



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. E005 OF 2021

WILLY KIBET.....1ST PETITIONER/APPLICANT

MARTIN MUCHAI KARIUKI.....2ND PETITIONER/APPLICANT

VERSUS

ETHICS AND ANTI CORRUPTION COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

JAMES NGANGA GACHATHI.....1ST INTERESTED PARTY

NAKURU WATER AND SANITATION SERVICES COMPANY.....2ND INTERESTED PARTY

RULING

1. The petitioners filed a **Notice of Motion** application dated **14th April 2021** seeking for orders interlia;

a) THAT pending hearing and determination of this application inter-partes and the hearing and determination of this petition, this Honourable Court be pleased to issue Conservatory orders suspending the directive of the 1st Respondent to the 2nd Interested Party in the letters of 12/4/2021 and 10/3/2021 respectively, requiring the suspension of the Petitioners from office on half pay and therefore prohibiting them from performing their duties of Procurement manager and Clerical officer.

b) THAT pending the hearing and determination of this Application inter-parties, the Honourable Court be pleased to order that the Petitioners herein remain procurement manager and clerical officer of the 2nd Interested Party with full salary, privileges and benefits without any interference from the Respondents, their agents and or servants.

c) THAT the Honourable Court be pleased to stay implementation of the 1st Respondent's letters of 12/4/2021 and 10/3/2021 to the 2nd Interested Party and requiring the suspension of the Petitioners from office on half pay and allow unrestricted access of the Petitioners to their place of work and to perform their duties as Procurement manager and Clerical officer respectively.

d) THAT the Court does certify that the Petition and the application raise immense issues of public interest, interpretation of the Constitution and the bill of rights and the same ought to be referred to the Chief Justice or Acting Chief Justice to empanel a bench of uneven number of judges to hear and determine the matter.

e) THAT this Honourable court be pleased to award costs of this application to the Petitioners.

2. The application is premised on grounds on the face of the record and the supporting affidavit of **Willy Kibet** (the 1st Petitioner). The petitioner averred that on 10th March 2021, they were charged with graft charges together with the 1st interested Party, all officials of the 2nd interested party in Nakuru Chief Magistrates Court, EACC No. 001 of 2021. Orders restraining them from accessing the 2nd interested party's offices were issued on the same date until 23rd March 2021 when further directions were to be issued. On 23rd March 2021 the court directed that it lacked jurisdiction because it had not been gazzeted as a special court. The orders of 23rd March 2021 have since lapsed. The petitioners reported to the 2nd interested party's offices and have to date continued to discharge their duties. The 1st respondent vide letters dated 10th March 2021 and 12th April 2021 directed the 2nd interested party to suspend the petitioners from office by virtue of **Section 62 (1) of the Anti- corruption and Economic Crimes Act, 2003** pending determination of Nakuru EACC No. E001 OF 2021.

3. The 1st petitioner deponed that they are not public officers within the meaning of **Article 260 of the Constitution**. He stated that they do not draw salaries from public exchequer, consolidated fund or from parliament's allocation of public funds hence they are not subject to provisions under **Section 62 (1) Anti- corruption and Economic Crimes Act**.
4. The 1st petitioner averred that under **Article 50 of the Constitution**, they are presumed innocent until proven guilty, hence it is inimical and unethical for them to be punished by way of suspension from employment before the hearing and determination of the criminal charges against them. The letters seeking for their suspension on half pay are therefore illegal, slippery and unconstitutional. The letters are also selectively discriminatory contrary to **S. 27 of the Constitution** which binds all and the suspension offends their rights to freedom from discrimination.
5. The 1st petitioner further averred that the issues before the trial court were dealt with in 2019 and the tender awarded by the 2nd interested party as per the decision of the Public Procurement Administrative Review Board. The 1st Petitioner deponed that any law that is inconsistent with the Constitution is unconstitutional to the extent of it's inconsistency hence **Section 2 of the Public Officer Ethics Act No. 4 of 2003** is unconstitutional to the extent that it defines "Public Officer" differently than is provided in the Constitution. The 1st petitioner averred that the suspension is an extra-judicial punishment and premature confirmation of guilt of allegations made against them, thus subjecting them to indignity and an affront to their constitutional right to human dignity enshrined in **Article 28 of the Constitution**. The suspension inflicts upon the petitioners extreme psychological and mental torture, as well as cruel, inhuman and degrading treatment as enshrined in **Article 29(d) of the Constitution**.
6. The petitioners averred that the respondent's actions offend the constitution, are absurd, unreasonable, barbaric, oppressive and vindictive. It is their legitimate expectation that they will serve their full terms unless removed through known and established due process. They thus urged the court to find in their favor in both the application for conservatory orders and in the substantive prayers in the petition.
7. The 1st interested party filed a replying affidavit supporting the petition and the application herein by asserting that the petitioners' application and petition is grounded on infringement of their rights to fair labour practices, right to equality and freedom from discrimination, freedom from psychological torture as well as cruel, inhuman and degrading treatment, the right to fair administration, and right to fair hearing.
8. This court issued conservatory orders on 6th May 2021 upon satisfying itself that the petitioners had fulfilled all the prerequisites as have been developed by the Courts over the years for granting the orders sought pending hearing and determination of the application. The 1st interested party averred that the law on conservatory orders is well settled in a myriad of cases, for instance, the case of **Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017) eKLR** and in the **Nubian Rights Forum & 2 others v Attorney General & 6 others**.
9. The 1st interested party averred that conservatory orders may be issued in matters wherein a claim for enforcement of Bill of rights in the Constitution is being made like in this case where the petitioners are alleging that their rights under **articles 10,27,28,29 (d) and (f), 41, 47, 48 and 50** have been violated. He further averred that a prima facie case is not a case which must succeed at the hearing of the main case but one which discloses arguable issues like this case.
10. The 1st interested party averred that the 1st respondent failed to consider that the issues raised in the graft charges against them were in relation to Tender No. NAWASCO/07/2019/2020 for provisions of security services to the 2nd interested party and which issues were addressed by the **Public Procurement Administrative Review Board in its Ruling of 19/8/2019**. The petitioners and the 1st interested party acted on the said directive when issuing the tender to Bony security services. The board did not find any corruption and economic crime in award of the contract to Dango Five Security Limited in the said ruling and application.
11. He contended that the charges herein are mischievous, lacking in merit, incompetent and based on falsehood and non-disclosure of facts. The same is a non-starter as no money has been lost or misappropriated. He stated that the Respondents' actions are unreasonable and amounting to abuse of their offices in addition to the unfair treatment suffered at their hands. The petitioners and the 1st interested party contended that they have been unfairly treated by the respondents and if allowed to stand, the respondent's irregular action will financially cripple the petitioners and the deponent since their salaries is their source of income.
12. The deponent asserted that the court is empowered under **Article 23(3)** to issue the conservatory orders that they are seeking for as the rights violated are those ones under **article 23 (1), (3),28,29 (d) and 50 of the Constitution**. The 1st interested party deponed that the public interest in favour of preserving and protecting values and principles of the Constitution and this court ought to intervene by checking the excesses of the respondents and grant the orders as sought herein.
13. The 1st respondent filed a replying affidavit sworn by its investigator one **Agosta Mecca** who was the lead investigator that culminated in the charges subject of the instant proceedings. He averred that given the mandate given to EACC by the law to investigate any person on matters of corruption, Economic Crimes and unethical conduct on receipt of a complaint against a state or public officer, or on its own initiative, the 1st respondent received a complaint involving allegations of procurement irregularities in the provision of security services by Nakuru Water and Sanitation Services Company Limited (NAWASSCO) in the financial year 2019/2020 and immediately commenced investigations.
14. The investigation established that NAWASSCO is fully owned by the County Government of Nakuru which is a public entity and that the petitioners **contravened provisions of Anti-corruption and Economic Crimes Act, Public Procurement Act and Disposal Act 2015** by awarding the contract for provision of security services to Dango Five Securities who was interlia, unresponsive and contrary to the laid down procedures and laws vide **Tender No NAWASSCO/07/2019/2020**. The facts as established reveal offences of willful failure to comply with the law/ applicable procedures and guidelines relating to procurement as stipulated in the **Anti-Corruption & Economic Crimes Act**.

15. The 1st respondent averred that besides the evidence gathered in the course of investigations, the accused persons were also interviewed and their statement recorded. Pursuant to section 35 of the Anti-Corruption & Economic Crimes Act, the 1st respondent forwarded it's report on the outcome of the investigations to the director of Public Prosecutions with a recommendation that they be charged. After going through the evidence gathered in the said report, the director of Public Prosecutions charged them with the offence that was disclosed in the report.
16. The 1st respondent submitted that the Water Act creates different levels of institutions in the water sector. At the top there is the Ministry of water, Water Services Regulatory Board (WASREB), Water Services Boards (WSBs) and at the bottom is the Water Service Providers (WSPs). All these are state agencies.
17. Therefore, water companies are companies performing a public function, within the Ministry of Water which is a state organ. They are agencies of the Government and thus employees thereon are public officers who should abide with **Chapter 6 of the Constitution** and all written law. NAWASSCO being owned fully by the County Government of Nakuru is an office in County Government and its employees are therefore public officers within the definition and meaning of **Article 260 of the Constitution of Kenya**. Further and as a Public office, its employees are paid from public funds.
18. **Articles 79, 80 and 252 of the Constitution, Section 11 of Ethics and Anti-Corruption Commission Act (EACC Act)** as well as **Section 4 and 42 of the Leadership and Integrity Act mandate the Commission** to carry out such investigations but the said mandate does not in any way infringe on the constitutional rights of petitioners. **Section 62 (1) of ACECA** require that any person who is charged with Corruption must be suspended from office with half pay and the petitioners being public officers as demonstrated above and being charged with Corruption and Economic Crimes are subject to the provisions of **Section 62 of ACECA**.
19. The 1st respondent submitted that the petitioners cannot purport that the letters dated 10th March 2021 and 12th April 2021 are discriminatory and without any color of right. No bias has been proved by the petitioners. In contra-distinction, the 1st respondent has demonstrated that the said letters were written and issued with full tenor of the law. The petitioners have not challenged in any way the constitutional and statutory mandate of the Respondents to investigate, charge and prosecute them, neither have they demonstrated how the statutory or constitutional provisions empowering the respondents to act have infringed or threatened to infringe on their constitutional rights and freedoms.
20. The application was canvassed by written submissions. Both parties filed submissions as summarized herein under.

PETITIONER'S SUBMISSIONS

21. The petitioners submitted that not a state officer as defined in the constitution fits into the definition of public officers in Kenya, however, not everyone who is a public officer can be said to be a state officer as state officers are only those ones who hold official positions of state offices as listed in **Article 260 of the Constitution**. Going by the definitions of **Article 260** and definitions provided by the **Public Officers Ethics Act, 2003**, the petitioners in this matter are neither state officers nor public officers, as they do not meet the criteria laid out in the respective provisions.
22. The petitioners placed reliance in the Supreme Court case of **Fredrick Otieno Outa v Jared Odoyo Okello & 4 others [2014] eKLR** where the court held that a public officer is one who holds an official position in a public office and who is being sustained through remuneration and benefits that come from the exchequer. The petitioners submitted that their remuneration does not come from the exchequer and that the 2nd interested party does not get money to pay its employees from the consolidated fund or from parliament, hence the definition of public office does not apply to the 2nd interested party and consequently, the petitioners and the 1st interested party are not public officers.
23. The petitioners submitted that **Sections 48 and 87 of the Public Procurement and Asset Disposal Act of 2015** which they are accused of breaching does not apply to the petitioners and the 1st interested Party as **Section 4 of the said Act** states that it applies to state organs and public entities of which the 2nd interested party by whom the petitioners and the 1st interested party are employed, is not. The petitioners submitted that until the court determines otherwise, they are to be presumed innocent until proven guilty as envisaged under **Article 50 of the Constitution**. **Article 27 (1)** provides for equal treatment of every person before the law, hence, the petitioners should not be discriminated for the positions they hold which are deemed to be controversial by the public.
24. The petitioners placed reliance in the case of **Paula Alala Okoth v Kenya Airports Authority & 2 others [2014] eKLR** and submitted that the graft charges are yet to be determined, thus it is unconstitutional to interrupt their employment by way of suspension with half salary, based on the presumption of guilt.
25. The petitioners and the 1st interested party are bound by the contents of their employment contracts, in which the disciplinary procedures are outlined and ultimately the constitution of Kenya which provides for fair labour practices under **Article 41**. The 1st respondent thus violated the petitioners right to fair labour practices by compelling the 2nd interested party to suspend the petitioners and the 1st interested party indefinitely. In **Humphrey Sitati v Board of Management Lenana school [2020] eKLR**, it was held that indefinite suspension was a breach of contract and such suspension is unfair and unlawful. Petitioners also placed reliance in **Donald C. Avude v Kenya Forest Service [2015] eKLR** and submitted that their suspension and withholding of their half salary, which is their right, is inhumane and goes against the principles of Fair Labour Practices. It is also unlawful since it is not provided for by the organization policies of the 2nd interested party.
26. The petitioners further submitted that the actions of the 1st respondent failed to comply with **Article 10 (2) (b) of the constitution**, by failing to treat them with dignity, equity and by infringing on their human rights. The arbitrary directive by the 1st respondent suspending the petitioners and the 1st interested party and barring their access to their offices amounted to psychological and mental torture, treatment which was degrading, thus infringing on their fundamental rights and freedoms as envisaged under **Article 28 and 29 of the Constitution**.

27. The petitioners submitted that the 2nd respondent cannot compel the 2nd interested party to act in accordance with the provisions of section 63 (2) as the said provision is specific to public officers only. The instructions in the letters by the 1st respondent and the 2nd interested party should thus hold no effect against the petitioners and the 1st interested party. Hence, the court should issue Conservatory orders suspending the 1st respondent's directive and allow the petitioners unrestricted access to the 2nd interested party's offices, to allow them to continue performing their official duties as procurement manager and clerical officer.

28. The petitioners submitted that this matter raises substantial questions of law and prayed that the court be guided by **Article 165(4) of the Constitution** and certify that the matter be referred to the Chief Justice for purposes of empaneling a bench of uneven number of judges to hear and determine this case. Constitutional rights of the petitioners have been violated hence this is a matter of public interest and the court should ensure that tenets and principles of the Constitution are upheld and protected.

1ST AND 2ND RESPONDENTS WRITTEN SUBMISSIONS

29. The respondents submitted that the suspension and half salary subject to the conclusion and outcome of the court proceedings was lawful and within the precincts of **Section 62 (1) of the Anti-corruption and Economics Crime Act**. The 1st respondent carried out a lawful mandate in the circumstances and in public interest as espoused by the court in **Thuita Mwangi & 2 others v Ethics & Anti-corruption Commission**.

30. **Article 157 of the Constitution** gives the 2nd respondent the independent mandate to institute criminal proceedings where a criminal offence has been established. It is thus in the public interest that the petitioners are prosecuted for committing a criminal offence provided for and punishable in law. Further **Article 27 (1) and (2)** provides for equality before the law for all persons, hence the petitioners are not immune to the proceedings. The public has trust in the 2nd respondent that its mandate shall not be carried out in bias and justice shall not be applied selectively.

31. The respondents urged the court not to curtail the mandate of the 2nd respondent since a Criminal Offence has been established with no evidence of malice whatsoever. The threshold under **Section 4 of the Director of Public Prosecutions Act** has been met and granting the petitioners the relief sought will be tantamount to declaring them immune to the prosecution and /or criminal proceedings whose institution the 2nd respondent should carry out independently without requiring consent from a different authority.

32. The petitioner has failed to demonstrate any excess use of authority by the respondents or contravention of any written law as all the actions by the respondents were in the interest of justice. The petitioners do not dispute the lawful processes by the respondents in the circumstances, their plea is that the petitioners ought not be subjected to these procedures as they do not fall into the arm bit of definition of public and/or state officers.

33. As averred in the 1st respondent's replying affidavit, the 2nd interested party is a private company whose major shareholder is the County Government of Nakuru hence it's subject to the oversight authority of the County Government under the provisions of the County Government Act and to that extent, the 2nd interested party's employees are public officers within the meaning of **Article 260 of the Constitution**.

34. The respondents placed reliance in **Katiba Institute & Another v Attorney General & Another [2020] eKLR** and submitted that there is no inconsistency between the **Constitution and the Public Officers and Ethics Act**. The petitioners' actions are unjust and unlawful and they cannot therefore claim infringement of their fundamental rights and freedoms based on wrongdoing on their part. They have also failed to demonstrate their allegations and are merely using this petition to abuse the due process of law by delaying criminal proceedings against them.

35. Placing reliance in the court of **Moses Kasaine Lenolkulala v DPP (2009) eKLR** the respondents submitted that the suspension at half pay was lawful and in accordance to **Section 62(1) of ACECA**. They urged the court not to grant the conservatory orders and allow the law to take its course by dismissing the petition herein.

ISSUES FOR DETERMINATION

- a) **Whether the petitioners and the 1st interested parties are public officers?**
- b) **Whether the petitioners and the 1st interested parties should be granted the reliefs sought?**
- c) **Whether the matter be referred to the chief justice for empaneling of uneven judges.**

Whether the petitioners and the 1st interested parties are public officers?

36. Placing reliance in the case of **Moses Kasaine Lenolkulala v DPP (2009) eKLR** the respondents submitted that the suspension at half pay was lawful and in accordance to **section 62(1) of ACECA**. They urged the court not to grant the conservatory orders and allow the law to take its course by dismissing the petition herein.

37. Article 260 of the Constitution defines a public officer to mean;

- (a) any State officer;
- (b) Any person, other than a state officer, who holds a public office

38. A “public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.

39. Section 2 of the Public Officers Ethics Act 2003, elaborates who a public officer is. The provision states,

“an officer, employee or member including an unpaid, part-time temporary officer or employee or member of ... a corporation, council, board, committee, or other body which has power to act under, and for the purposes of any written law, relating to local government, or undertaking of public utility or otherwise to administer funds belonging to, or granted by the government, or money raised by rates, taxes or charges in pursuance of any such laws.”

40. The 2nd interested party is a private company whose major shareholder is the County Government meaning that they are fully owned by the County Government. NAWASSCO may thus be deemed to be a public sector employer, if the County Government exercises control over its general policy. The case of **National Union of Water & Sewerage Employees V Mathira Water and Sanitation Company Limited & 2 Others [2013] eKLR** held that

“The Water Companies such as Mathira Water and Sanitation Company Limited are previous water departments of Local Governments. They are wholly owned by the Local Governments. Their directors are appointed by the Local Governments and included in the recent past, mayors and Councilors. Their Boards also include professionals from the private sector. The Water Companies are to shift under the devolved structures of government, to become subsidiaries of the County Government, perhaps with Governors and County Representatives, included in the Boards.”

41. Further the court stated **“Courts have examined the status of the Water Companies in various decisions, and appear to agree that although these are limited liability companies, they are registered as agents and instrumentalities of the Local Governments. They are private companies, rendering public services, and controlled by Public Authorities. In Eldoret High Court Miscellaneous Civil Application Number 97 of 2003, Republic v. Eldoret Water and Sanitation Company Ex parte Booker Onyango [2008 eKLR], Justice Mohammed Ibrahim concluded that Eldowas is an agent and instrumentality of the Government. This conclusion was adopted by this Court in the case of Industrial Court Cause Number 1722 of 2011, David Gioko and Others v. Nairobi City Water and Sewerage Company Limited. The Court concluded that a circular issued by the Head of Public Service, altering the mandatory retirement age of public service employees from 55 to 60 years, applied to the employees of the Nairobi City Water and Sewerage Company Limited. The employer and the trade union adopted the 60year mandatory retirement age in their CBA. The employees of Mathira Water and Sanitation Company may therefore be viewed as public servants, as they are working for an agent and instrumentality of a Public Authority. They are public servants, though not in the traditional public service, controlled directly by Government Ministries. Their employer is a private company, rendering public service.”**

42. In ascertaining whether the employees of NAWASSCO are paid from a public fund this court would still rely on the **National Union of Water & Sewerage Employees V Mathira Water and Sanitation Company Limited & 2 Others** (supra) where the court concluded

“The water companies are private limited liability companies, performing a public function, within the Ministry of Water which is State Organ. They are agencies of the Government. The revenue generated by the first Respondent accrues from its sale of water resources. Water is a resource that belongs to the people of Kenya, the public, held in trust for them by the Government. The tariff revenue account is not therefore a private account, but a public account, privately held and transacted. The employees of the water companies are paid from public funds, not private funds.”

43. The **Exchequer and Audit Act** on the other hand defines Public money to mean; revenue, any trust or other moneys held, whether temporarily or otherwise by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not.

44. In the case of **Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission [2014] eKLR** Lenaola J (as he then was) held **“Given that definition of public funds and given that the Petitioner’s members work for institutions, parastatals or corporations that provide a public function, then to my mind they are properly within the public service category and therefore state corporations and their employees fall within the meaning of public office and public officers, and I so find.”**

45. In view of the foregoing authorities, I hold that the petitioners are public officers within the meaning of Article 260 of the Constitution since they provide a public function. Nothing stops them from being subjected to **Section 62 (1) of the Anti- corruption and Economic Crimes Act**.

Whether the petitioners and the 1st interested parties should be granted the reliefs sought?

46. The tenor, import and scope of a conservatory order was highlighted by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows:

“[86] “Conservatory orders” bear a more decided public- law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

47. In **Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017)**

eKLR the Court was emphatic that: -

“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”

48. From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following: -

a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.

b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

c) Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

49. A *prima facie* case is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, an applicant has to show that he or she has a case which discloses arguable issues and a case alleging violation of rights, arguable constitutional issues. The applicants have alleged that the respondents have contravened or are likely to contravene fundamental rights, freedoms and duties guaranteed under **Articles 27,29,41,48 and 50 of the Constitution**. Without saying more, it is clear that this petition discloses *prima facie* arguable issues for trial. In other words, it cannot be said that the petition is wholly frivolous or unarguable.

50. Another issue is whether the Applicant has satisfied the provisions of **Article 23(3) (c) of the Constitution**. As was held in **Centre for Rights Education and Awareness (CREAW) & 7 others** (supra) a party seeking a conservatory order only requires to demonstrate that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. However, this must be weighed against the public interest. **Section 62 (1) of ACECA** require that any person who is charged with Corruption must be suspended from office with half pay and the petitioners being public officers as demonstrated above and being charged with Corruption and Economic Crimes are subject to the provisions of **Section 62 of ACECA**.

51. **Majanja J** in the case of **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR** stated that:

“The section 62 (sic) must be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in Chapter 6 of the Constitution. Suspension does not amount to a penalty but merely suspends certain rights pending determination of the trial. In the event the person is acquitted the full benefits are restored. If the person is convicted, then the suspension merges into a penalty.

52. In his decision in **Moses Muteithia & 5 others v Jacob Muthomi Kirera & 4 others [2017] eKLR** and in finding that there was no violation of the rights of an accused person arising from such suspension, **Gikonyo J** observed that:

“Therefore, I am not able to find any violation of right to be presumed innocent until proven guilty, when a person charged with offences to do with corruption, economic crimes and integrity is suspended at half pay pending conclusion of his case. As I have already stated, section 62(1) of ACECA imposes a statutory obligation on the 2nd and 5th Respondent to suspend at half pay any public officer who has been charged under ACECA. Accordingly, the 1st Respondent ought to have been suspended at half pay pursuant to the provisions of Section 62 of ACECA as no prejudice would have been suffered by the 1st Respondent.”

53. The Learned Judge went on to conclude as follows:

“The section must be understood within the inviolable wider objects of the Constitution to foster integrity for leadership in public service.”

54. Having found that the petitioners are public officers and having been charged for offences of corruption and Economic Crimes, then it is lawful and in the interest of the public for them to be suspended with half pay, under the terms of **Section 62(1)**, until the conclusion of the case. If the prosecution results in an acquittal, then the public or state officer is restored to his position and paid all the monies and other privileges that may have been withheld in the period of his suspension.

55. For now, the court does not see any violation of rights in this case, the respondents are mandated to carry out independent investigations and to allow the petitioners in office would hamper the said investigations. In any event the applicants shall still have their say in the criminal proceedings.

Whether the matter should be referred to the chief justice for empaneling of even number of judges.

56. The matter at hand in my respectful view does not warrant a reference to the Honourable Chief Justice. The issues are clear namely whether they are state officers which i have answered above. More significantly the matter to be referred to the Chief Justice must have a **substantial question** which in my view does not. There is nothing complicated since Article 260 of the Constitution has been extensively expounded above and **Section 62 of the Anti-Corruption and Economic Crimes Act** does not infringe on the petitioner's rights.

57. **Consequently, this court does not find any merit in the application and the same is hereby dismissed. Costs shall await the outcome of the substantive petition.**

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 4TH DAY OF OCTOBER 2021.

H.K .CHEMITEI

JUDGE