



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

PETITION NO. 18 OF 2019

MICHAEL KAMAU KURIA.....PETITIONER

VERSUS

ETHICS & ANTI CORRUPTION COMMISSION.....RESPONDENT

AND

PETITION NO. 19 OF 2019

GACHOMBA AND COMPANY

PROPERTIES LIMITED.....PETITIONER

VERSUS

ETHICS & ANTI CORRUP TION COMMISSION.....RESPONDENT

JUDGMENT

1. I have before me two related petitions arising from the same set of facts and circumstances. The first is Petition No. 18 of 2019 in which Michael Kamau Kuria alleges violation of his constitutional rights following issuance of a notice to him by the respondent to explain the source of his assets. The respondent is a public body established under section 3 of the Ethics and Anti-Corruption Commission Act which has the mandate to, among other things, institute and conduct court proceedings to recover or protect public property, or to freeze or confiscate proceeds of corruption.

2. In his Amended Petition dated 23rd October 2019, the petitioner states that he had received a notice by cover of a letter dated 8th August 2019 from the respondent requiring that he explain the disproportion between his alleged assets listed in the notice and his known legitimate sources of income. The notice had been issued pursuant to section 26 and 55 (2) of ACECA. The respondent had indicated in the notice that it had been carrying out investigations into the petitioner’s assets acquired between January 2013 and December 2017. It had concluded that there is a huge disparity between the value of the petitioner’s assets and his known legitimate source of income. In the notice, the respondent had listed, among others, two (2) of the petitioner’s bank accounts held at Equity Bank (K) Limited. These were account numbers 016xxxxxxxxx and 111xxxxxxxxx.

3. The respondent had proceeded to tabulate an analysis of transactions that had taken place in each account from the year 2013 to the end of the year 2017. The respondent had concluded the notice by stating that the petitioner was suspected of engaging in corruption and economic crime and inviting the petitioner to explain in writing the disproportion between the assets enumerated in the notice and his known legitimate sources of income within a period of seven (7) days after receipt of the letter, failing which the respondent would commence civil proceedings against the petitioner seeking forfeiture of any unexplained assets. The said letter was received on behalf of the petitioner by his Advocates on 14th August 2019.

4. The petitioner contends that he is alarmed since, despite the fact that he had never been served with any warrants or orders issued by a court in relation to furnishing the respondent with information or bank statements regarding the said accounts, the respondent was privy to or has access to such bank account information. In his view, such information could only have been obtained without notice to him and without due process and therefore illegally. He contends that it would be in violation of his constitutional right to fair administrative action to require him to respond to the said notice, particularly to the transactions tabulated in the notice, as he is not privy to the source of such information,

nor has he been furnished with any information or documents that would enable him respond.

5. The petitioner further contends that by purporting to illegally and secretly access his accounts and obtaining information therefrom, the respondent has violated his right to privacy, property, fair administrative action and fair hearing provided for respectively under Articles 31, 40, 47 and 50 of the Constitution.

6. It is also his contention that by threatening to institute civil proceedings against him aimed at forfeiture of his alleged unexplained assets on the basis of illegally obtained evidence should he fail to provide a written explanation within 7 days from the 14th of August 2019, the respondent has contravened and breached his constitutional right not to answer any questions that might produce evidence against him which is protected under Article 50 of the Constitution.

7. The petitioner therefore seeks the following reliefs:

i. A declaration that the evidence underpinning the notice dated 8th August 2019 to explain the disproportion between the assets listed and the known legitimate sources of income pursuant to section 26 and 55(2) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003, was illegally obtained in a manner that was detrimental to the fair administration of justice and in violation of the Petitioner's inalienable rights to privacy; to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and the right to a fair hearing.

ii. A declaration that the respondent in conducting its investigations against the petitioner did so ultra vires the Constitution of Kenya and therefore any findings from the same are null and void for all purposes.

iii. A declaration that the inherent, inalienable, fundamental, legal and constitutional right against self-incrimination, the right to fair administrative action and the right to a fair hearing as protected by the Constitution applies at all times prior to investigation, during investigations, prior to arraignment in court and during the trial and cannot be eroded by section 26 and 55(2) of the Anti-Corruption and Economic Crimes Act 2003. (Act No. 3 of 2003).

iv. An order directing the respondent to forthwith stop contravening and or violating the fundamental rights of the petitioner in the discharge of its purported mandate under the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and permanently stay and or quash the implementation and operation of the said Notice dated 8th August 2019 issued by the respondent.

v. General damages to be awarded to the Petitioner as against the Respondent for the breach, violation and/or contravention of the Petitioner's constitutional rights and the same be assessed at Kshs. Ten Million.

vi. An order for costs of these proceedings which is to be paid to the Petitioner.

8. Petition No. 19 of 2019 has been lodged by a limited liability company, Gachomba and Company Properties Limited, in which Michael Kamau Kuria is a director, In its Amended Petition which is substantially the same as the petition by Michael Kamau Kuria, the petitioner also alleges violation of various constitutional rights by the respondent. It also seeks orders similar to those sought by Mr. Kamau, and on similar grounds.

9. The two petitions were canvassed before me on 22nd January 2020. At the close of the hearing of Petition No. 19 of 2019, Mr. Nyoike for the respondent indicated to the court that the two petitions related to the same parties and his submissions would be substantially the same. The only difference in the petitions was that there were two notices in place, one to the individual director, Michael Kamau Kuria, and the other to the company. The issues in contention were the same, and the warrants being challenged were also the same, as were the prayers. The link in the two petitions was that the individual, Michael Kamau Kuria, is the beneficial owner of the private limited liability company, Gachomba and Company Properties Limited. The shareholders of the company are his wife, Catherine Wanjiku Njeri, his mother, Agnes Wanjiku Kuria, and Mr. Michael Kamau Kuria's seven (7) children. According to Mr. Nyoike, Mr. Kuria is a mandatory signatory to account number 111xxxxxxx held at Equity Bank, one of the three accounts set out in the warrants being challenged in these petitions.

10. While adopting the written submissions filed on behalf of the petitioners, Mr. Kokebe observed that the petitioners had filed written submissions on each petition and the court could therefore render one judgment on the two petitioners. In the circumstances, even though no orders had been sought or made for the formal consolidation of the petitions prior to the hearing, this judgment relates to the issues and concerns raised in both petitions. For the sake of convenience and clarity, Michael Kamau Kuria shall be referred to as the 1st petitioner while the company shall be referred to as the 2nd petitioner.

11. Like the 1st petitioner, the 2nd petitioner states that by a notice dated 8th August 2019, the respondent had notified it that it was required, pursuant to section 26 and 55 (2) of ACECA, to explain the disproportion between its alleged assets listed in the notice and its known legitimate sources of income. The respondent had indicated in the notice that it had been carrying out investigations into the petitioner's assets acquired between January 2013 and December 2017 and had concluded that there is a huge disparity between the value of the petitioner's assets and its known legitimate source of income.

12. The respondent had listed in the notice the petitioner's bank account number 111xxxxxxx held at Equity Bank (K) and had set out an analysis of the transactions in the account between 2015 and 2017. It had stated in the notice that the petitioner is suspected of engaging in corruption and economic crime as it allegedly did not have a legitimate source of income. It had invited the petitioner to explain in writing, within 7 days of receipt of the notice, the disproportion between the assets enumerated in the notice and its known legitimate sources of income failing which it would commence civil proceedings against the petitioner seeking forfeiture of any unexplained asset.

13. The 2nd petitioner echoes the alarm expressed by the 1st petitioner that despite the fact that it has never been served with any warrants or

orders to furnish the respondent with information or bank statements with regard to its account, the respondent is privy to and has had access to its bank account information. It contends that such information could only have been accessed without following due process and therefore illegally. It is also its contention that it would be in violation of its constitutional right to fair administrative action to require it to respond to the said notice and especially to the transactions tabulated in it as the petitioner is not privy to the source of such information and neither has it been furnished with any such information or documentation that would enable it file a response.

14. It maintains, like the 1st petitioner, that it cannot respond to the respondent's request as it must have obtained its information illegally and in excess of its authority. It contends that any response that it makes to the said notice would have the effect of sanctioning or sanitising an illegality and would in effect be waiving its inalienable constitutional rights to privacy, property, fair administrative action and to fair hearing. The petitioner alleges violation of its right to privacy (**Article 31**); fair administrative action (**Article 47**) and fair hearing (**Article 50**).

15. In the respective petitions, the petitioners contend that by the respondent threatening to institute civil proceedings against them aimed at forfeiture of their alleged unexplained assets on the basis of illegally obtained evidence, should the petitioners fail to provide a written explanation within 7 days from 14th August 2019, the respondent has breached their constitutional right not to answer any questions that might produce evidence against them as set out under **Article 50 (I)** of the Constitution. The 2nd petitioner asks the court to grant orders expressed in the same terms as sought by the 1st petitioner.

16. The petitions are supported by affidavits sworn by the 1st petitioner, Michael Kamau Kuria in support of his petition. An affidavit in support of the 2nd petitioner's case is sworn by Ms. Catherine Wanjiku Njeri, Mr. Kuria's wife and a Director of the 2nd petitioner.

17. In his affidavit, the 1st petitioner describes himself as a former civil servant and states that he is currently a businessman dealing in transport business and real estate in Kenya. He had received a call on 13th August 2019 from one Abel Tunga Marevu, an officer with the respondent, who informed him that he was urgently required to collect a letter from the respondent's office. He had written to the respondent requesting it to serve the said letter through his advocates on record. The letter, which was dated 8th August 2019, was received by his advocates M/s Chege Wainaina & Company Advocates on 14th of August 2019 did receive a letter dated 8th August 2019.

18. The letter ('MKK 2') required that he explains the disproportion between the assets listed in the letter and his known legitimate sources of income. He notes that the letter indicates that the respondent has been carrying out investigations into his assets and noted the huge disparity between his assets and his known legitimate source of income. The respondent had listed the two accounts held by the respondent at Equity Bank (K) Limited being account numbers 016xxxxxxxxxx and 111xxxxxxxxxx. It had also tabulated the transactions that occurred in respect of each account between the years 2013 and 2017.

19. The 1st petitioner reiterates his alarm about the demand by the respondent and his concern that the information on his accounts was obtained unprocedurally. He further reiterates the claims in his petition that he had never been served with the order or warrants to access his accounts and that the conduct of the respondent amounts to a breach of his fundamental rights. He avers that should he respond to the notice, he would be sanitizing the illegality perpetrated by the respondent and he urges the court to allow his petition and grant him the prayers that he seeks.

20. In her affidavit on behalf of the 2nd petitioner, Ms. Njeri makes averments similar in content to those by the 1st petitioner with respect to receipt of the phone call from the respondent to collect the notice on the assets of the 1st petitioner. She had written a letter dated 14th August 2019 (CWN 1') requesting it to serve the letter on her advocates on record. The 2nd petitioner's advocates had received the notice ('CWN 2'). The notice required the 2nd petitioner to explain the huge disparity between the value of its assets and its known legitimate source of income. It had listed, among others, one of the 2nd petitioner's bank accounts held at Equity Bank (K) Limited, being Account No. 111xxxxxxxxxx, along with an analysis of the transactions that had occurred in the account between 2013 and 2017.

21. Ms. Njeri reiterates the statements in the petition about the threat by the respondent to institute civil proceedings seeking forfeiture of any unexplained assets; the alarm of the petitioner that the respondent had accessed its private bank information without notice and without a warrants or a court order; and its conclusion that any information or evidence thus obtained was obtained maliciously, unprocedurally and illegally.

22. Like Mr. Kuria, Ms. Njeri asserts that the respondent's conduct amounts to an infringement of the 2nd petitioner's fundamental constitutional rights to privacy, protection of the right to property, right to fair administrative action and the right to a fair hearing.

23. It is her averment further that if at all the respondent did apply for warrants or an order mandating it to access and extract information from the 2nd petitioner's bank account, it did not notify or serve the petitioner with the order to enable it file an appropriate response thereto. This, according to the deponent, is in violation of the 2nd petitioner's rights to fair administrative action and fair hearing.

24. Ms. Njeri avers that should she, as a director of the petitioner, respond to the notice on its behalf, she would be, in effect, sanctioning the illegality perpetrated by the respondent in purporting to unprocedurally and unlawfully access and extract the petitioner's private and privileged information.

25. The respondent opposes the petitions and has filed in each an affidavit sworn on its behalf by Abel Tunga Marevu. Mr. Marevu is an employee of the respondent duly appointed as an investigator under section 23 of ACECA. He is also a member of the team that is conducting investigations in respect of the matters raised in the petitions.

26. Mr. Marevu's deposition was that the respondent had, through enquiry File No. EACC/INQ/AT/9/2018, been investigating allegations of

corruption involving embezzlement of public funds, irregular procurement, bribery, abuse of office and conflict of interest by current and former public officials of the Nyandarua County Government. The respondent had received credible information that the 1st petitioner, Michael Kamau Kuria, a former Chief Officer of Finance and Economic Planning at the County Government, had accumulated vast wealth in land, buildings and motor vehicles over the short period of time between 2013-2016 that he was an employee of the County Government. It had also established that the said Michael Kamau Kuria is the beneficial owner of the 2nd petitioner, which was incorporated on 25th February 2015.

27. According to the respondent, the shareholders of the 2nd petitioner are the close family members of Michael Kamau Kuria's family. By a letter dated 9th April 2018 ('PT 1'), the Registrar of Companies had indicated the shareholders of the company as being;

- i. Catherine Wanjiku Njeri - wife
- ii. Agnes Wanjiku Kuria - mother
- iii. Imani Wanjiku Kamau - child
- iv. Kayden Thuku Kamau - child
- v. Jayden Kamau Kamau - child
- vi. Margaret Nyambura Wairimu - child
- vii. Shantel Muthoni Kamau - child
- viii. Carloton Chege Kamau - child
- ix. Ronny Gachomba Kamau - child

28. Preliminary investigations revealed that the petitioner was established by the said Michael Kamau Kuria with the sole purpose of using it as a vehicle to receive proceeds of corruption and economic crime on his behalf. The investigations further revealed that the 2nd petitioner had received monies under suspicious circumstances from companies, business firms and individuals which transacted with the County Government. Such companies and business firms included:

- a. Wanjohi Contractors and General Supplies Limited
- b. Olkalau Ventures
- c. Kanjuiri General Contractors and Supplies Ltd
- d. Kaimbaga Enterprises
- e. Githioro Contractors and General Supplies Ltd.
- f. Jilsu General Contractors and Supplies Limited
- g. Silverdola General Contractors and Supplies Limited

29. According to the respondent, these companies and business entities were associated with Michael Kamau Kuria's wife, Catherine Wanjiku Njeri, his mother, Agnes Wanjiku Kuria, his business partner, Henry Njoroge Gathiga and their associates. Annexure 'PT2' contained copies of letters from the Registrar of Companies detailing ownership of the companies and business entities.

30. It is averred on behalf of the respondent that Michael Kamau Kuria not only took part in the tender committee that awarded the tenders but he also authorized the payments as the Chief Officer, Finance. He was also in a pole position to influence any award of tenders as annexure 'PT 3', a copy of the minutes of the Tender Committee, demonstrated.

31. It is the respondent's deposition that the companies set out above were awarded numerous tenders in the 2013-2016 period in a manner that flouted the law and revealed procurement irregularities involving collusion, conflict of interest, non-disclosure, fraud, bribery and abuse of office.

32. According to the respondent, the method used for procurement in all the suspect awards was to request for quotations and the petitioners would collude with senior procurement officials of the County Government to ensure that only the companies were invited to place quotations to the exclusion of all other prequalified suppliers. In support of this averment, the respondent exhibited as annexure 'PT 4' a copy of the tender opening register for some of the suspect contracts.

33. It is further averred on behalf of the respondent that through its director, Catherine Wanjiku Njeri, the 2nd petitioner was fully aware of investigations being undertaken against it and was invited to record a statement but declined in writing to make the statement.

34. It is also its averment that section 33 of the Public Procurement and Disposal Act, 2005 (which was then in operation) expressly placed a limitation on contracts between procurement entities with employees, their families, companies and their associates.

35. It is the respondent's case that its preliminary investigation satisfied it that there was a need to investigate the bank accounts of the petitioners and other related entities and to further scrutinize the transactions in their accounts. It had accordingly made an application to court ("PT 5") seeking warrants to investigate the petitioners' accounts held at Equity Bank Limited among other related accounts.

36. The respondent deposes that the court, being satisfied that it had sufficiently demonstrated grounds raising reasonable suspicion that the petitioners were involved in corrupt conduct touching on the subject matter of the investigations, issued warrants dated 5th March, 2019 ("PT 6") to investigate accounts. It is averred on its behalf that in obtaining the warrants, it had demonstrated to the court that there was reasonable suspicion to warrant issuance of the warrant to investigate the accounts and the court had duly exercised its discretion in accordance with the law, such law being section 180 of the Evidence Act, section 118 and 121(1) of the Criminal Procedure Code and section 23 of ACECA.

37. The respondent avers that as it had legally obtained warrants to investigate accounts belonging to the petitioners, it did not violate the rights of the petitioners to privacy or fair administrative action as alleged. In any event, under Article 24 of the Constitution, a right or fundamental freedom in the Bill of Rights, including the right to privacy, can be limited in accordance with the prescriptions in Article 24. Its deposition was that it is in the public interest that investigations on corruption and economic crimes be conducted expeditiously and to their logical conclusion. It had therefore not violated any of the petitioners' rights, noting that the right to fair trial under Article 50 of the Constitution is accorded to an accused person and not a person subject of an investigation. Further, the petitioners had also not demonstrated how their right to property had been violated.

38. The respondent further avers that the warrant to investigate the petitioners' accounts granted by the court on 5th March, 2019 were obtained lawfully. Accordingly, any account opening documents, statements, bankers' books or any other relevant information issued in regard to the warrants is legal and can be used to further investigations.

39. From the investigation of the 2nd petitioners' accounts for the period between January, 2013 and December 2017, the respondent had established that the 2nd petitioner received cash deposits and bank transfers totaling Kshs. 82,083,066.00 from sources reasonably suspected to be proceeds of corruption, embezzlement and bribery. The respondent had then issued Notices for Unexplained Wealth on 8th August, 2019 pursuant to the provisions of section 26 and 55(2) of the ACECA requesting the 2nd petitioner to explain in writing the disproportion between its assets and its known legitimate source of income.

40. The respondent avers that the petitioners face serious allegations of corruption involving embezzlement of public funds, procurement irregularities, bribery, abuse of office and collusion which have far reaching ramifications towards safeguarding public finances and protecting public interest. On 26th March 2019, the court had issued preservation orders against properties belonging to the petitioners and their associates to forestall dissipation of the assets and to safeguard them in the event of civil and/or criminal liability. It urges the court to dismiss the petitions with costs.

41. The parties filed written submissions in support of their respective cases which I have read and shall consider in determining this matter.

Analysis and Determination.

42. The petitioners allege violation of constitutional rights. They have, accordingly, an obligation to demonstrate which rights have been violated, and the manner of violation- see **Anarita Karimi Njeru vs Republic [1979] 1 KLR 154 and Trusted Society of Human Rights Alliance vs Attorney General and 2 Others [2012] eKLR.**

43. The petitioners allege violation of the rights guaranteed under Articles 31 (privacy), 40 (property), 47 (fair administrative action and 50 (right to fair hearing). From the pleadings therefore, the core issue for determination is whether the petitioners have demonstrated a violation of the rights guaranteed under these Articles, and are therefore entitled to the reliefs that they seek.

Violation of the right to privacy

44. The petitioners submit that Article 31 of the Constitution guarantees the right to privacy, which includes the right not to have one's property searched or possessions seized. They contend that a bank account is private property which may not be searched in an arbitrary and summary manner without notice to the account holder. They rely on the decision in **Tom Ojienda t/a Tom Ojienda & Associates vs Ethics and Anti -corruption Commission & 5 others [2016] eKLR** and **Millicent Wamuyu Ngatia vs IG of Police & 4 others [2019] eKLR** to submit that the respondent ought to have notified them of the allegations against them and sought a response to the said allegations before taking any action against them.

45. The respondent's submission on this contention is that the petitioners are challenging the notices issued to them pursuant to sections 26 and 55(2) of ACECA. The notices require the petitioners to explain the disproportion in wealth of Kshs. 263,083,066.60 comprising immovable properties worth Kshs. 181,000,000.00 and bank deposits at Equity bank account number 111xxxxxxxxx totaling Kshs. 82,083,066.00.

46. The respondent notes that the petitioners have not challenged the notice to explain the assets. That their contention is that they had never been served with a notice to furnish the respondent with their bank statements and the said bank statements were therefore obtained illegally. The respondents argues, however, that it obtained the warrants lawfully. It had made an application for warrants to investigate the account to the Chief Magistrate's Court under section 118 and 121(1) of the Criminal Procedure Code, section 180 of the Evidence Act and section 23 of ACECA. It had satisfied the court that it had reasonable grounds for the suspicion that the petitioners and other entities were involved in

corrupt or criminal conduct that justified the grant of the warrants to investigate the account.

47. The respondent has relied on the decisions in **William Baraka Mtengo v Attorney General & 3 others [2018] eKLR**; **Erastus Kibiti Stephen vs Euro Bank Limited & another {2003} eKLR** and **Mape Building & General Engineering vs Attorney General & 3 others {2016}eKLR** to submit that it had obtained the warrants lawfully, such warrants being obtained *ex parte* and without notice to the petitioners.

48. I have considered the submissions of the parties on this issue. In his decision in **Mape Building & General Engineering vs Attorney General & 3 others** Onguto J observed that:

“In the circumstances of this case, the warrants and freezing orders were evidently necessary for the purposes of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations the 2nd Respondent was, in my view, justified in making the application for both the warrants and freezing order ex parte.”

49. I agree with the sentiments of the court in the above matter. In order to effectively investigate accounts in which funds suspected to be the proceeds of crime or corruption are suspected to have been deposited, the court is empowered to issue warrants *ex parte* if satisfied that there is a reasonable ground to do so.

50. The petitioners have relied on the decision of the Court of Appeal in **Director of Public Prosecutions vs. Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others** (supra) as well as the case of **Millicent Wamuyu Ngatia vs IG of Police & 4 others** which followed the decision in **Director of Public Prosecutions vs. Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates**.

51. This court has had occasion to consider the ramifications of the said decision in **Innocent Momanyi Obiri v Ethics & Anti-Corruption Commission & another [2019] eKLR** in which it observed that:

“In my view, the decision of the Court of Appeal was limited to the provisions of ACECA. It cannot be read and extended to the provisions of sections 118- 121 of the Criminal Procedure Code. To hold otherwise would be to deal a death blow to investigation of any offence, not just economic crimes, in Kenya. I am not persuaded that the Court of Appeal in Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others (supra) had this in contemplation when it made its decision. Accordingly, it is my finding and I so hold that the warrant in this case was proper and there was no requirement for notice to the applicant before the 1st respondent applied for the warrant.”

52. In any event, I take the view that in light of the ruling of the Supreme Court in **Civil Application 21 of 2019- Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others**, the Court of Appeal decision in **Director of Public Prosecutions vs. Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others** does not assist the petitioners in this case. In its ruling, the Supreme Court stated that:

“[15] We have considered these rival submissions. It is not in doubt that the fight against corruption and economic crimes is a matter of great public importance. In the circumstances, in the interest of justice and to provide guidance, a clear and authoritative statement of this Court on the issues raised is imperative. Consequently, we allow this application and direct that pending the hearing and final determination of the applicant’s appeal—No. 30 of 2019, the effect of the High Court and Court of Appeal decisions in this matter is hereby stayed. Neither party to this appeal, nor any other person shall use, apply or in any way rely upon them until the said appeal is heard and determined.” (Emphasis added).

53. What is the ‘effect’ of the Court of Appeal decision, and the High Court decision (Lenaola J (as he then was)) preceding it, in **Tom Ojienda t/a Tom Ojienda & Associates vs Ethics and Anti –corruption Commission & 5 others (supra)**? In its decision, the Court of Appeal in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others** (supra) had stated as follows:

“We find and hold that in its investigations EACC is inflexibly bound to comply with the provisions of those sections which, for the avoidance of doubt, are as follows;

26. Statement of suspect’s property

(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property—

....

27. Requirement to provide information, etc.

(1) The Commission may apply ex parte to the court for an order requiring an associate of a suspected person to provide, within a reasonable time specified in the order, a written statement stating, in relation to any property specified by the Secretary, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

....

28. Production of records and property

(1) *The Commission may apply, with notice to affected parties, to the court for an order to—*

(a) require a person, whether or not suspected of corruption or economic crime, to produce specified records in his possession that may be required for an investigation; and

(b) require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not.

(2) *A requirement under subsection (1)(b) may include a requirement to attend personally to provide explanations and information.*

(3) *A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.*

The text of these provisions is quite clear and admitting to no ambiguity whatsoever, it is the duty of the courts to give full effect and meaning to them in interpretation, and the obligation of EACC to fully comply there with. We find persuasive the approach in BARNES –VS- JARVIS [1953] 1 W.L.R. 649, where Lord Goddard C.J. said;

“A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver.”

It is obvious from the above-quoted sections of the ACECA that the Legislature’s intention was for a person of interest or suspect to be aware of the intended action of EACC against him. It also intended for a person of interest to first be given a chance to voluntarily comply with the notice before any action is taken against him. This was not done by EACC who chose the easier general path of seeking warrants, ex parte instead of paying due regard to the preliminary steps required under its constitutive and operative statute. In so doing, it infringed on Ojienda’s fundamental rights and affected his interests, hence the learned Judge’s invalidating action, which we have no difficulty endorsing.”

54. The ‘effect’ of the **Prof Tom Ojienda** decision, as appears to be the common understanding –see **Innocent Momanyi Obiri v Ethics & Anti-Corruption Commission & another** and **Millicent Wamuyu Ngatia vs IG of Police & 4 others** - is that whenever the EACC is carrying out an investigation with respect to corruption, including an investigation that entails inquiry into bank accounts, it must issue a notice under sections 26, 27 and 28 of ACECA, and that it cannot utilise the provisions of sections 118 and 120 of CPC and section 180 of the Evidence Act.

55. This ‘effect’ is what the Supreme Court stayed in its ruling. In my view, in so doing, it restored the position that obtained prior to the Court of Appeal decision in the **Prof Tom Ojienda** case that had guided investigation and interpretation of challenges to warrants to investigate persons suspected of corruption and economic crimes-see **Mape Building & General Engineering v Attorney General & 3 others** [2016] eKLR; **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others** [2018] eKLR; **Omwanza Ombati t/a Nchogu, Omwanza & Nyasimi Advocates v Director of Criminal Investigations Department Emmanuel Kanyungu & 3 others** [2017] eKLR; **Francis Njau Njoroge & another t/a Francrom General Merchants v Insurance Regulatory Authority & 5 others** [2018] eKLR; **William Baraka Mtengo v Attorney General & 3 others** [2018] eKLR and **George Onyango Oloo v Eacc & another** [2019] eKLR.

56. The principle that had been established by these decisions is that so long as the respondent follows the requirements with respect to obtaining search warrants in applications under sections 118 and 120 of the CPC and section 180 of the Evidence Act, the court will be slow to find that the warrants are illegal or irregular.

57. In **Okiya Omtatah Okoiti v AG and 4 Others** (supra), the court cited the decision in **Minister of Safety and Security v Van der Merwe & others** 2011 (5) 61 (CC) and stated as follows:

“112. There are no allegations before us that the above ingredients are missing in the impugned warrants. The guidelines stated above include:- (a) the person issuing the warrant must have authority. We have no doubt that the magistrate had authority. Secondly, (b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts. There is no allegation to the contrary in this case. The terms of the warrants have not been said to be vague or overbroad. Further, there is no allegation that the warrants were not reasonably intelligible to both the searcher and the person to be searched.

113. We are aware that search warrants ought to be scrutinized with "sometimes technical rigour and exactitude." [84] This is because as the Supreme Court of Appeal of South Africa observed:-

"A search warrant is not some kind of mere, interdepartmental correspondence "or note." It is, as its very name suggests, a substantive weapon in the armoury of the State. It embodies awesome powers as well as formidable

consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere, checklist approach. ...”

58. The court went on to conclude that:

114. In the absence of evidence of abuse of power or a gross violation of the rights of a person to be searched, a court would be slow to find that a search warrant is unlawful on purely technical grounds.

115. The right to privacy is expressly guaranteed by Article 31 of the Constitution, while the statutory procedure for conducting search and seizure by the police has three inbuilt requirements to be met. Such requirements are that:- (a) prior to the search and seizure the police should obtain a search warrant; (b) such warrant should be issued by a judicial officer; and (c) lastly there should be proof on oath that there is reasonable suspicion of commission of an offence.”

59. In light of the foregoing, I am unable to find that the respondent’s action in this matter violated the petitioners’ right to privacy as alleged.

Violation of the Right to Property

60. The petitioners have also alleged violation of the right to property under Article 40. This Article guarantees to everyone the right to acquire and own property of any description in any part of Kenya. The petitioners note that under Article 260, property is defined to include **“Money, choses in action or negotiable instruments.”** They cite the words of Lenaola J (as he then was) in **Tom Ojienda t/a Tom Ojienda & Associates vs Ethics and Anti –corruption Commission & 5 others (supra)** in which the Learned Judge had found that the petitioner’s right to property had not been violated. The 1st and 2nd petitioners in this case then, in a submission that contradicts their allegation that there had been a violation of their right to property, respectively conclude their submissions by stating that:

“Therefore, the petitioner’s right to property was not deprived under Article 40 of the Constitution.”

61. I believe I need say no more on this point save to observe that the petitioners, inadvertently perhaps, concede that there has been no violation of their right to property guaranteed under Article 40 as alleged.

Violation of the right to fair administrative action

62. The petitioners submit that under section 23(4) of ACECA, section 180(1) of the Evidence Act and section 118 of the CPC are applicable to EACC for purposes of detection, prevention and investigation of offences related to corruption and economic crimes. They further observe that section 118 of the CPC allows a Magistrate to grant *ex parte* search warrants with respect to any criminal activity, while section 180(1) of the Evidence Act allows the issuance of a search warrant for the scrutiny of the bank books of a suspect. They conclude that under section 23 of ACECA read together with section 118A of the CPC and section 180 of the Evidence Act, the respondent is enabled to obtain search warrants to carry out investigations and criminal proceedings if the evidence discloses criminal culpability. The petitioners, however, fall back on their argument with respect to sections 27 and 28 of ACECA and the Court of Appeal decision in the **Prof Tom Ojienda** case which they submit gives them the right to be heard, failing which their right to fair administrative action is violated.

63. The respondent counters that it did not violate the petitioners’ right to fair administrative action. It observes that the petitioners were aware of the investigations; the directors were invited to record statements on the allegations, but declined to do so.

64. In light of my findings earlier in relation to the decision of the Court of Appeal in the **Prof Tom Ojienda** case considered against the ruling of the Supreme Court in the appeal before it, I am not satisfied that there was a violation of the petitioners’ right to fair administrative action.

Violation of the Right to Fair Hearing

65. Similarly, I find that the petitioners have not demonstrated an infringement of the right to fair hearing. The petitioners have not demonstrated how this right was violated, confining themselves to observing that the respondent did not give them a right to be heard, which violated their right under Article 50(1) of the Constitution. As submitted by the respondent however, warrants were sought and obtained for purposes of investigation of the petitioners’ bank accounts. The petitioners were then issued with a notice to explain the source of the assets identified pursuant to the notices. Thus, the petitioners have an opportunity to be heard with respect to the assets and funds the subject of the notice should an application for forfeiture of the assets be made by the respondent. There is therefore no violation of the right to a fair hearing demonstrated.

66. In the circumstances, it is my finding and I so hold that the petitioners have not demonstrated violation of any of their rights under the Constitution. The two petitions are therefore without merit and are therefore dismissed with costs to the respondent.

Dated and Signed at Nairobi this 15th day of April 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent and pursuant to a notice issued on 8th April 2020. The parties have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE