article 156 of the Constitution, the Attorney General is the principal government legal adviser and represents the national government in court or in any other legal proceedings to which the national government is a party to, other than criminal proceedings.

4. The original petition named the Ethics and Anti-Corruption Commission (EACC) as the 2nd Interested Party. The EACC is a constitutional commission established pursuant to Article 79 of the Constitution and is responsible for ensuring compliance with and enforcement of the provisions of Chapter six of the Constitution on leadership and integrity.

5. When the initial petition was amended on 13th May, 2015 the petitioners named the COG as the Respondent although paragraph 1A indicates that it is the 3rd Interested Party. The Attorney General is the 1st Interested Party. The Ethics and Anti-Corruption Commission is the 2nd Interested Party. The Clerk of the Senate is brought on board as the 3rd Interested Party. The Clerk of the National Assembly is joined to the proceedings as the 4th Interested Party in the amended petition. As it is not clear whether the Council of Governors is a respondent or an interested party, and in order not to perpetuate the confusion caused by the petitioners through their pleadings I will refer to the parties by the names in which they have been sued.

6. Through the petition dated 30th March, 2015 as amended on 13th May, 2015, the petitioners seek the following reliefs:

a) The Honourable Court be pleased to determine the following questions:

i. Whether Executive Order No. 6 of 2015 is constitutionally valid; and

ii. Whether Executive Order No. 6 of 2015 binds all public officials irrespective of whether they are elected or appointed.

b) The Honourable Court be pleased to make the following declarations and issue the following orders:

(i) A Declaration be and is hereby issued that Executive Order No. 6 of 2015 is constitutionally valid;

(ii) A Declaration be and is hereby issued that Executive Order No. 6 of 2015 binds all public officials irrespective of whether they are elected or appointed;

(iii) The Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant in the interests of justice in the circumstances of this Petition;

(iv) The Honourable Court be pleased to issue an order ordering the Respondent to bear the costs of this Petition for being the party directly responsible, through actions and or omissions, for the violations of the Constitution and the law which necessitated the Petitioner to seek remedy in the Honourable Court.

7. A brief background will suffice. On 26th March, 2015, H. E. President Uhuru Kenyatta in a special sitting of Parliament convened pursuant to Article 132(1)(b) of the Constitution addressed the extent of the scourge of corruption in the country based on a report prepared by the EACC titled '*REPORT ON THE CURRENT STATUS OF CORRUPTION MATTERS UNDER INVESTIGATION TO THE PRESIDENCY*' dated 20th March, 2015.

8. The report which the President presented in his address contained a list of names of public officers being investigated by the EACC on suspicion of being engaged in corruption or economic crimes. The President went ahead to issue Executive Order No. 6 of 2015 (hereinafter simply referred to as the Executive Order) in which he directed all persons whose names were in the report to "step aside" in order to allow for independent and credible investigations by the EACC into the alleged wrongdoing by those individuals.

9. Following the issuance of the Executive Order, five cabinet secretaries and several top civil servants complied and left office. However, elected State officers including members of parliament and governors did not resign stating that the President lacked the capacity to direct elected State officers to leave office. The petitioners subsequently filed this petition seeking a validation of the President's Executive Order.

10. The petition is supported by affidavits sworn on 30th March, 2015 and 13th May, 2015 by the 1st Petitioner. From the filed pleadings, the petitioners' case is that they are in support of the President's directive as spelt out in the Executive Order. Citing Articles 103, 144, 145, 150, 181, 194, the petitioners aver that gross violation of the Constitution and abuse of office or gross misconduct are among the conditions for removal from office of elected leaders. According to the petitioners, independent and credible investigations are condition precedent to the engagement of the removal mechanisms set out in law.

11. The petitioners depose that Chapter Six of the Constitution highlights the kind of conduct expected of all public officials which must be above suspicion. Their argument is that any violation of Chapter Six constitutes both a gross violation of the Constitution and gross misconduct.

12. It is the petitioners' case that they are opposed to the protestations of the COG, published in the Standard Newspaper on 30th March, 2015, that the President lacked the capacity to issue the Executive Directive. The petitioners assert that contrary to the views of the COG, the Executive Order did not allude to the removal from office of any of the elected State officers named in report. Their position is that the presidential directive only sought to facilitate the smooth operation of the organs of State which was in line with the executive authority vested upon him by Article 132. Further, that Article 132 mandates the President to ensure compliance with Articles 10, 232(1) and 232(c) (iii) of the Constitution.

13. The petitioners state that presumption of innocence is not a finding of innocence. It is their case therefore that the investigations are part of the due process and the rule of law that elected State officers are subject to. The petitioners further contend that violation of the Executive Order would amount to violation of Articles 10 and 4(2) of the Constitution to the extent that the rule of law will not be upheld; Article 73 which stipulates the responsibilities of leaders; Article 79 which creates EACC; Article 131 to the extent that the executive authority of the President will not be exercised; Article 232(1)(c)(i) to the extent that the President cannot demand compliance with Article 10; and Article 254, Section 11 of the Ethics and Anti-Corruption Commission Act, 2011, and Section 12 of the Public Officer Ethics Act, Cap. 183 to the extent the President cannot act on reports he receives from the EACC. They assert that the Executive Order is desirable as it aids the war against corruption.

14. The petitioners appreciate the underpinnings of Articles 249 and 254 and aver that the temporary vacation of office will allow the EACC to conduct investigations. It is the petitioners' averment that vacation of office during investigation will ensure that the governors do not compromise and tamper with evidence. Their argument is that allowing the investigations to be done while the named governors are in office offends best practice and is irregular, unreasonable, irrational, unlawful and therefore unconstitutional.

15. The petitioners depose that Kenya's war against corruption has largely been ineffective in past regimes because of political patronage

where the corrupt were protected by the wielders of power. They claim that this war cannot be won without the President's support. It is thus their assertion that the Executive Order is the President's firm and clear stance of his readiness to fight corruption.

16. The COG opposed the petition through an affidavit sworn on 14th May, 2015 by its then Chairman, Mr. Isaac Ruto. The COG's case is that the petitioners were misguided in asserting that the Executive Order binds all public officials regardless of whether they are elected or appointed.

17. According to the COG, the Constitution does not provide for the stepping aside of a governor but only removal as per Article 181 of the Constitution and Section 33 of the County Governments Act, 2012. Further, that the said Act provides that the removal of a governor shall be through a motion of the County Assembly. It is the COG's position that the stepping aside of a governor would be tantamount to resignation. In the COG's view, the Constitution distinguishes between the removal of an elected official and an appointed public official. The COG contends that elected State officers are not appointees of the President but the people of Kenya who can decide on their removal through their elected representatives in line with the due process prescribed in Article 75 of the Constitution.

18. The COG further state that the office of a county governor can only become vacant for the reasons stipulated in Article 182 of the Constitution. It is argued that vacation of office can only occur once a governor is convicted of an offence not when he or she is suspected of an alleged offence as suggested by the Executive Order. It is additionally urged that stepping aside based on mere allegations breaches the principle of presumption of innocence until proved guilty as provided in Article 50 of the Constitution.

19. The COG deposes that Article 2 of the Constitution binds all persons and State organs. This, it is asserted, essentially means that the Executive Order cannot supersede the Constitution. It is further the COG's case that Article 1 shares the sovereign power of the people between the national executive and the executive structures in the county governments. It COG's case therefore that one level of government is not subservient to the other level of government in exercise of power. The COG additionally notes that Article 6(2) of the Constitution provides for the independence of the two levels of government and that they are required to conduct their mutual relations on the basis of consultation and cooperation.

20. The COG avers that the two levels of government are autonomous and distinct in structure and operations with separate political structures and institutions. This, it is asserted, connotes a separation of the two levels with limited powers of interference with each other's constitutional areas as provided for in Article 189(1)(a). It is COG's argument therefore that the President can only exercise his executive authority on county government affairs in consultation and cooperation with governors and hence the Executive Order was *ultra vires* as it exceeded his constitutional and statutory authority.

21. The Attorney General filed written submissions dated 19th October, 2015 in support of the petitioners' case. The Attorney General commenced by stating that the President's authority to issue the Executive Order stemmed from Article 131 with Clause (2)(a) & (e) granting the President the authority to respect, uphold and safeguard the Constitution and the rule of law. He further submitted that the President is mandated under Article 132 to address the nation on the measures taken and progress achieved in the realization of the national values referred to in Article 10.

22. The Attorney General stated that Section 45(1) of the Leadership and Integrity Act, 2012 provides that the EACC should submit an annual report containing all the information relevant to the enforcement and compliance with the Act to the President and Parliament. Further, that the EACC under Section 27(1) of the Ethics and Anti-Corruption Commission Act and Article 254(2) of the Constitution is required, at the end of each financial, to cause a report to be prepared and submitted to the President and the National Assembly. This, he contends, is a partnership aimed at ensuring measures are undertaken to implement the national values in Article 10 of the Constitution.

23. The Attorney General refers to Section 4(3) of the Leadership and Integrity Act, 2012 as providing that in undertaking its mandate, the EACC may request a State organ to assist it in ensuring compliance with and enforcing Chapter Six of the Constitution and the Act. It is also pointed out that the Ethics and Anti-Corruption Commission Act obligates the EACC, in addition to its mandate under Article 252 of the Constitution, to work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption through prevention and investigation of corruption.

24. It is also the Attorney General's case that the sovereign power delegated to State organs shall be exercised in accordance with the Constitution. He therefore asserts that no State organ or person is above the Constitution and all their actions are amenable to the Constitution. Further, that this notion is underpinned in Article 2 which provides the supremacy principle.

25. It is additionally the Attorney General's case that Article 3 enjoins all persons, State organs, State officers and public officers to uphold and defend the Constitution. The Attorney General points out that Article 4(2) of the Constitution stipulates that Kenya's governance as a sovereign Republic shall be founded on the national values and principles in Article 10, which can only be amended by way of a referendum under Article 255 of the Constitution. The arguments were supported by reference to the case of **Trusted Society of Human Rights Alliance v Attorney General & others [2012] eKLR**.

26. In opposing the COG's argument that elected State officers cannot step aside pending investigations, the Attorney General submitted that Section 42(7) of the Leadership and Integrity Act, 2012 provides for suspension of a State officer during investigation. Further, that Article 179(5) of the Constitution specifically provides that in the absence of the governor the deputy will assume the functions of the governor. It is thus the Attorney General's case that it is only prudent for members of the COG who are under investigation to step aside as per the provisions of Section 42(7) of the Leadership and Integrity Act. This argument is supported by reference to the case of **In the Matter of Interim Independent Electoral Commission [2011] eKLR** and Article 30(6) of the United Nations Convention against Corruption.

27. The EACC supported the petition through a replying affidavit sworn on 15th December, 2015 by Paschal Mweu, who was a member of the team which investigated the persons listed in the report that was tabled in Parliament by the President.

28. The EACC's position is that Chapter Six of the Constitution sets out the responsibilities of leadership. It is EACC's averment that based on the Constitution, leaders are required to declare any public interest that may conflict with the discharge of their duties. It is averred that this makes both the appointed and elected State and public officers accountable to the public for decisions and actions they undertake as required by the national values and principles.

29. It is the EACC's case that while carrying out investigations on the elected State officers listed in the report, they encountered a number of challenges. Some of the challenges included refusal by the staff to furnish them with documents required for investigations; reluctance by staff to come forward to record statements due to fear of reprisals from the elected leaders; attempts to regularize anomalies to align with the law by preparing backdated documents such as minutes and tender documents; missing documents; and, delays and apathy toward the investigators. It is further averred that some of the records and documents may have been tampered with before being released to the investigators. It is EACC's case therefore that it is not only reasonable but prudent for the listed persons to step aside so as to allow for independent investigations to be undertaken.

30. The Clerks of the Senate and the National Assembly filed joint grounds of opposition dated 25th April, 2016 through which they oppose the petitioners' cases as follows:

1. That Articles 103 and 104 of the Constitution, section 41(2) of the Leadership and Integrity Act, No.19 of 2012 and section 11 of the Ethics and Anti-Corruption Commission Act, No. 22 of 2011 are distinctive and conclusive on the law and procedure of removal of Members of Parliament.

2. That the Members of Parliament do not serve in office at the pleasure of the President but the electorates who have been empowered under Article 104 of the Constitution to exercise a right of recall.

3. That by asking the Court to order Members of Parliament allegedly implicated in corruption allegations to step aside at the instance of the President, the Petitioners abrogate the presumption of innocence guaranteed under Article 50 (2)(a) of the Constitution.

4. That the Petitioners ignore a well-established legal principle of "he who hires can fire" in that it purports to vest control of tenure of service of Members of Parliament on the President notwithstanding the fact Members of Parliament are the employees of the electorates who elected them.

5. That the Petition is asking the Court to arrogate authority on the President to exercise control over the Members of Parliament contrary to and in total usurpation of the sovereign will of the People under Articles 1 and 104 of the Constitution.

6. That the Court therefore has no jurisdiction to grant the orders sought.

7. That in the generality of the forgoing, the Petition is frivolous, lacks merit, is argumentative, incompetent and an outright abuse of the process of the court and ought to be dismissed.

31. The petitioners filed submissions dated 7th April, 2015 and further submissions dated 15th December, 2015. In the submissions dated 7th April, 2015, the petitioners contend that the Executive Order did not seek to remove the COG's members from office as it was issued in exercise of executive authority under Article 131 to ensure compliance with Article 10 and to comply with his obligation to fight corruption.

32. The petitioners submit that the principle of accountability and transparency in a democratic society necessitates that government officials both elected and appointed be responsible to the citizenry for the decisions and actions they make. They submit that the standards of accountability are established through tradition, laws and oversight by independent bodies such as the Judiciary, constitutional commissions and a free press. It is consequently their contention that Articles 73 and 75 clearly entails that any allegation of corruption that results into investigations by the EACC under Article 79 disqualify one from continuing in office during the investigations. They additionally assert that presumption of innocence is not a finding of innocence and investigations are therefore part of the due process.

33. The petitioners submit that suspension pending investigations is a standard human resource practice whenever an employee is alleged to be guilty of misconduct or incompetence. It is their case therefore that the President's directive was not a disciplinary action but a necessity to afford the EACC time for the investigations. They state that this does not amount to termination of employment. It would therefore follow that once the EACC has concluded its investigations, the findings would inform the decision whether the suspension would be terminated or whether the case would proceed to the disciplinary stage.

34. The petitioners contend that the process of investigation need to be protected so that it is credible as the findings are necessary for enforcing constitutional provisions on the removal of elected officials. According to the petitioners, the President's directive is a step up on the war on corruption and edifies the public office.

35. It is the petitioners' position that any violation of Chapter Six of the Constitution by a State or public officer while in office constitutes both gross violation of the Constitution and gross misconduct. The petitioners contend that establishment of the corruption allegations was made by the EACC in a process that was credible and independent and such a process is a condition precedent to the removal mechanism provided in the Constitution and other laws. They urge that the President's directive did not seek to direct the EACC but to facilitate the smooth operation of its functions.

36. The petitioners state that Article 254 obligates commissions and independent offices to submit reports to the President and Parliament at the end of each financial year. Further, that Section 11(1)(b) of the Ethics and Anti-Corruption Act requires the EACC to work with other State and public offices in the development of standards and best practices in integrity and anti-corruption. Also, that Section 11(1)(e) of the

Act requires the EACC to recommend appropriate measures that can be taken against a State officer and Section 11(3) states that it may cooperate and collaborate with other State organs in the prevention of corruption.

37. The petitioners submit that in light of Section 12 of the Public Officer Ethics Act, 2003, there exists a conflict of interest where a suspect stays in office while under investigation. It is on this premise that they submit that the President's directive was simply a facilitative mechanism to the already set constitutional and statutory principles. According to the petitioners, the COG did not demonstrate how creating an enabling environment for the EACC to execute its mandate amounts to contravention of the Constitution.

38. The petitioners in their further submissions dated 15th December, 2015 reiterated that the Executive Order did not usurp the mandate of the EACC but actually supported and facilitated its work. They submit that the President's directive enhanced the autonomy of the EACC by creating an environment where powerful individuals cannot interfere or frustrate active investigations. It is their emphasis that the stepping aside order must be construed within the context in which it was made.

39. The petitioners in addition to highlighting the relevant laws applicable in this matter, and in particular Articles 2(6) and 132(5) of the Constitution, went ahead to state that the President has an international obligation to fight corruption. It is the petitioners' case that Kenya has ratified the United Nations Convention against Corruption which observes that corruption is a plague that undermines democracy and the rule of law. The petitioners additionally state that the President is also obligated to uphold the African Union Convention on Preventing and Combating Corruption.

40. The petitioners submit that the Executive Order does not offend the spirit of devolution as fighting crime and matters of security are not devolved functions, arguing that counties do not have their own anti-corruption institutions. They thus assert it is the duty of the national government to fight corruption in Kenya as a whole.

41. The petitioners submit that the EACC is an independent commission as prescribed by the Constitution. They state that EACC is, however, not the sole decision-maker but is required to have a collaborative and consultative relationship with other State organs in the decision-making. This, they contend ensures the values of fairness, acceptability and accuracy are upheld. They add that the EACC does not operate in a vacuum but needs all the help it can receive to effectively execute its mandate. It is therefore urged that the Executive Order was issued to facilitate the EACC and it cannot be construed to have violated its mandate. According to the petitioners, the Executive Order instead sends a clear message that the Executive is determined to defeat corruption.

42. The COG filed submissions and list of authorities dated 9th October, 2015. The COG identified the first issue as to whether the President can direct elected leaders to step aside. It is submitted that elections play a pivotal role in any democracy as they enable the citizens to exercise their sovereignty through their democratically elected leaders as enshrined in Article 1(2) of the Constitution. He notes that their role is important to the extent that the Constitution cushions them from any arbitrary removal from office. It is the argument of the COG that the petitioners are misguided in their cause as stepping aside as defined by the Macmillan English Dictionary means **"to leave an official position or job especially so that someone else can take your place"**. It is contended that stepping aside of elected officials is not provided for as the Constitution, under Article 181, only provides for removal from office.

43. The COG submit that Parliament has enacted legislation, being Section 33 of the County Governments Act, 2012, providing for the removal of a county governor through a motion of the county assembly which has to be endorsed by the Senate. Further, that Article 75 of the Constitution provides that a State officer who contravenes the principles of leadership and integrity is subject to the applicable disciplinary procedure for the relevant office. This assertion is buttressed by the decision in **Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR**.

44. The COG's position is that a vacancy in the governor's office can only arise based on the reasons outlined in Article 182 of the Constitution where Clause (1)(d) clearly states that a governor can only vacate office once convicted of an offence not when suspected of committing an offence as per the President's directive. It is the COG's case, in reliance on Article 2, that the Executive Order cannot supersede the principles of the Constitution.

45. On the second issue as to whether the President's directive offends the spirit of devolution, the COG submit that Article 1 of the Constitution provides that the sovereign power of the people is to be exercised at the national and county levels as delegated among the State organs. This, the COG states, has paved way for a multi-level system of government which is at the core of the Constitution. To elaborate on this point, the decision in **Council of Governors & 3 others v Senate & 53 other [2015] eKLR** was cited.

46. The COG submit that Article 6(2) of the Constitution provides that the governments at the national and county levels are distinct and inter-dependent and conduct their mutual relations on the basis of consultation and cooperation. It is contended that this autonomy ensures the separateness of the two levels of government with limited powers ensuring neither interferes with the other's mandate. According to the COG the President can only exercise his executive authority over the county governments as required by Article 189 of the Constitution. It is thus the COG's case that the directive issued by the President frustrates devolution and the gains so far secured in its implementation and realization.

47. Turning to the third issue as to whether the President's directive is in breach of the presumption of innocence, the COG submits that Article 50 of the Constitution trenches the tenets of due process and thus stepping aside from office on flimsy grounds of unauthenticated allegations is equivalent to a reversal of the principle of presumption of innocence until proven guilty. It is argued that this Article provides that a person should be informed of the charge with sufficient detail to answer and have adequate time and facilities to prepare their case. It is pointed out that the importance of this right was captured in the case of **Trusted Society of Human Rights Alliance v Attorney General and 2 others [2012] eKLR**.

48. The fourth issue identified by the COG is whether the President can direct independent offices on how to conduct their work. The COG submits that the President does not have constitutional or statutory mandate to direct the EACC, the Director of Public Prosecutions and the Judiciary on their constitutional mandates as they are independent bodies. It is submitted that Article 249 shows that the EACC is only

subject to the Constitution and the law and will not be under the direction or control of any person or authority. Reliance is placed on the decision in **Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR**. It is therefore the COG's submission that the President breached the Constitution by purporting to control and direct the EACC and in essence acted *ultra vires* thus rendering the directive illegal and irrational. The Court is therefore urged to find that this petition lacks merit and dismiss it with costs.

49. The EACC filed written submissions dated 8th February, 2016. It is submitted that stepping aside of State officers under investigation for lack of integrity under Chapter Six of the Constitution is not only reasonable but prudent so as to allow for independent investigations to be undertaken. Further, that upon conclusion of the investigations the governor can resume duties as provided in Article 259(10).

50. The EACC contends that the COG's argument that a governor can only be removed from office pursuant to Article 181 of the Constitution is a narrow interpretation of the Constitution in an attempt to apply it selectively which is against the principle of interpreting the Constitution in a wholesome and purposive manner. It is further submitted that Article 181(1)(a) provides that gross violation of the Constitution or other law is a ground for removal of a governor from office. He adds that both elected and appointed leaders are bound by the national values and principles stipulated in Article 10.

51. It is further contended by the EACC that there are numerous examples of State officers in Kenya and other jurisdictions who resigned or stepped aside upon being investigated. The EACC gives examples of such instances. It is submitted that stepping aside is a major step towards the road of reform, and national interests should supersede the personal interests of the elected leaders. It is stated that the issues that led to the investigations revolved around misuse of public funds, abuse of office and other improprieties. It is therefore urged that those implicated should have voluntarily stepped aside to clear their names and restore public confidence in their offices.

52. In my view, there is a jurisdiction question that should first be addressed in order to determine whether the Court should go ahead and address the substantive questions or down its tools. The case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** established that:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

53. The issue I want to address was not raised by any of the parties but as was stated in the just cited case, a question of jurisdiction may be raised **"by a court on its own motion"**.

54. The jurisdictional question is whether this matter raises any **"dispute that can be resolved by the application of law"** in the terms of Article 50(1) of the Constitution. In other words, is there a dispute to be resolved by this Court? I say so because the petitioners seek orders affirming the constitutionality of the Executive Order. What happens if I find the Executive Order unconstitutional? Should I then declare it unconstitutional as asked by the COG and the Clerks of the Senate and the National Assembly? How can I declare the Executive Order unconstitutional yet there is no cross-petition seeking that it be declared unconstitutional? In my view there is no dispute because nobody sought a declaration that the Executive Order is unconstitutional. The petition as couched only aims at receiving one conclusion namely that the Executive Order is constitutional. The petitioners are seeking what amounts to an advisory opinion.

55. It is my opinion that the doctrine of mootness denies this Court the authority to determine this matter. The doctrine was recently explained by the Constitutional Court of South Africa in **AB and Another v Pridwin Preparatory School and Others (CCT 294/18) [2020] ZACC 12** as follows:

"The general principle is that an application is moot when a court's ruling will have no direct practical effect.^[1] Courts exist to determine concrete legal disputes and their scarce resources should not be frittered away by entertaining abstract propositions of law, however engaging. Typically, this Court will not adjudicate an appeal if it no longer presents an existing or live controversy, and will refrain from giving advisory opinions on legal questions which are merely abstract, academic or hypothetical and have no immediate practical effect or result. This principle was recently reiterated in *President of the Republic of South Africa*.^[2] There, it was held that "courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision"."

56. The Court nevertheless went ahead and explained the exception to the principle thus:

"But that is not the end of the matter because "mootness is not an absolute bar to deciding an issue . . . the question is whether the interests of justice require that it be decided."^[3] In class actions or public interest litigation, the decisions pertaining to the rights contained in the Bill of Rights can have a far-reaching practical effect on many others.

In *Langeberg Municipality*, this Court formulated the test for adjudicating a moot matter in these terms:

"This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order, which this Court may make, will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced."

57. This Court is indeed alive to the fact that the war against corruption is not a small matter and courts should, whenever they get the

opportunity to do so, express distain for the vice. Instruments meant to exterminate corruption, like the Executive Order, should be analyzed and validated if they comply with the Constitution. Having said so, I still find that this petition does not raise any dispute and is moot.

58. In the body of the amended petition, the petitioners have not named any respondent. The body of the petition indicate all the parties are interested parties. In constitutional litigation, an interested party is not a principal party. In Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, popularly known as the Mutunga Rules, an “interested party” is defined **“as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”** The same Rule states that a “respondent” is **“a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom.”**

59. A constitutional petition seeks to resolve a dispute and envisages a situation where it is alleged that constitutional rights or provisions have been violated. This explains the requirement by Rule 10(2) of the Mutunga Rules that a petition should disclose among other things the constitutional provision violated; the nature of injury caused or likely to be caused to the petitioner; and the relief sought by the petitioner.

60. The petition before this Court fails in all those aspects. It does not disclose the constitutional provisions that are said to have been violated, the injury sustained by the petitioners and the relief sought to assuage the injury. The petitioners refer to a statement published in the newspapers by the COG disputing the authority of the President to issue the Executive Order. They, however, did not explain how the COG’s challenge to the presidential directive violated any constitutional provision or caused any injury to them. The governors were enjoying their constitutionally guaranteed right of freedom of expression when they expressed their opinion in regard to the Executive Order. Their opinion cannot be said to have violated anybody’s constitutional rights.

61. In summary, there is no dispute before this Court to be addressed through the delivery of a judgement. What needs to happen and which must now happen is that this petition should be dismissed for being an abuse of the court process.

62. The petitioners may wish to know that the question of the constitutionality of the Executive Order was partially addressed by the Court of Appeal in **Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others [2017] eKLR** where it was held that:

“Granted the obligations vested in the President by the Constitution as regards realization of the national values and the express requirement to annually to report to the Nation on the measures taken to realize these national values, the President cannot be faulted for focusing on the fight against corruption or for urging institutions that have the constitutional mandate towards realization of the national values, to work harder and show results of their work.

Subject to the foregoing, however, the appellant has a genuine grievance that the President not only directed the EACC to present its report to the DPP, but also set specific deadline within which that was to be done. Well meaning as the directive may have been, it gave the impression, and we believe any reasonable person would have perceived it as such, that the President was directing the EACC on how and within what period to discharge its mandate. The setting of the deadlines, by the President rather than by the EACC itself, within which to conclude investigations and submit report to the DPP can reasonably be perceived as undue interference with the EACC in the discharge of its mandate, much as it is not the only institution which is concerned with the fight against corruption. Such deadlines also have implications for the quality of investigations, the focus being shifted more to the deadline itself rather than careful consideration of all the evidence for or against the person being investigated...

In our view therefore, the High Court cannot be faulted for concluding, in the circumstance of this appeal that the President’s directive to the EACC to submit its report to the DPP within a timeframe set by the President himself rather than the EACC was not consistent with the constitutional and statutory independence of the EACC. It should be remembered that the Constitution has set out elaborate accountability mechanisms for constitutional commissions and independent offices, which ought to be resorted to in the event that they fail to properly discharge their constitutional mandates. Accordingly, while it is the responsibility of all Kenyans, led by the President, to combat the nefarious corrupt practices that threaten our national fabric, the golden thread of rule of law, human rights and constitutionalism that runs through the Constitution demands that the battle against corruption must be waged within the law. We have not seen any reason to believe that observing the rule of law is synonymous with condonation of corruption. Experience from other jurisdictions vividly demonstrates that it is possible to effectively combat corruption within a rule of law framework.”

63. For the reasons already stated, it is clear that this Court has no authority to engage its adjudicatory powers in this matter. No dispute has been placed before the Court by the petitioners. They have not identified any of their constitutional rights or constitutional provisions violated by the COG in issuing a statement disputing the authority of the President of the Republic of Kenya to issue the Executive Order. The author of the Executive Order being the President has not been accused by the petitioners of violating any of their constitutional rights and fundamental freedoms. This Court has no jurisdiction to issue legal opinions to parties which is what the petitioners seek through these proceedings. In short, I find no merit in the petitioners’ case.

64. Having determined that these proceedings are an abuse of the Court process, I find that the parties opposed to the petition are entitled to costs. Consequently, the petition is dismissed with costs to the Council of Governors, the Clerk of the Senate and the Clerk of the National Assembly.

Dated, signed and delivered virtually at Nairobi this 13th day of May, 2021.

W. Korir,

Judge of the High Court
