



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION**

**CORAM: MUMBI NGUGI J**

**PETITION NO 25 OF 2018**

DR EVANS ODHIAMBO KIDERO.....1<sup>ST</sup> PETITIONER

DR SUSAN AKELLO MBOYA.....2<sup>ND</sup> PETITIONER

DR EVANS ODHIAMBO KIDERO

(suing on behalf of the estate of the late

ABIGAEI OTIENO KIDERO) .....3<sup>RD</sup> PETITIONER

DR EVANS ODHIAMBO KIDERO (suing on behalf of

the estate of the late PHILIP AYOT KIDERO) .....4<sup>TH</sup> PETITIONER

GEM INVESTMENTS.....5<sup>TH</sup> PETITIONER

GEM APARTMENTS.....6<sup>TH</sup> PETITIONER

GEM SUITES.....7<sup>TH</sup> PETITIONER

ORRO LIMITED.....8<sup>TH</sup> PETITIONER

ARGENTI LIMITED.....9<sup>TH</sup> PETITIONER

PAUL AOL.....10<sup>TH</sup> PETITIONER

**VERSUS**

**THE CHIEF MAGISTRATES OF MILIMANI**

LAWS COURTS.....1<sup>ST</sup> RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT

HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

**CONSOLIDATED WITH**

**PETITION NOS. 79 AND 137 OF 2016**

**DR SUSAN AKELLO MBOYA..... PETITIONER**

**VERSUS**

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

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL.....3<sup>RD</sup> RESPONDENT**

**THE CHIEF MAGISTRATES OF MILIMANI**

**LAWS COURTS.....4<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**MULKI ABDI UMAR.....6<sup>TH</sup> RESPONDENT**

**DENNIS JOSECK MARE.....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. This judgment relates to three petitions raising similar issues and in which the parties are essentially the same. The older in time of the three petitions, Petition No. 79 and 137 of 2016, were filed by Dr. Susan Akello Mboya in 2016 following searches conducted at the residence she shares with her husband, Dr. Evans Odhiambo Kidero. Following the issuance of search warrants in Misc Criminal Application Nos.113, 114, 115 and 116 of 2016- EACC vs Evans Odhiambo Kidero & 2 Others at the Chief Magistrates Court, Makadara. In the consolidated petitions respectively dated 29<sup>th</sup> February and 3<sup>rd</sup> April 2016, Dr. Mboya sought an order staying the warrants to investigate her account No. 666xxxxxxx held at Commercial Bank of Africa dated 24<sup>th</sup> February 2016 which had been issued to Dennis Joseck Mare in Makadara Chief Magistrate Miscellaneous Criminal Case No. 116 of 2016 on the basis that the execution of the warrants violated her constitutional rights. She also sought an order of certiorari to quash the said warrants.

2. The 2<sup>nd</sup> petitioner also asked the court to restrain the EACC and its agents from obtaining any warrants or order from any court or lifting copies of account opening documents, statements, cheques, deposit slips, telegraphic money transfers, client instructions, bankers books and or any information in respect of her account. Orders were also sought restraining the EACC from purporting to investigate or further investigating any of the petitioner's personal accounts or her matrimonial homes for alleged acts of corruption or economic crimes. The petitioner also sought exemplary damages and costs against the respondents.

3. In the petition dated 25<sup>th</sup> September 2018 and amended on 29<sup>th</sup> January 2019 (which, for clarity, shall be referred to hereafter as the main petition), the petitioners seek a raft of orders against the respondents arising from the execution of search warrant issued on 19<sup>th</sup> September 2018 by the Chief Magistrate's Court in Miscellaneous Application No. 4359 of 2018. For the sake of convenience and clarity, I will refer to Dr. Evans Odhiambo Kidero, the 1<sup>st</sup> petitioner in the main petition as the 1<sup>st</sup> petitioner while reference shall be made to Dr. Mboya, the sole petitioner in Petition No. 79 of 2016 (Consolidated with Petition No. 137 of 2016) as the 2<sup>nd</sup> petitioner.

**The Parties**

4. The 1<sup>st</sup> petitioner, Dr. Evans Odhiambo Kidero, was the immediate former Governor of Nairobi City County at the time of filing the main petition. He also filed the petition in his capacity as the administrator of the estate of his late wife, Abigael Atieno Kidero (deceased) who died in 2010 as the 3<sup>rd</sup> petitioner, and as the administrator of the estate of his son, Philip Ayot Kidero, who also died in 2010, as the 4<sup>th</sup> petitioner. The 2<sup>nd</sup> petitioner, Dr. Susan Akello Mboya, is the wife of the 1<sup>st</sup> petitioner, the two having married in 2011.

5. The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> petitioners are limited liability companies incorporated in the Republic of Kenya. Their directors and shareholders are the 1<sup>st</sup> and 2<sup>nd</sup> petitioners. The 10<sup>th</sup> petitioner, Paul Aol, is described as an adult male of sound mind who works with the 1<sup>st</sup> petitioner.

6. The main petition is lodged against the Chief Magistrate's Court, Makadara Law Courts as the 1<sup>st</sup> respondent while the Ethics and Anti-Corruption Commission (EACC) is joined as the 2<sup>nd</sup> respondent.

7. The office of the Director of Public Prosecution (DPP) had been joined as the 3<sup>rd</sup> respondent but was removed from the proceedings pursuant to a ruling of the court made on 6<sup>th</sup> November 2018. Also joined to the petition as the 4<sup>th</sup> respondent is the Director of Criminal Investigations (DCI), an office established under the Constitution.

8. Finally, the petitioners have joined the office of the Attorney General (AG) as the 5<sup>th</sup> respondent. The AG's office is established under Article 156(4) of the Constitution with the constitutional mandate to advice and represent the national government in legal proceedings.

9. The 2<sup>nd</sup> petitioner's consolidated petitions were lodged against the EACC, the Inspector General of Police, the DPP, the Chief Magistrate's Court, Makadara as well as two investigators with the EACC in their personal capacities.

### **Procedural History**

10. Petition Nos. 79 and 137 of 2016 had been filed in 2016 following an attempt by the EACC to carry out investigations in relation to the 1<sup>st</sup> and 2<sup>nd</sup> petitioner. The petitions had been filed alongside **Petition No. 78 of 2016- Evans Odhiambo Kidero v EACC & others**. A perusal of the pleadings and averments in the petitions indicates that they raised substantially the same issues to wit: whether the provisions of sections 23, 26, 27 and 28 of the Anti-corruption and Economic Crimes Act (ACECA) and section 11(1)(d) of the Ethics and Anti-Corruption Commission Act (EACC Act) were unconstitutional.

11. Petition No. 78 of 2016 was transferred to this Division on 4<sup>th</sup> April 2017 and renamed ACEC Petition No. 8 of 2017. It was thereafter consolidated with **Petition No. 109 of 2016-Okiya Omtatah Okoiti & Another –v The Honourable Attorney General & 3 others** and was heard and determined by a three judge bench. It is not clear from the record why the 2<sup>nd</sup> petitioners' two petitions were not consolidated with and heard alongside Petition Nos. 78 of 2016 and 109 of 2016.

12. When Petition No. 25 of 2018 came up before Ong'udi J on 4<sup>th</sup> October 2018, it was brought to the attention of the court that Petition No 79 of 2016 and 137 of 2016 had been consolidated and were still pending before the Constitutional and Human Rights Division of the High Court over the same issues. On 15<sup>th</sup> October 2018, these petitions were consolidated with Petition No. 25 of 2018.

13. Prior to the hearing of the consolidated petitions, a number of interlocutory applications were filed by the petitioners in the main petition. The first was an application seeking, amongst others, conservatory orders staying any further execution of the search warrant dated 19<sup>th</sup> September 2018 by the EACC pending the hearing and determination of the application. The petitioners also sought a mandatory order compelling the immediate surrender of all the properties of the 2<sup>nd</sup> -10<sup>th</sup> petitioners which were searched and seized without any warrant on the 20<sup>th</sup> September 2018.

14. In its ruling dated 6<sup>th</sup> November 2018, the court (Ong'udi J) granted a conservatory order staying any further execution of the search warrant dated 19<sup>th</sup> September 2018 or any other search warrant in respect to the petitioners by the EACC pending the hearing and determination of the petition. The court also granted an order that any searched and seized properties which the EACC had already found to be unrelated to the matter at hand should be released forthwith to the petitioners and an inventory prepared, signed by all the parties and furnished to all the parties and the court. The court also expunged the office of the Director of Public Prosecutions from the proceedings.

15. The petitioners filed yet another application dated 16<sup>th</sup> November 2018 seeking release of the documents that the court had ordered should be released by its ruling of 6<sup>th</sup> November 2018. On 20<sup>th</sup> November 2018, by consent, the parties agreed that EACC would release to the petitioners all the documents that had been seized in the search of the petitioners' premises which were not related to the issues in this case, and they further agreed to proceed with the substantive petition.

16. The petitioners also filed an application dated 11<sup>th</sup> October 2018 in which they sought orders to compel Ms. Mulki Abdi Umar, the deponent of the affidavit filed on behalf of the EACC, to appear in court for purposes of cross-examination on her affidavit sworn on 3<sup>rd</sup> October 2018. This application was heard and dismissed in the ruling of the court dated 8<sup>th</sup> May 2019.

17. Finally, the petitioners lodged an application dated 4<sup>th</sup> September 2019 seeking orders for removal of caveats and restrictions placed on the properties the subject of the investigations impugned in this petition. By the directions of the court issued on 27<sup>th</sup> November 2019, the issues raised in that application will be considered and determined alongside the substantive issues raised in this petition.

### **The Petition**

18. In the Amended Petition dated 29<sup>th</sup> January 2019, the petitioners seek a total of 23 orders, running from a-w, in relation to the orders issued by the Chief Magistrate's Court to the EACC to investigate the 1<sup>st</sup> petitioner and to search his properties. The petitioners rely on the affidavit sworn on 25<sup>th</sup> September 2018 in support of the initial petition, and a further affidavit sworn on 4<sup>th</sup> February 2019 as well as a Further Further affidavit sworn by the 1<sup>st</sup> petitioner. The petitioners filed submissions dated 13<sup>th</sup> June 2019 as well as a list of authorities, and submission in reply to the respondents' submissions dated 22<sup>nd</sup> July 2019.

19. The petition is expressed to be brought under the provisions of Articles 2(1), 3, 10, 19, 20, 21, 22, 23 (3) 24, 27(1) 28, 29, 31, 47, 48, 50, 79, 258, and 259 of the Constitution. Reliance in support of the petition is also sought in various international conventions and legislation.

20. With regard to the factual basis for the petition, the petitioners state that the 1<sup>st</sup> petitioner was the first Governor of Nairobi City County and successfully served a term of 5 years. He is a man of decent means who has accumulated his wealth gradually over the course of years since his first employment in 1983. He has been continuously engaged in gainful employment in the private sector and had never served in any public office before. The petitioners set out his educational background, a Bachelor of Pharmacy at the University of Nairobi and a Master's degree in Business Administration from the United States International University in 1991.

21. They also set out his employment background over the years: in 1984 by PAC Laboratories as a Production Pharmacist; in February 1985 by Warner Lambert (East Africa) Ltd; SmithKline & French Laboratories Limited in January 1989 as a Field Sales Manager; Glaxo East Africa Limited in January 1989 as a Field Sales Manager; SmithKline Beecham in October 1991 as its pharmaceutical products

consultant in Tanzania, Uganda and Mozambique; and from January 1999, its Managing Director in East and Central Africa. He was appointed the Managing Director of Nation Media Group in August 2000 until October 2003 when he was appointed the Managing Director of Mumias Sugar Company Limited (hereafter (MSC') where he stayed until mid- 2012. They also set out the 1<sup>st</sup> petitioner's cumulative earnings in the period of his employment between 1985 and 2012.

22. It is the petitioners' case that during the period when the 1<sup>st</sup> petitioner was its Managing Director and thereafter, MSC was a public limited liability company. The 1<sup>st</sup> petitioner sets out the shareholding in MSC as at 30<sup>th</sup> June 2017, which shows that the Permanent Secretary, Treasury, holds 20% of the shares in MSC while the remaining shares are held by individuals and corporate entities.

23. The petitioners assert that on 16<sup>th</sup> December, 2010, the Kenya Anti-Corruption Commission (KACC), the predecessor of the EACC, had written to the 1<sup>st</sup> petitioner requiring him to furnish to it a written statement on twelve properties and interests and shareholding in four companies set out in the letter, which KACC claimed the 1<sup>st</sup> petitioner had acquired in unexplained circumstances, between May, 2003 and November, 2010. His response dated 21<sup>st</sup> December, 2010 was that MSC was not a public body and he was not a public officer. Accordingly, the demand that KACC had made to him was unlawful and would not be met.

24. It is the petitioners' assertion further that on 28<sup>th</sup> December, 2010, KACC again wrote to the 1<sup>st</sup> petitioner demanding that he furnishes a written statement on his properties and interests. In his response dated 17<sup>th</sup> January, 2011, the 1<sup>st</sup> petitioner sought to know from KACC whether the notice issued to him under section 26 of ACECA violated his constitutional right against self-incrimination and his right to privacy. He also sought to know whether the information he supplied in compliance with the notice would subsequently be used against him in any legal proceedings. In its letter dated 20<sup>th</sup> January, 2011, KACC did not respond to his questions but reiterated that he complies with the two notices. By his letter dated 31<sup>st</sup> January, 2011, the 1<sup>st</sup> petitioner reiterated that the three concerns raised in his letter should first be addressed.

25. According to the petitioners, on 28<sup>th</sup> January, 2011, the 1<sup>st</sup> petitioner sought the opinion of the AG on the legal status of MSC in view of the demands of the KACC. The opinion that the 1<sup>st</sup> petitioner received from the AG dated 31<sup>st</sup> January, 2011 was that MSC was not a public body or state corporation in view of the minority shareholding of the Government of Kenya, and the fact that the Government did not have a controlling interest in MSC.

26. The petitioners further assert that neither KACC nor the respondents in this matter pursued the matters in respect of which KACC had investigated the 1<sup>st</sup> petitioner from January, 2011 until January, 2015 after the election of the 1<sup>st</sup> petitioner as Governor of Nairobi County. The matters were revived towards the end of his tenure.

27. The petitioners state that on 14<sup>th</sup> January, 2015, the 1<sup>st</sup> petitioner, in response to a demand made to him on 2<sup>nd</sup> April, 2015, notified EACC that MSC was not a public body and EACC therefore had no jurisdiction to investigate him on matters relating to it. EACC thereafter on 17<sup>th</sup> August, 2015 sought the AG's opinion on whether MSC was a public body within the meaning of section 2 (e) of ACECA. The petitioners' case was that the legal opinion given by the AG on 25<sup>th</sup> August, 2015 was that the answer to the question would depend on whether the Government has a controlling interest in MSC, which was dependent upon establishing whether the majority shareholding in MSC is treated as a single voter or cumulative vote comprising of all of the rest of the shareholders constituted thereby.

28. The 1<sup>st</sup> petitioner asserts that when he joined MSC, he found it rundown and on the verge of collapse. It had, in the previous financial year, made a loss of Kshs. 244,858,000 as was discernible from its audited and published financial statements for 2002/2003. From his dedication and support from the MSC Board of Directors and management team, MSC had become a success story for the years he was the Managing Director until he left the company. Its accounts were audited and published to help any person interested in the affairs of MSC to assess and determine their dealings with the company.

29. It is his contention that for the period that he was in MSC, the composition of the Board remained substantially the same. It is the current Board of MSC that set and approved policies that guided him in his decision making as the Managing Director. The 1<sup>st</sup> petitioner asserts that the current Board of MSC signed all the audited and published financial statements of the company for the period he served as Managing Director, which he terms an unequivocal agreement by each of the members of the Board to the contents of the financial statements for the periods, as audited by the auditors, Deloitte & Touché. MSC had made profits in billions of shillings and its net equity had grown progressively during his tenure as Managing Director. The petitioners make further detailed averments with respect to the growth in profits and earnings per share of the company in the period that the 1<sup>st</sup> petitioner was the Managing Director until he left the company.

30. The petitioners assert that the 1<sup>st</sup> petitioner was a hardworking dedicated man. He was also prudent and had learnt the art of saving and investing early, making several overseas investments in equity which have continued to grow. He had acquired several properties over the years, and a large portion of his properties had been acquired as early as 1995, just a few years after he was engaged in gainful employment. The petitioners set out the dates and the properties that the 1<sup>st</sup> petitioner, either alone or with his first wife, now deceased, had acquired over the years. He had also acquired certain properties with his daughter as well as with his wife, the 2<sup>nd</sup> petitioner.

31. They further assert that the 1<sup>st</sup> petitioner owns shares in various companies, and had publicly declared his wealth as required by the Public Officer Ethics Act, 2003 on 31<sup>st</sup> Jan 2014 and 22<sup>nd</sup> Jan 2016. It is the petitioners' case that the 1<sup>st</sup> petitioner has been in the private sector for most of his working life, and virtually all his assets were acquired prior to his joining public service.

32. The petitioners set out the 1<sup>st</sup> petitioner's venture into politics as Governor of Nairobi and what he achieved in his tenure as Governor. They cite in particular rehabilitation of public hospitals in the county and the county road network, and the hosting of international conferences and international guests. He had, however, failed in his re-election bid and had therefore stopped being a public officer as defined in Article 260 of the Constitution.

33. According to the petitioners, since the 1<sup>st</sup> petitioner left politics after the 2017 general elections, he has been subjected to continued threats, attacks, harassment, witch-hunt and intimidation by EACC. They state that the 1<sup>st</sup> petitioner was arrested on 8<sup>th</sup> August 2018 for alleged commission of economic crimes while he was the Governor of Nairobi City County, and the criminal case against him is ongoing.

34. According to the petitioners, the 1<sup>st</sup> petitioner was shocked, scared, terrified, humiliated and severely traumatized when on 20<sup>th</sup> September 2018, at about 4.00 a.m. his Muthaiga home was raided and literally turned upside down by about 40 gun-wielding officials of the EACC. The officials were armed with the search warrant dated 19<sup>th</sup> September 2018. The 1<sup>st</sup> petitioner was held hostage at his home till about 12.00 p.m. with no consideration of his dignity as protected by Article 28 of the Constitution. They further assert that similar raids were made in his home in Kisumu and in his office at Westlands.

35. The petitioners claim that the heavily armed EACC officers proceeded to seize different properties. Such properties belonged not just to the 1<sup>st</sup> petitioner but also to his wife, the 2<sup>nd</sup> petitioner as well as their children. They had also seized property belonging to the 1<sup>st</sup> petitioner's late wife and son. Also seized were properties belonging to the 5<sup>th</sup>-10<sup>th</sup> petitioners, which are separate legal entities, when the warrant had been issued only in respect of the 1<sup>st</sup> petitioner. The petitioners contend that the conduct of the EACC officers was in violation of their rights to privacy, dignity, property, fair administrative action and fair hearing.

36. The petitioners state that the 1<sup>st</sup> petitioner had learnt that the search warrant had been issued to the EACC on 19<sup>th</sup> September 2018 by the Chief Magistrate's Court pursuant to an application of the same date. The warrants had been obtained on the basis of a deposition that the 1<sup>st</sup> petitioner was being investigated over alleged misappropriation of public funds and illegal acquisition of wealth at the Nairobi County Government and MSC.

37. The petitioners contend that the search warrant against the 1<sup>st</sup> petitioner is unconstitutional, defective and ought to be quashed. This is because the EACC does not have jurisdiction to investigate the affairs of MSC as it is a private company and not a public company as erroneously asserted by the EACC. The petitioners contend in this regard that under Article 79 of the Constitution, EACC was established with the sole mandate of ensuring the observance and adherence to Chapter 6 of the Constitution which provides for leadership and integrity of state officers.

38. They argue that the role of EACC is limited to ensuring that state officers observe the principles of leadership and the national values and principles of governance in accordance with both the Constitution and the Leadership and Integrity Act. Its jurisdiction is limited to state officers, and if it purports to extend its jurisdiction to non-state officers, it acts illegally and in excess of its constitutional and statutory jurisdiction. The petitioners' case is that any decision the EACC makes in relation to the purported investigation of a non-state officer is illegal and ought to be quashed, as should any search warrant that it obtains to investigate a non-state officer's property.

39. The petitioners posit that any former or current employee of MSC is not a public officer but a private citizen over whom EACC has no jurisdiction. Accordingly, the Chief Magistrate's Court had issued a warrant over a matter in which the EACC could not exercise jurisdiction, and the warrant should therefore be quashed.

40. The second aspect of the petitioners' challenge to the search warrants is that they are vague, overbroad, open-ended, and not reasonably intelligible to the searcher. It has since been abused by the EACC to go on a fishing expedition to look for incriminating evidence against the 1<sup>st</sup> petitioner, his family and employees. This conduct on the part of the EACC, according to the petitioners, has resulted in violation of the petitioners' rights guaranteed under Articles 28, 29, 31 and 40 of the Constitution. The petitioners allege abuse of the search warrant by EACC as it confiscated the 1<sup>st</sup> petitioner's properties acquired as early as 1987 when the alleged period of investigation was for the period when the 1<sup>st</sup> petitioner was the Managing Director of MSC and the Governor of Nairobi City County.

41. It is the petitioners' contention, thirdly, that the search warrant was obtained without following due procedure. It is their case that no notice in writing was issued to the 1<sup>st</sup> petitioner asking him to give particulars of which properties he owns and when he acquired them. Further, that EACC is required to give a suspect an opportunity to produce particulars of his properties first. They assert that by failing to afford the 1<sup>st</sup> petitioner such opportunity to be heard as contemplated under section 26 of ACECA, EACC violated the 1<sup>st</sup> petitioner's rights under Article 40, 48 and 50 of the Constitution. The warrant dated 19<sup>th</sup> September 2018 was obtained without following due procedure as, secondly, the 1<sup>st</sup> petitioner was not granted any notice before the warrant was obtained to search his premises.

42. The petitioners cite the decisions in **County Government of Meru v Ethics and Anti-Corruption Commission [2014] eKLR** and **Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR** which they argue held that it is mandatory for EACC to notify a party against whom a warrant is sought before moving the court to issue warrants.

43. The petitioners further argue that EACC had applied for the warrant under section 118 of the Criminal Procedure Code (CPC). They argue that the provisions of this section are inconsistent with section 28 of ACECA, and that section 24(3) of ACECA provides that the CPC is applicable only to the extent that its provisions are not inconsistent with the provisions of ACECA. To the extent, therefore, that section 118 of the CPC is inconsistent with section 28 of ACECA, the latter section prevails. It is the petitioners' case therefore that by failing to notify the 1<sup>st</sup> petitioner that it was obtaining the warrants against him, the EACC violated his rights under Article 31, 47 and 50 of the Constitution.

44. A fourth argument advanced by the petitioners is that under ACECA, a search warrant can only be obtained where the suspect has failed to produce the particulars requested by the EACC. Their contention is that the search warrant issued against the 1<sup>st</sup> petitioner was obtained without following due procedure since the 1<sup>st</sup> petitioner was denied an opportunity to furnish the particulars of his properties and the warrant was not restricted to documents or records that the 1<sup>st</sup> petitioner had declined to give particulars of. The petitioners contend that a plain reading of section 29(1) of ACECA demonstrates that a search warrant is only used where a suspect has declined to cooperate with the EACC with regard to providing particulars of his properties.

45. A further argument advanced is that the EACC had already commenced prosecution of the 1<sup>st</sup> petitioner in **Anti-Corruption Court Case Number 32 of 2018 Republic vs Dr. Evans Kidero & Others** over alleged misappropriation of public funds in Nairobi City County. It is their contention therefore that the search warrant in this matter was obtained in a bid to sustain an ongoing criminal prosecution which is facing imminent failure due to lack of evidence. This, they contend, is also a violation of the 1<sup>st</sup> petitioner's right to a fair trial under Article 50.

46. The petitioners allege that the EACC clothed itself with non-existent powers by purporting to search and seize properties belonging to the 2<sup>nd</sup>-10<sup>th</sup> petitioners when it went to search the 1<sup>st</sup> petitioner's premises on 20<sup>th</sup> September 2018. It is their case that there was no search warrant against these petitioners, and the EACC should not have searched or seized property belonging to the companies which are separate legal entities from the 1<sup>st</sup> petitioner. The petitioners accuse the EACC of abuse of power by intimidating the 1<sup>st</sup> petitioner's family members in a bid to get his family members, friends and associates to shun him, a violation of his right to human dignity under Article 28.

47. They assert that there was no order obtained under section 27 of ACECA allowing EACC to search and seize the 2<sup>nd</sup>-10<sup>th</sup> petitioners' properties, and no search warrant was obtained against them. It is the petitioners' case therefore that in the circumstances, the EACC violated the rights of these petitioners to privacy, property, dignity, fair administrative action and fair hearing.

48. The petitioners further allege that the EACC, without a warrant or order of the court but in reliance on the search warrant issued on 19<sup>th</sup> September, 2018, raided properties and establishments owned by the 1<sup>st</sup> petitioner or by companies in which he is a shareholder or director. That in so doing, EACC harassed and intimidated tenants, occupants or patrons of the establishments while claiming to be undertaking investigations and valuations of the properties and establishments. It also sought to register restrictions on some of the properties without sufficient cause or notice to the 1<sup>st</sup> petitioner or the companies as required under section 76 of the Land Registration Act No 2 of 2012.

49. The petitioners enumerate the acts of the EACC which they deem prejudicial to them. These include writing to the Ministry of Lands on 20<sup>th</sup> August 2018 indicating that it was investigating allegations of corruption in respect to 13 properties and demanding searches and documents in respect of the properties, writing to the same Ministry in September, 2018 indicating that it was undertaking investigations of corruption relating to property L. R. No. Nairobi Block 91/156 and demanding that a restriction be placed on the property; forcefully entering on to L. R. No. 1160/663 and L. R. No. 209/9841 on 18<sup>th</sup> October 2018, intimidating tenants and searching the property.

50. The petitioners further allege that the EACC wrote on 18<sup>th</sup> October, 2018 to the 'purported' tenant on L. R. No. Block 91/156 notifying him that it was investigating the 1<sup>st</sup> petitioner for corruption in respect to the property and that it would enter the property on 22<sup>nd</sup> October, 2018 to carry out a valuation of the same. The petitioners further allege that the EACC forcefully entered onto L. R. No. 7258/48 on 19<sup>th</sup> October, 2018, detained and handcuffed security guards, harassed and intimidated tenants and proceeded to search and inspect the property in purported reliance on the letter dated 18<sup>th</sup> October, 2018 in respect to property L. R. No. Nairobi Block 91/156.

51. It is their contention further that on 29<sup>th</sup> October, 2018 EACC officers forcefully entered L.R. No. Nairobi/Block 91/156 Gigiri with a view to inspecting and valuing the same but were removed upon intervention by the tenant's security. The petitioners assert that the intervention was necessary as the tenant of the premises is a diplomat and no prior notice of the intended inspection and valuation had been given to the 1<sup>st</sup> petitioner, the registered owner of the property.

52. It is also their case that on 30<sup>th</sup> October, 2018, EACC officers had forcefully entered L. R. No. 205/45 Riverside Drive Phase 2 and L. R. No. 205/46 Riverside Drive Phase 1, L. R. No. 209/5917; L. R. No.209/4350/6 Rose Avenue registered in the name of Gem Investments Limited and Gem Apartments Limited and had inspected and valued the properties. The petitioners argue that the unauthorized exercise undertaken by the EACC without prior notice is disruptive of the businesses on the properties and has caused panic amongst the tenants and patrons of the establishments.

53. The petitioners are also aggrieved by the qualifications of the EACC officer in charge of the valuation of the 1<sup>st</sup> petitioner's property. They contend that notwithstanding the lack of legal authority on the part of the EACC to undertake the valuation, the officer, Pius Nyange Maithya, is not a registered valuer as required by sections 8 and 22 of the Valuers Act, Cap 532. It is their case therefore that there is no genuine valuations being undertaken by the EACC as a valuation can only be carried out by an authorised valuer.

54. They contend that the inspection and valuation by the EACC is an afterthought intended to remedy the demonstrated flaw in the exaggerated desktop valuation of the 1<sup>st</sup> petitioner's properties upon which the suspicion of unexplained assets is based. The petitioners assert that there is reasonable apprehension that if not restrained by an order of injunction the EACC will continue to infringe the 1<sup>st</sup> petitioner's fundamental rights and to sabotage him in respect of the properties set out in the petition.

55. The court notes that the list contains 58 properties registered in the name of the 1<sup>st</sup> petitioner, his children and his companies. Thirteen (13) of the properties were purchased between 1987 and 2002, some between 2004 and 2012, while some have no dates of purchase indicated. 10 of the properties are registered in the names of companies, one in the name of a son of the 1<sup>st</sup> petitioner, one each respectively in the name of the 1<sup>st</sup> petitioner and his daughter and one in the name of the 1<sup>st</sup> and 2<sup>nd</sup> petitioner. The rest of the properties are in the name of the 1<sup>st</sup> petitioner.

56. The petitioners assert that all the 58 properties were acquired before the 1<sup>st</sup> petitioner became a state officer upon election as Governor of Nairobi County in 2013. They cannot therefore be the subject of investigations by the EACC pursuant to the warrants issued on 19<sup>th</sup> September, 2018 or at all. They contend that the actions of the EACC have caused havoc among the tenants and patrons of the properties and there is imminent danger that they will vacate the properties or avoid the establishments for fear of harassment. It is the petitioners' case that the conduct of the EACC amounts to economic sabotage against the 1<sup>st</sup> petitioner and is intended to cripple him financially.

57. The petitioners allege violation by all the respondents of their constitutional rights under various Articles of the Constitution. They allege violation of the principles of good governance set out in Article 10 (1) (a) to (c) and (2) (a) to (c) in their pursuit of investigations against the 1<sup>st</sup> petitioner in so far as it relates to allegations of misappropriation of public funds from MSC and the 1<sup>st</sup> petitioner's acquisition of wealth during his tenure as Managing Director. This assertion is based on what the petitioners term misinterpretation of section 2 (e) of ACECA as conferring the status of a public body to MSC notwithstanding the fact that the Government of Kenya does not have the whole or a controlling majority of shares in MSC. They also allege a misinterpretation, for the same reason, of section 2 of the State Corporation Act, Cap 446 of the Laws of Kenya as conferring the status of a state corporation to MSC since the Government does not have the whole or a controlling majority of shares in MSC.

58. It is also their case that the respondents have violated the principles of good governance by taking action contrary to the legal opinions given by the AG on 31<sup>st</sup> January, 2011 and 25<sup>th</sup> January, 2015 on the legal status of MSC. They accuse the respondents further of attributing the status of a public body and state corporation on MSC, and the status of a state officer and public officer on the 1<sup>st</sup> petitioner during his tenure as Managing Director of MSC between 2003 and 2012. They further contend that the respondents have breached the principles of good governance by appropriating public funds and resources in the pursuit of unlawful investigations which will not result in the promotion of social justice, good governance, integrity, transparency and accountability.

59. The petitioners contend that the respondents have violated and infringed upon the 1<sup>st</sup> petitioner's right to equality before the law, equal protection and equal benefit of the law as well as full and equal enjoyment of all rights and fundamental freedoms under Article 27 (1) and (2) of the Constitution of Kenya. This is on the basis that the EACC is in pursuit of investigations against him in so far as it relates to allegations of misappropriation of public funds from MSC and his acquisition of wealth during his tenure as Managing Director thereof. They contend that the EACC has imposed liability for public office and suspicion for commission of corruption and economic crimes on him for the period between 2003 to 2013. They further allege such violation on the basis that the 1<sup>st</sup> petitioner has been subjected to an unlawful inquiry on the source of income for purchase of properties acquired before 2003 and between 2003 and 2012 when he was a private citizen.

60. The petitioners make similar contentions regarding breach of the principles of good governance and rule of law in relation to the other petitioners. They allege, with respect to the 2<sup>nd</sup> petitioner, that the respondents, in the seizure and detention of her will, correspondences between her and her Advocates and other private personal documents and personal properties, have violated her right to equality before the law, equal protection and equal benefit of the law as well as full and equal enjoyment of all rights and fundamental freedoms under Article 27 (1) and (2) of the Constitution. They have also violated her right to privacy under Article 31 (c) and (d), right to property under Article 40 (3), and right to property acquired before and during marriage under Article 45 (3).

61. These violations are alleged to have been committed in the treatment of the 2<sup>nd</sup> petitioner and her property as an extension of the 1<sup>st</sup> petitioner; apportioning liability for suspicion of commission of criminal offenses, corruption and economic crimes to her; and extending investigations, searches and seizures in respect to the 1<sup>st</sup> petitioner to her notwithstanding the differences between them and in their properties. Similar arguments are made with respect to the 3<sup>rd</sup> to 10<sup>th</sup> petitioners.

62. The petitioners contend that the EACC violated Article 27 of the Constitution with respect to the 2<sup>nd</sup> -10<sup>th</sup> petitioners on the basis that they are associates of the 1<sup>st</sup> petitioner. They also allege violation of the said petitioners' right to dignity under Article 28 by the said search which exposed their private affairs. It is their contention also that the respondents violated the 1<sup>st</sup> petitioner's right to dignity by conducting the search in the wee hours and by victimizing his associates. They further allege violation of the 1<sup>st</sup> petitioner's right to privacy by executing the search warrants which were vague, overbroad and not specific and thus enabled the respondents to go on a fishing expedition against the 1<sup>st</sup> petitioner.

63. The petitioners assert that the power to issue search warrants under sections 118 to 121 of the CPC is a legislative limitation to the right to privacy. Accordingly, EACC was under an obligation to demonstrate to the court, in seeking the search warrant against the 1<sup>st</sup> petitioner, that there was justification for the application and that it had met the requirements of Article 24 (2).. They allege abrogation of judicial authority under Articles 10 (1) (b) (2) (a) to (c) and 159 (1) (2) (a) and (e) in the issuance of the search warrants and contend that the EACC willfully misrepresented to the court that issued the warrant that there was evidence to support the issuance of the warrant when there was none.

64. They also allege that the court performed its judicial duties perfunctorily without setting out the grounds upon which it found that the reasons advanced by the EACC for the warrant were meritorious. The court had issued the warrant with no reasonable or justifiable basis and without defining the scope of the search warrant. The court did not also give a return date for the EACC to return the documents to court as required by sections 118 to 121 of the CPC.

65. The petitioners further contend that the EACC violated the 1<sup>st</sup> petitioner's right to privacy and property by writing letters to his tenants and patrons of his properties, as well as by entering into and inspecting the said properties and registering caveats.

66. The petitioners further allege violation of their right to fair administrative action under Article 47(1) of the Constitution. They allege that they were entitled to written reasons from the respondents, and their failure to furnish such reasons and obtaining the search warrant without notifying them violated this right, as well as the provisions of ACECA.

67. The petitioners seek a declaration that MSC is not a public body or state corporation as defined under section 2 (e) of ACECA and section 2 of the State Corporations Act. They further seek a declaration that the 1<sup>st</sup> petitioner was not a state or public officer as defined under section 11 (1) of the EACC Act as read with Article 260 of the Constitution between 2003 and 2012 when he served as the Managing Director of MSC. They further ask the court to declare that the EACC has no authority or power to investigate the 1<sup>st</sup> petitioner on any of his properties acquired before 2003 and/or between 2003 and 2012, and that any such investigations or searches or recommendations for his prosecution, as well as intended seizure of his properties as unexplained assets are unlawful, unconstitutional and null and void *ab initio*.

68. The petitioners further seek a declaration that the EACC has no authority or power to investigate the 1<sup>st</sup> petitioner on any allegations of misappropriation of public funds and illegal acquisition of wealth during his tenure as Managing Director of MSC between 2003 and 2012. Any investigations or searches of the 1<sup>st</sup> petitioner's properties, seizures of his documents and properties, or recommendations for his prosecution and intended seizure of his properties as unexplained assets, in so far as the properties are alleged to have been acquired during his tenure as Managing Director of MSC between 2003 and 2012 are unlawful, unconstitutional and null and void *ab initio*.

69. An order of prohibition is sought to restrain the EACC from, *inter alia*, further investigating the 1<sup>st</sup> petitioner or conducting searches on his properties with a view to investigating the source of income for the purchase of the properties he acquired before 2003 and/or between 2003 and 2012. Orders are also sought prohibiting the EACC from investigating the 1<sup>st</sup> petitioner further on any allegations of misappropriation of public funds and illegal acquisition of wealth during his tenure as Managing Director of MSC.

70. The petitioners further seek a declaration that initiation of investigations against the 1<sup>st</sup> petitioner and searches on his properties subsequent to the institution of criminal charges against him is unlawful, unconstitutional and null and void *ab initio*. They also seek a declaration that failure by the EACC to deliver the documents and properties seized from the petitioners before the court which issued the search warrant and to file a return in respect thereof within a reasonable time or at all or to release the said documents to the petitioners upon being ordered to do so by this Court, contravenes sections 118 to 121 of the CPC as read with Articles 28, 31, 40 (3) and 47 of the Constitution and the said actions of the EACC are therefore unlawful and unconstitutional.

71. The petitioners ask the court to declare that the power to issue search warrants under sections 118 to 121 of the CPC is a legislative limitation to the constitutional right to privacy under Article 31 of the Constitution, and that the state or state agency seeking a search warrant is required to demonstrate a justifiable and reasonable basis for the request and that the provisions of Article 24 (2) of the Constitution have been met. The petitioners further ask the court to issue an order of certiorari to quash the search warrants issued on 19<sup>th</sup> September 2018 and the entire proceedings relating to the said case.

72. A declaration that the EACC's seizure and detention of the 1<sup>st</sup> petitioner's will, correspondences between him and his Advocates and other private and personal documents and properties violated his right to privacy under Article 31 (c) and (d) of the Constitution and are therefore unlawful and unconstitutional. An award of general, aggravated and exemplary damages are sought in this regard.

73. With respect to the 2<sup>nd</sup> petitioner, a declaration is sought that the seizure and detention of her will, correspondences with her Advocates and other private personal documents and properties violated her right to privacy, property, property acquired before and during marriage under Article 45 (3) of the Constitution and that the said actions are therefore unlawful and unconstitutional. General, aggravated and exemplary damages in respect of these alleged violations are sought as against the respondents. Similar declarations and orders for damages are sought with respect to the 3<sup>rd</sup> to 10<sup>th</sup> petitioners.

74. The petitioners ask the court to direct the EACC to release to them forthwith all documents and properties that it had seized pursuant to the search warrants and to deliver to them and to the court inventories of such documents within seven days of the order.

75. The petitioners also pray for an injunction to restrain the EACC from writing letters to tenants, occupiers or patrons of the petitioners' properties, or from entering or inspecting the said properties or seeking to register any caveats, cautions, prohibitions or restrictions at the Ministry of Lands on the said properties. They seek, as against the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, general, aggravated and exemplary damages for the loss suffered by the petitioners as a result of the letters written by the EACC and for the unlawful entries, inspections, searches and valuations of the properties and for the caveats, cautions, prohibitions or restrictions registered on the properties. The petitioners also ask the court for the costs of the petition.

76. The 1<sup>st</sup> petitioner's affidavit in support of the petition to which is annexed documents in support reiterates the contents of the petition. The 1<sup>st</sup> petitioner also filed a Further Further Affidavit sworn on 4<sup>th</sup> February 2019 in which he reiterates that MSC was a public limited liability company and not a public body or state corporation in the period that he was its Managing Director. He further reiterates that the warrant issued on 18<sup>th</sup> September 2018 was issued on the basis that MSC is a public body and he was a public officer when he served as its Managing Director. The EACC has therefore, in his view, pursued investigations against him on an erroneous legal foundation.

77. According to the 1<sup>st</sup> petitioner, the actions of EACC resulted in his tenants terminating their leases thus resulting in economic loss. The tenant in L. R. No. Nairobi Block 106/220 has abandoned the premises, resulting in constructive termination of the lease, while a restriction has been placed on Nairobi/Block91/156. He terms the actions of the EACC in respect of his properties as economic sabotage.

78. The 2<sup>nd</sup> petitioner, Dr. Susan Akello Mboya, avers in her affidavit in support of the petition that she is a private citizen of Kenya who does not hold any state or public office. She has worked for gain in several multinational companies and was the founder in 2002 of a nonprofit organization that has empowered hundreds of young African women over the past 16 years. That it does this by providing scholarships, financial assistance, career guidance and mentoring for academically gifted but economically disadvantaged girls. She further avers that the organization has been tremendously successful and has won awards and brought recognition to itself and to the country as a whole. She has been actively involved in mentoring and supporting young women for over 20 years and has invested millions of her own funds towards this cause.

79. She further avers that she has been recognized for her charitable work both locally and overseas, has been awarded the Elder of the Burning Spear award and in addition to her own doctorate has received 3 honorary doctorates from US institutions in support of her programmes. She asserts that by the nature of her position, she is required to be a person of the highest personal integrity as she raises and administers several millions of dollars annually to support her initiatives. She also earns millions of dollars every year through employment and from her very successful investments within and outside the country. She has held senior executive positions in leading multinational organizations for the past 28 years and has invested her earnings in real estate and equities over the years. She had also inherited property from her parents who had invested in real estate since the early 1960s.



80. It is the 2<sup>nd</sup> petitioner's averment that the sources of her income are not shrouded in any secrecy and are easily ascertainable as she regularly does her tax returns. Further, that all her personal bank accounts are regularly audited by duly appointed auditors within and outside the country. She is therefore an independent and financially empowered woman who champions the empowerment of the female gender and she does not depend on any individual to satisfy her financial needs. Since her marriage, she has filed separate tax returns and maintained separate bank accounts from the 1<sup>st</sup> petitioner, whom she married in 2011. She is required, from her position as a consultant, a senior executive of multinational companies and on the charitable organizations that fund the education of young girls and advocate for women empowerment, to demonstrate that she is a trustworthy person. She must also maintain high levels of integrity and have an unblemished reputation.

81. It is her averment further that her bank accounts predate her marriage, and she maintains the vast majority of her investments and income separate from the 1<sup>st</sup> petitioner's. She, however, has a joint bank account with the 1<sup>st</sup> petitioner which is limited to family expenditure, payment of bills and daily maintenances that would be required of a normal domestic set-up of a husband and wife. She states that she is not a state officer as envisaged under Article 260 of the Constitution, does not hold any state office whatsoever, and has not demonstrated any interest in such office.

82. Dr. Mboya avers that she was shocked and traumatized when on 20<sup>th</sup> September 2018 EACC purported to illegitimately cloth itself with non-existent powers by purporting to search and seize her documents and properties from her private home and office. She avers that documents and property that were clearly designated as belonging to her and her son were taken with wanton disregard to her right and her family's right to privacy. It is her averment that there was no search warrant issued against her authorizing EACC to search and seize her property, and it does not have powers to search and seize any one's property without a search warrant. The EACC had also not obtained an order under section 27 of the ACECA to search and seize her property or documents. She contends that she is being discriminated against because she is married to the 1<sup>st</sup> petitioner, and since there was no search warrant obtained against her, the EACC had, by searching and seizing her property, violated a number of her constitutional rights.

83. Dr. Mboya also swears affidavits on behalf of the 5<sup>th</sup>- 9<sup>th</sup> petitioners which are limited liability companies in which she is a director. She avers that there were no search warrants issued with respect to them, and no notices were issued as required under section 27 of ACECA. She therefore asserts that there was violation of these entities' right to privacy, dignity, property, fair administrative action and fair hearing.

84. The 1<sup>st</sup> petitioner, as the administrator of the estates of his deceased wife and son, the 3<sup>rd</sup> and 4<sup>th</sup> petitioners, swears affidavits with respect to the seizure of documents relating to the estates. Such documents include death certificates, an autopsy report and certificate of confirmation of grant.

85. The 10<sup>th</sup> petitioner, Paul Aol, in an affidavit sworn on 25<sup>th</sup> September 2018, avers that he was also traumatized when the EACC purported to carry out searches and seizure of documents that belong to him, though it is not indicated where the searches were conducted and which documents were seized. He makes averments similar to those of the 2<sup>nd</sup> petitioner that he is not and has never been a state officer. He also avers that the EACC did not have a search warrant obtained under section 27 of ACECA in respect to him.

86. In response to affidavits filed on behalf of the EACC, the 1<sup>st</sup> petitioner avers that the actions of the respondents are motivated by malice and bad faith. This assertion is based on the fact that in the affidavit of Mulki Abdi Umar sworn on 3<sup>rd</sup> October 2018, EACC, has stated that certain properties belong to the 1<sup>st</sup> petitioner, which he denies, and annexes searches in respect of the properties in evidence. It had also assigned what he terms as exaggerated desktop valuations to the said properties.

87. The petitioners argue that EACC had failed to take into account the years in which the 1<sup>st</sup> petitioner had purchased the properties in contention. Had it complied with the requirements of section 27 of ACECA, he would have been able to furnish it with the requisite information on ownership, value and years of purchase. He sets out in a table in his affidavit the EACC valuation of the respective properties against what he states is their value. He also denies ownership of vehicles set out in the affidavit of Ms. Umar which he avers have been maliciously assigned to him.

88. The 1<sup>st</sup> petitioner further avers that he had officially announced his interest in and commenced campaigns for the seat of Governor of Nairobi County. He had therefore received into his bank accounts donations from friends, well-wishers and supporters amounting to Kshs 423 million. He had also obtained a loan of Kshs 200 million from Family Bank on 29<sup>th</sup> July 2011, and he could therefore not be accused of engaging in money laundering. He asserts that as a result of the affidavit of the EACC, his reputation in the eyes of the public has been irredeemably injured in violation of Article 33(3) and the investigations against him should be stopped permanently.

### **The Case of the EACC**

89. An affidavit in opposition to the petition was sworn on behalf of the EACC by Ms. Mulki Abdi Umar, an Advocate and investigator with the EACC. She was also a member of the team which was investigating the matters raised in the petition. Ms. Umar also swore a further affidavit on 21<sup>st</sup> November 2018 as well as a further affidavit in response to the Amended Petition on 11<sup>th</sup> February 2019.

90. The EACC case is that it is empowered by law to investigate the conduct of any person or body which in its opinion constitutes corruption or economic crime and unethical conduct pursuant to the provisions of Chapter Six of the Constitution, the ACECA and the EACC Act, as well as the Leadership and Integrity Act. It also has power, under Article 252 of the Constitution and section 11(d) of the EACC Act, to investigate corruption and economic crimes and to make appropriate recommendations to the DPP.

91. It is its case that the grant of orders sought by the petitioners will amount to interference with its constitutional and statutory mandate. In the absence of evidence of malice, illegality, irrationality, procedural impropriety, or unreasonableness on its part, the orders sought by the petitioners should not issue. Such orders would defeat the investigations that it has carried out into offences constituting corruption and

economic crimes. Further, that its exercise of its constitutional and statutory mandate to investigate corruption and economic crimes and to institute proceedings in court for recovery or protection of public property does not amount to an infringement on the constitutional rights of the petitioners.

92. EACC argues that in order to carry out its investigations, it was necessary for it to access the petitioners' premises. That under section 29 of ACECA, it is empowered to apply for warrants, though the section does not set out the procedure for such an application. The procedure for applications for warrants is regulated by section 118 of the CPC, which provides under section 118A that an application for a search warrant shall be made *ex-parte* before a magistrate.

93. EACC further argues that its investigators had sought a warrant to search the 1<sup>st</sup> petitioner's premises based on reasonable suspicion which had been particularized in the supporting affidavit of Shadrack Kaberia Mwenda sworn on 19<sup>th</sup> September 2018 which had been filed in Misc. Criminal Application No. 3459 of 2018. The search warrant was lawfully issued pursuant to section 118 of the CPC as read with section 23 and 29 of the ACECA. In its view, should the petitioners be dissatisfied with the orders issued by the Chief Magistrate's Court, their recourse lay in section 382 of the CPC which provides for revision but not in a constitutional petition.

94. EACC contends that the issues dealing with its power to undertake criminal investigations and to obtain search warrants *ex-parte* were exhaustively dealt with in **Nairobi Petition No. 109 of 2016 consolidated with ACEC No.8 of 2017 (Formerly Constitutional Petition No. 78 of 2016)** in which the 1<sup>st</sup> petitioner was a party.

95. With regard to the investigations against the 1<sup>st</sup> petitioner, EACC stated that sometime in early 2016, it had received several allegations of misappropriation of public funds and illegal acquisition of wealth by the 1<sup>st</sup> petitioner while he served as the Managing Director of MSC and as the Governor of Nairobi City County. The allegation was that the 1<sup>st</sup> petitioner had colluded with some public officials from the County Government and MSC to defraud the Government of colossal sums of money.

96. It had commenced investigations against the 1<sup>st</sup> petitioner and its preliminary investigations had revealed that the 1<sup>st</sup> petitioner had received tens of millions of shillings into several of his bank accounts held in different currencies. He had also acquired several assets in Nairobi and elsewhere during his tenure as the Managing Director of MSC and as Governor, Nairobi City County.

97. On 19<sup>th</sup> January 2016, an application was made to investigate the 1<sup>st</sup> petitioner's account No. 068000004475, held in Family Bank. The application had been made in Makadara Chief Magistrate's Court Misc. Application No. 38 of 2016. The application was granted and warrants to investigate the account were issued on 19<sup>th</sup> January 2016. Upon service on the bank, the bank had furnished the EACC with the bank statement. From the statement, EACC had discerned that there were large cash deposits on a regular basis into the 1<sup>st</sup> petitioner's account, which were quite characteristic of money laundering.

98. EACC had further noted from the bank statements that between 27<sup>th</sup> January 2011 and 31<sup>st</sup> December 2015, the 1<sup>st</sup> petitioner received into the said bank account a sum of Kshs 317,116,000 in cash deposits alone. The account also reflected a sum of Kshs. 200 million equivalent to slightly over US\$ 2 million at the prevailing exchange rate which amount was apparently deposited in a fixed deposit account. There were also other funds invested in fixed deposit accounts. According to the EACC, the transactions in the above account led to discovery of other accounts associated with the 1<sup>st</sup> petitioner. On the basis of the information it had gathered, EACC sought warrants to investigate other accounts belonging to the 1<sup>st</sup> petitioner which are set out in Ms. Umar's affidavit. Four of the accounts were in the name of the 1<sup>st</sup> petitioner, a third was in the name of the Evans Kidero Foundation and the last in the name of the 2<sup>nd</sup> petitioner.

99. EACC was conducting investigations into these accounts as it was reasonably believed or suspected that the 1<sup>st</sup> petitioner had colluded either directly or indirectly to fraudulently transfer public funds to personal accounts, and that he had, acting in concert with other officers at MSC and the Nairobi City County Government, perpetrated conduct amounting to corruption and economic crimes.

100. According to the EACC, while it was in the course of its investigations into the accounts, the 1<sup>st</sup> petitioner had, on 29<sup>th</sup> February 2016, filed **Petition No. 78 of 2016- Dr. Evans Odhiambo Kidero v Ethics and Anti-Corruption Commission & 3 others** seeking to challenge the warrants EACC had obtained to investigate the bank accounts. He had been granted conservatory orders on 1<sup>st</sup> March 2016 restraining the EACC or any other agent or investigators from carrying out any further investigations into the accounts.

101. The 2<sup>nd</sup> petitioner, who is the wife of the 1<sup>st</sup> petitioner, had also filed **Petition No. 79 of 2016- Dr. Susan Akello Mboya –vs- Ethics and Anti-Corruption Commission & 3 others** to challenge the warrants obtained by EACC to investigate her bank account No. 6661230013 held at Commercial Bank of Africa. She had also filed **Petition No. 137 of 2016-Dr. Susan Akello Mboya v Ethics and Anti-Corruption Commission & 6 others** to stop the EACC from carrying out further investigations against her. No interim orders were issued in the petition, and it was consolidated with Petition No. 79 of 2016.

102. EACC notes that the conservatory orders granted to the 1<sup>st</sup> petitioner on 1<sup>st</sup> March 2016 essentially stopped it from further investigating him or his associates for a period of more than 2 years. The 1<sup>st</sup> petitioner had later amended his petition to seek orders, amongst others, to declare section 23 of ACECA unconstitutional on the basis that it contravened Articles 79, 244 and 245 of the Constitution. He had also sought orders to the effect that the mandate of EACC is limited to enforcing the provisions of Chapter Six of the Constitution and does not extend to investigating offences other than those specified under Chapter Six.

103. EACC further notes that Petition No. 78 of 2016 was consolidated with **Petition No. 109 of 2016- Okiya Omtatah Okoiti & Another –v The Honourable Attorney General & 3 others** and was heard and determined. In its decision dated 8<sup>th</sup> June 2018, the three judge-bench of the High Court dismissed the petition, holding that there was no inconsistency between the powers donated to the EACC under the ACECA and the provisions of Article 79 as read with Article 252 of the Constitution. They also held that for a party to institute a constitutional process to circumvent a process by which institutions established by the Constitution are to exercise their jurisdiction is an

abuse of the Court process. The court also held that to entertain such a course would lead to the courts crippling such institutions. EACC states that the dismissal of the consolidated petition paved the way for it to continue with its investigations in the matter.

104. EACC had therefore made an application to search the 1<sup>st</sup> petitioner's office, business and residential premises vide Chief Magistrate's Court at Milimani, Misc. Criminal Application No 3459 of 2018. It had disclosed to the court that it was investigating the 1<sup>st</sup> petitioner regarding allegations of misappropriation of public funds and illegal acquisition of wealth while he was the Governor of Nairobi City County and the Managing Director of MSC. It had also disclosed that its investigations so far had revealed that the 1<sup>st</sup> petitioner had amassed unexplained wealth which is not commensurate to his known legitimate source of income.

105. EACC had also indicated that for it to complete its investigations, it was necessary to search the 1<sup>st</sup> petitioner's business, offices and residential premises. It had also disclosed that it had reasonable and probable cause to believe that vital information and documents relating to alleged fraudulent acquisition of public funds were in the 1<sup>st</sup> petitioner's premises. It is its case that the threshold for issuance of the orders sought was met to the satisfaction of the Magistrate. Further, that having established a reasonable basis to carry out a search of the 1<sup>st</sup> petitioner's office, business and residential premises, the search warrant was obtained lawfully pursuant to section 118 of the CPC and section 23 and 29 of ACECA, and no prior notice to the 1<sup>st</sup> petitioner was required.

106. It is the EACC case further that the Chief Magistrate's Court had jurisdiction to issue the orders under the provisions of section 118 of the CPC, and the petitioners cannot contend that their constitutional rights to privacy under Article 31 have been contravened, nor can it be held liable for executing lawful court orders. It contends that there is no statutory or constitutional requirement to make a prior demand or give notice for an application of this nature since such an investigation by its very nature is largely a covert operation. According to the EACC, giving notice of intended action to the suspect or his associates may lead to failure of the operation.

107. It was averred on behalf of the EACC that the warrant had authorized Shadrack Kiberia Mwenda, an investigator with the EACC, or any other duly appointed investigator, to have access and/or gain entry into the residential premises, offices and business premises of the 1<sup>st</sup> petitioner situated along Tchui Road, Muthaiga and wherever they may be situated within the Republic of Kenya. The warrants also authorized the use of reasonable force if necessary, and to search the said premises believed to contain useful information and documents that may assist the Commission to carry out full investigations into the commission of corruption and economic crimes and other related offences suspected to have been committed by the 1<sup>st</sup> petitioner. It was also authorized to carry away original and copies of documents, property or other things necessary and relevant for the conduct of the investigations.

108. According to the EACC, it had carried out the searches on 20<sup>th</sup> September 2018 at the 1<sup>st</sup> petitioner's Muthaiga residential premises, offices located at Eldama Park along Peponi Road/Eldama Ravine, and Milimani residential house, Kisumu. Contrary to the allegations by the petitioners, the search had been conducted at 6.00 a.m. and not at 4.00 a.m. The EACC denied that it held any person hostage or falsely imprisoned or violated the rights of any of the petitioners during the execution of the search.

109. It contends that during the search, the 1<sup>st</sup> petitioner and one Moses Papa Elung'ata recorded a statement on the search at the premises and confirmed that the search was well conducted. It had observed the rights of the petitioners as required by the Constitution and the law during the execution of the search warrant, and the documents retrieved from the premises were retrieved pursuant to the search warrant and were lawfully retained.

110. EACC asserts that under ACECA, it has the mandate to investigate any person alleged to have committed corruption and/or economic crimes. Under section 55 of ACECA, it may commence proceedings if, after an investigation, it is satisfied that the person has unexplained assets. It is further its case that under ACECA, for purposes of proceedings for forfeiture of unexplained assets, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds are held in trust for the person whose assets are in question or otherwise on his behalf. It contends that it should be allowed to continue with its investigations and to take the necessary steps as mandated under the Constitution and other laws.

111. EACC denied that the search warrants obtained were obtained to further the prosecution in Anti-Corruption Criminal Case Number 32 of 2018- Republic vs Dr. Evans Kidero & 10 others, noting that the criminal prosecution in that case was just one of the cases that were being investigated against the 1<sup>st</sup> petitioner.

112. EACC argues that the 1<sup>st</sup> petitioner has raised in this petition issues similar to the issues that have previously been determined by a court of competent jurisdiction in a bid to stop it from exercising its legal mandate provided under the Constitution and relevant laws. The petitioners were raising in this petition the same issues that were exhaustively determined by the 3 judge bench in Petition No. 109 of 2016. It is its case therefore that this petition is frivolous, vexatious, incompetent and improperly before court and an abuse of the court process.

113. EACC exhibits to its affidavit in reply titles and searches of some 75 properties which it states that its preliminary investigations show are owned or allegedly owned by the 1<sup>st</sup> petitioner either in his own name, his children, his spouse and/or persons and companies associated with him. It also gives desktop valuations of the properties pending actual valuation. It also sets out a list of 11 motor vehicles which it states are registered in the name of the 1<sup>st</sup> petitioner or his companies.

114. EACC denies that the petitioners' right to a fair hearing under Article 50 has been violated. In its view, the purpose of criminal law is for the good of the public and the rights of an individual cannot supersede the public good. It noted that the petitioners had not produced any evidence to demonstrate that it had acted otherwise than in accordance with its constitutional and statutory mandate.

115. In the further affidavit sworn on 21<sup>st</sup> November 2018, the EACC through Ms. Umar responds to the supporting affidavits of Dr. Susan Akello Mboya, Paul Aol and Dr. Evans Odhiambo Kidero which had been annexed to the 1<sup>st</sup> petitioner's affidavit sworn on 25<sup>th</sup> September 2018. The EACC states that the properties and/or documents seized were found in the 1<sup>st</sup> petitioner's possession and custody, were lawfully

retrieved from the 1<sup>st</sup> petitioner's premises pursuant to the search warrant, and were seized as they are relevant to the ongoing investigations.

116. EACC addresses itself to the specific prayers sought in the petition. It argues that orders for general damages quantified at Kshs 10,000,000 for each petitioner are untenable as the EACC was executing a lawful court order and cannot therefore be condemned to pay damages. It avers that the 1<sup>st</sup> petitioner will be afforded an opportunity to defend himself at the appropriate time and the court should not therefore be used to defeat efforts to investigate well founded allegations of corruption and economic crimes. Further, it is its case that the process of establishing the characterization of any property, whether lawfully or unlawfully acquired, is through adduction of evidence and trial before a court of law and not through a petition. Accordingly, granting the orders sought in this petition will lead to a miscarriage of justice and will be prejudicial to the public interest.

117. Finally, in her affidavit sworn on 11<sup>th</sup> February 2019, Ms. Umar responds to the Amended Petition and the 1<sup>st</sup> petitioner's Further Further Affidavit sworn in support. She avers that EACC has the mandate under ACECA to investigate any person alleged to have committed corruption and/or economic crimes. Contrary to averments by the 1<sup>st</sup> petitioner, the EACC had, in a letter dated 16<sup>th</sup> December 2010, issued the 1<sup>st</sup> petitioner with a notice to furnish a statement of property pursuant to section 26 of ACECA. The 1<sup>st</sup> petitioner had not, however, despite receipt of the notice and letters dated 28<sup>th</sup> December 2010 and 20<sup>th</sup> January 2011, complied with the requirements set out in the said notice.

118. EACC notes that in the letter dated 28<sup>th</sup> December 2010, it had informed the 1<sup>st</sup> petitioner that it has mandate to investigate the conduct of any person who, in its opinion, is suspected of corruption or economic crime. It had also informed the 1<sup>st</sup> petitioner in the notice that the list of properties provided was not exhaustive but a sample of what the 1<sup>st</sup> petitioner was known or suspected to own. EACC had received, in the course of its investigations, more allegations and information relating to unexplained wealth owned by the 1<sup>st</sup> petitioner, thus necessitating a wide scope of investigations.

119. With regard to the legal opinion by the AG with respect to the status of MSC, EACC'S position was that this issue cannot be decided in these proceedings as they are issues to be determined by the trial court. Ms. Umar cited in this regard the decision in **Republic v Director of Public Prosecution & another ex parte Chamanlal Vrajlal Kamani & 2 others [2015] eKLR**.

120. EACC asserts that in the performance of its functions, it shall not be under the direction or control of any person or authority, its independence being provided for under Article 249(2) of the Constitution and section 28 of the EACC Act.

121. With regard to the averments by the 1<sup>st</sup> petitioner in his Further Further Affidavit regarding the warrant issued in Misc Crim Case No 443 of 2016, EACC v Evans Odhiambo Kidero & Susan Akello Mboya, it is EACC's position that the issues were exhaustively dealt with in **Okiya Omtatah Okiiti & Another v The Honourable Attorney General & 3 others (supra)**. EACC asks this court not to re-litigate the issues that have already been dealt with and determined, and which are the subject of appeal in **Civil Appeal No. 413 of 2018**.

122. EACC reiterates that it acted lawfully in exercising its constitutional and statutory mandate to investigate corruption and economic crimes, and under the provisions of ACECA, it has the mandate to investigate any person alleged to have committed such crimes. It has also complied with the orders of the court of 6<sup>th</sup> November 2018 by releasing documents and items found to be unrelated to the investigations.

123. Regarding the complaint by the petitioners on the placement of caveats on the subject properties, EACC's position is that it acted within the law in making the request for placement of the caveats to the Land Registrar. It contends that section 11(4) of the EACC gives it all powers necessary or expedient for the efficient and effective execution of its functions under the law.

124. It is also its case that the declaratory orders sought in the Amended Petition can only be made through adduction of evidence in a trial and not in the present petition. The petitioners would be given an opportunity to defend themselves and this court should not be used to defeat efforts to investigate well founded allegations of corruption and economic crimes.

125. The EACC addressed the challenge to the manner of execution of the search warrants issued on 19<sup>th</sup> September 2018 in the affidavit of Pius Nyange Maithya sworn on 5<sup>th</sup> November 2018. Maithya states that he is a registered valuer and investigator with the EACC. He was also a member of the team that was investigating the matters raised in this petition. He states that EACC was, pursuant to its mandate, conducting investigations with respect to the subject matter of the petition. Part of the investigation involved inspection for purpose of valuations.

126. EACC alleges that the 1<sup>st</sup> petitioner is guilty of non-disclosure as he had failed to disclose to the court that EACC had been in touch with him by way of a letter dated 9<sup>th</sup> October 2018 to facilitate release of documents that had been seized pursuant to the order issued in Misc. Appln. No. 3459 of 2018. EACC was intending to release some of the items which in its view may not have been relevant to the investigations or which had already been dealt with by the investigators.

127. According to the EACC, it had inspected the 1<sup>st</sup> petitioner's properties for purposes of valuation. In the course of the inspection, its officers were required to identify themselves to the occupier of premises and the reason for needing access to the premises before entry. On 29<sup>th</sup> October 2018, Maithya and a team comprising two police officers and 3 officers went to property L. R. No. Nairobi/Block 91/156 – Gigiri to inspect the said property for purpose of valuation. After introducing themselves, the officers were allowed into the premises by the security officers manning the gate. They were also allowed to inspect the premises by a man who was in the premises.

128. As they were conducting external inspection of the premises, three men came over and upon explaining their mission, the men informed the EACC officers that the premises were occupied by a diplomat and EACC needed to get consent from their office. After consultation, the EACC officers agreed to halt the exercise pending further consultation on when they could visit the premises. EACC denies that there were

any angry incidents or that its officers forcefully gained entry to the premises, nor were they removed from the premises as alleged by the 1<sup>st</sup> petitioner.

129. EACC further avers that its officers then proceeded to the 1<sup>st</sup> petitioner's premises on L. R. No. 21/1/36 Rosslyn Gardens. They were allowed into the premises to conduct inspection for purposes of valuation by the occupant of House No. 6. They were not able to inspect house numbers 4 and 7 as the occupants were absent and they only enter premises with the consent of the occupant. EACC states that on 30<sup>th</sup> October 2018, its officers went to L. R. No. 205/45 and 205/46 identified as Gem Suites situated on Riverside Lane and requested to speak to the Manager. They were requested to wait for the Manager but the 1<sup>st</sup> petitioner arrived and they explained to him their mission. The 1<sup>st</sup> petitioner informed them that he would not allow them to proceed with inspection for purpose of valuation. They then called their officer in-charge, a Mr. Mweu, and informed him that the 1<sup>st</sup> petitioner had refused to allow them to inspect the property for purpose of valuation.

130. As they were consulting, the 1<sup>st</sup> petitioner called them and informed them that he had decided to allow them to proceed with inspection. He however requested that they do not move around the premises with the uniformed security officers, which EACC agreed to. The 1<sup>st</sup> petitioner gave them an officer named Robert who took them round the premises. It is the EACC case that it sent back the extra security officers after the 1<sup>st</sup> petitioner allowed its officers to carry out the inspection and valuation, and the inspection was carried out smoothly without any angry confrontation.

131. It is its averment further that it had agreed to inspect one vacant apartment as a representation of the rest since they were reliably informed that the construction of all the apartments on the property was the same. It had carried out the inspection with decorum and there was no interruption of business as alleged by the petitioners. Maithya states that when the EACC officers identified themselves, they also freely gave out their identity cards to the 1<sup>st</sup> petitioner, who gave the cards to his employees to photocopy.

132. EACC then proceeded to L. R. No. 209/5917 identified as Gem Apartments where they were requested to wait for the 1<sup>st</sup> petitioner's officers to take them around. The same Robert who had taken them round at Gem Suites, along with another officer who identified himself as Charles Kikivi took the EACC officers round the premises for inspection for purpose of valuation. They agreed to inspect one apartment which was vacant as a representation of the rest. EACC reiterates that the inspection was conducted smoothly and with decorum, and it had not in any way interfered with the smooth operations of the 1<sup>st</sup> petitioner's businesses.

133. EACC asserts that inspection for purpose of valuation is not a search as alleged by the petitioners. Rather, it is part of investigations carried out by the EACC pursuant to its constitutional and legal mandate. It avers that under section 59 (1) of ACECA, in a prosecution for corruption or economic crime or a proceeding under the Act, a certificate of a valuation officer as to the value of a benefit or property is admissible and is proof of that value, unless the contrary is proved. It denies that the values placed on the properties are malicious as alleged. It further asserts that the petitioner will be afforded an opportunity to defend himself at the appropriate time, and the court should not be used to defeat efforts to investigate well founded allegations of corruption and economic crimes.

## The Submissions

134. The parties filed written submissions which were highlighted by their respective Counsel. The focus of the petitioners' submissions was on two areas. The first related to the issuance of the warrant on 19<sup>th</sup> September 2018 in Misc. Criminal Case No 3459 of 2018, which they observed did not relate to the period prior to the 1<sup>st</sup> petitioner's employment by MSC and after 2017, and was made under section 118 CPC and section 23 of ACECA. The search warrant did not touch on the 2<sup>nd</sup>-10<sup>th</sup> petitioners. They submitted further that the search warrant was specific to Isaac Kaberia Mwenda, required specific action and was to remain valid until 1<sup>st</sup> November 2018 when the court stopped the search and inspections. Their submission was that the EACC had continued with the search until a further order was issued on 20<sup>th</sup> November 2018. The petitioners submitted that despite this order, EACC continues to hold onto the documents belonging to the 2<sup>nd</sup>-10<sup>th</sup> petitioners in spite of the orders of the court that the documents be released.

135. The petitioners submitted that there was no basis for the EACC to take away the death certificates of Abigail and Philip Kidero, except to cause pain and agony. Further, that there was no basis for the EACC investigators to carry away documents relating to properties purchased by the 1<sup>st</sup> petitioner prior to 2002 when the warrant was specific to the period 2003-2017. Such action on the part of the EACC demonstrated, in the petitioners' view, bad faith in that it expanded the orders issued to it.

136. According to the petitioners, the application for the search warrant had been lodged under section 23, 26 and 29 of ACECA and section 118 of the CPC. They noted that reference is made in the affidavit in support of the application to suspicion, but it does not indicate that a request was made to the 1<sup>st</sup> petitioner to submit any documents or details of any property that was the subject of inquiry and he had refused to comply. According to the petitioners, under section 26 of ACECA, it is only when there is non-compliance that a person commits an offence. Further, as the court had granted powers of search against the 1<sup>st</sup> petitioner, the search could not extend to other parties. The petitioners submitted that section 29 of ACECA deals with searches conditional to non-compliance pursuant to a request under Part IV of ACECA, which cushions parties from searches and allows searches only when there is failure to comply.

137. According to the petitioners, the Court of Appeal had given guidelines on how investigations should be conducted. They referred the court to the decision in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR** (hereafter the **Tom Ojienda** case) in which the court had dealt with the provisions of section 118 of CPC and section 26 and 29 of ACECA. The petitioners' submission was that as held by the Court of Appeal, the right to apply for a warrant under section 29 of ACECA does not arise without conforming to section 26 of ACECA and Part IV thereof. Issuance of warrants without such conformity, in their view, is unconstitutional and a violation of Article 31 and cannot lead to a legal search. Once the EACC expanded the scope of the search, it fell into illegality, and since the EACC was seeking warrants to commence proceedings, such illegality cannot form the basis of prosecution. The petitioners urged the court to find that the search having been undertaken illegally, the entire process was illegal.

138. A further attack launched against the search warrants was the time at which it took place. According to the petitioners, Kenya being a democratic state, such processes are undertaken between 6.00 a.m -6.00 p.m. It was the petitioners' submission that the search in this case took place at 4.00 a.m. by a contingent of 46 officers, including Kaberia Mwenda, the only officer authorized in the warrant to carry out the search. Their submission was that court orders ought to be executed by the officer to whom they are issued and not by third parties. In their view, it is only when there is refusal to comply with such orders that an officer would seek assistance to enforce the court order.

139. The petitioners allege further that in the execution of the warrant, there was false imprisonment and that the warrant was executed at places other than the premises identified in the warrant, which was Tchui Road, Muthaiga, raids having been carried out concurrently at Kisumu and including properties belonging to the other petitioners. The petitioners relied on the decision in **Minister of Safety and Security v Van der Merwe & others**[1] [2011] (5) 61 (CC) with respect to what conditions should be met in order for a warrant to be considered valid.

140. They identified these as being that the warrants be issued under the law, it must identify the search, the authority conferred by the warrant and the person or container to be searched, the article to be searched and the offence and offender. The warrant should also not be vague and overbroad, and once the search is undertaken, the warrants must be returned to court with an inventory. The petitioners' submission is that none of the parties was invited to sign the inventory, and some of the properties taken belong to deceased persons. The petitioners argue that the EACC was violating the law by proceeding beyond what the court had mandated.

141. The petitioners asked the court to address the conflicting position in law on sections 118 CPC and Part IV of ACECA. They also asked the court to uphold the primacy of ACECA as pronounced by the Court of Appeal in the **Tom Ojienda** case. They also relied on the decision in **Samura Engineering Limited & 10 others v Kenya Revenue Authority** [2012] eKLR in which it was held that searches must be conducted in accordance with provision that respect the right to privacy under Article 31. The petitioners urged the court to find that there was a violation in this case of Article 31 and no legality can emerge from an illegality. They further urged the court, in the event that it finds the search warrants were issued in violation of the law, to find that the petitioners are entitled to damages.

142. The second limb of the petitioners' case is that the 1<sup>st</sup> petitioner was not a public officer within the meaning of section 2 of ACECA and that MSC was not a public body as defined by section 2 of AECA. MSC is also not a state corporation as defined under section 2(b)(v) of the State Corporations Act read together with section 3 of the Interpretation and General Provisions Act and Article 260 of the Constitution. The petitioners observed that two periods are defined in the warrant issued to the EACC. These were, first, the period that the 1<sup>st</sup> petitioner served as Managing Director of MSC between 2003 and 2012. They note that out of the search conducted by the EACC, 28 assets in the list were acquired in the period 2002-2013.

143. With regard to the status of MSC, the petitioners submit that it is a public limited liability company in which the government has minority shares. They argue that the government only has 22% of the shares, and such an entity would not qualify as a state corporation and public body. Further, that officers serving in such body would not qualify as state officers and the EACC therefore has no jurisdiction to investigate the acts of such officers. The petitioners refer the court to the letters of the AG in responses to the 1<sup>st</sup> petitioner's and the EACC's inquiries on the status of MSC in which the AG stated that the government holds 20% shares while 80% is held by private individuals. Should the court find that the government does not have a controlling share in MSC, then EACC lacked the jurisdiction to undertake any investigations or search of properties acquired between 2003 and 2012. Accordingly, any processes undertaken for the period 2003-2012 are null and void.

144. The petitioners emphasise that MSC was incorporated as a private company; its financial statements speak to its status when it availed its shares to private entities, and the government does not have controlling shares. The petitioners submit that it is the classification of MSC and its incorporation that must define the jurisdiction of the EACC and any action that it can undertake against its employees. The petitioners submit that private companies fall outside the jurisdictional mandate of the EAC in so far as anti- corruption and economic crimes are concerned.

145. The petitioners cited the decision in **Jacob Juma v Evans Kidero, The Governor, Nairobi County Government** [2016] eKLR to submit that the court, in striking out the petition, had made a determination on how proceedings against private companies should proceed. The petitioners are controlled by boards, and they noted that no investigations had been commenced by EACC against any board member of MSC which demonstrates bad faith against the petitioner. They further submitted that the board of MSC had not received any complaints or summoned the 1<sup>st</sup> petitioner to consider any complaints, nor had it stated that any funds of the company were lost through the actions of the 1<sup>st</sup> petitioner.

146. In addressing themselves to the question of the entry into the petitioners' premises for purposes of valuation, the petitioners submitted, first, that the 1<sup>st</sup> petitioner was an elaborate keeper of records, from his letters of employment, promotions, increases in salary and allowances. He had also given an account of his savings, including his savings abroad and returns on his investments, his engagement with the tax authorities and his tax compliance certificates.

147. They asked the court to note that in a letter dated 16<sup>th</sup> December 2010, the predecessor of EACC, the KACC, had written to the 1<sup>st</sup> petitioner regarding his income and acquisition of assets and demanded that he give an account of the assets and how he acquired them. He had also received inquiries regarding dumping of sugar in the local market, and tax evasion. This line of questioning had, however, died out, and a different line of questioning taken up. According to the petitioners, the entire process of investigation of the 1<sup>st</sup> petitioner has been malicious, oppressive and irrational, given that an investigation on one line mutates to an entirely different inquiry on the same property. In their view, the conduct of the EACC in investigating the 1<sup>st</sup> petitioner is a demonstration of unreasonableness and irrationality.

148. In further illustration of the irrationality and unreasonableness on the part of the EACC, the petitioners point out that the investigators had seized from the 1<sup>st</sup> petitioner expired passports of his late wife and son, as well as an expired US passport of the 2<sup>nd</sup> petitioner. They submit that the EACC did not give an explanation why these document were seized unless there was arbitrariness and irrationality.

149. The petitioners further contend that there were a lot of properties that the 1<sup>st</sup> petitioner had acquired before 2003, one of which originated from the father of the 2<sup>nd</sup> petitioner, and there was no basis, given the nature of the search warrants, for taking documents in relation to them. It was also their submission that the warrants did not include authority for the EACC agents to enter upon the premises for purposes of valuation, and the EACC cannot run roughshod and enter into private properties without an order of the court. Reliance for this submission was placed on the decision in **In the Matter of Marlene Jacobowitz v Board of Assessors for Town of Cornwall (6099/06, 6536/07)**.

150. The petitioners' case was that there cannot be access to their premises without a warrant. They ask the court to find that the entry for valuation was irrational and arbitrary. They also submitted that the person carrying out the valuation, Pius Nyange Maithya, does not appear in the 2018 list of valuers, which was yet another illustration of malice on the part of the EACC as the valuation of the property was carried out by a person who was not registered as a valuer.

151. The petitioners further challenged the placement of restrictions against their properties. They observe that the letters written to the Ministry of Lands in respect of the restrictions were not copied to the petitioners, and neither did the Lands Office notify them when the restrictions were placed on the properties. This, in their view, was contrary to the provisions of section 76 of the Land Registration Act. They submit that while the Registrar has power to place restrictions on his own motion or on application, he must direct that inquiries be made, and that notice of a restriction is given in writing to the proprietor of the properties affected by a restriction, which was not done in this case.

152. For the 2<sup>nd</sup> petitioner, it was submitted that judicial authority is vested in the courts. Once a court grants an order, it is not open to a party to embellish or extend the order to cover issues that the order does not cover. To allow a party to do so would be to allow such party to exercise the authority vested in the court.

153. While reiterating the facts set out in her affidavit in support of the petition, the 2<sup>nd</sup> petitioner asserts that she is a luminary and a philanthropist with an income in excess of US\$ 500,000 per year. She was never a state officer and has never been called upon to answer any queries in respect of her assets. She had married the 1<sup>st</sup> petitioner in 2011 and was not married to him for the period that he was being investigated, being 2003-2011. She contends that the fact of marriage is being used as the bridge to violate her rights for the first period of the investigation.

154. The 2<sup>nd</sup> petitioner submits that the 1<sup>st</sup> petitioner became a state officer between 2013-2017. She maintains that she has not participated in the running of the Nairobi City County, nor has she received any funds from the County. All she received from the 1<sup>st</sup> petitioner was funds in the domestic account for shared responsibilities. She asserts that the allegations forming the basis of the application that funds were being siphoned from the County to her account was false. Even when her account No 6661230013 at the Commercial Bank of Africa was investigated illegally by the EACC, no such funds or transfers were found.

155. It was the 2<sup>nd</sup> petitioner's submission that she was aggrieved that the EACC had executed the warrant obtained against the 1<sup>st</sup> petitioner against her also. She was further aggrieved that they had made the assumption that when one is a wife, one has no rights and a warrant obtained against a husband can be extended to search a spouse's property. In her view, to extend the warrant to her was unconstitutional, illegal and a naked act of trespass. She maintained that she was before the court to protect her right as an independent married woman, asserting that this status is recognized under Article 45 of the Constitution before, during and after marriage. She further cited section 4 of the Matrimonial Property Act as a statutory provision that also recognizes this right.

156. The 2<sup>nd</sup> petitioner echoed the submission that the EACC had violated the petitioners' right to privacy under Article 31 when the search warrant was executed. She submitted that she was woken up at 6.00 a.m. and her privacy was invaded when a search warrant against her husband was executed against her, which she submits is discrimination on the basis of gender. She contends that she was being treated as an appendage of her husband, with no rights at all. She reiterated that her will, her personal expired passports and tenancy agreements were seized, which confirms that her privacy was invaded when her property was seized without a court order.

157. The 2<sup>nd</sup> petitioner urged the court to protect married women in Kenya by finding that an order obtained against a husband cannot be executed against a married woman. However, even where an order is being executed against a married woman, a sweeping allegation about transfer of public funds cannot suffice. The 2<sup>nd</sup> petitioner also cited the case of **Minister of Safety and Security vs Van der Merwe** (supra) on the parameters the court should follow with regard to a search warrant, submitting that to do otherwise would lead to the rights of married women to, among other rights, privacy and dignity, being rendered otiose.

158. The 2<sup>nd</sup> petitioner asserts that from the inventory of property filed, the trespass against her had been proved. Her prayer for damages in the Amended Petition could therefore not be resisted, and she urged the court to grant her prayer for damages and costs.

#### **Submissions by the EACC**

159. EACC submits that it had commenced investigations following allegations that the 1<sup>st</sup> petitioner had unexplained assets which may have been acquired during his tenure at MSC and as Governor, Nairobi County. With regard to the contention by the petitioners that the EACC did not have the jurisdiction to investigate properties acquired by the 1<sup>st</sup> petitioner while he was working at MSC as it is alleged that it is a private company and the 1<sup>st</sup> petitioner was not a public officer then, EACC submits that its investigations, being investigations touching on unexplained assets, can be undertaken against any persons, and not necessarily against a public officer. Its submission was that this position is evident from the definition of unexplained assets in section 3 of ACECA.

160. EACC submitted further that section 55 (2)(a) and (b) of ACECA allows EACC to commence investigations against a person. It noted that while the initial statute, under that section, had the words 'a public officer', the provision had been deleted by Legal Notice No. 47 of

2007. Accordingly, EACC can carry out investigations against any person, not just a public officer.

161. With regard to the opinion of the AG relied on by the petitioners on whether MSC is a private or public company, the EACC submitted that such opinion is inconclusive, noting that the opinion given in the hand of the AG does not give a definite answer. In any event, according to the EACC, all it was engaged in at the moment was an investigation. It had not reached the conclusion that the petitioners have unexplained assets.

162. EACC further observed that some of the issues raised in this petition had been raised and determined in Petition No. 109 of 2016 in which the 1<sup>st</sup> petitioner was a party. The consolidated petition had addressed the issues raised in this petition with regard to warrants to search an account and whether notice should issue. EACC submitted that the warrants were issued pursuant to an application to a competent court which, upon hearing the application, issued the warrant. The warrant was executed on 20<sup>th</sup> September 2018 and the 1<sup>st</sup> petitioner was present and recorded a statement that the execution was done in a proper manner and there was no complaint. A statement had also been recorded by one of the petitioner's witnesses in Kisumu indicating that everything went smoothly and the officers had arrived at the premises at 6.45 a.m. Its submission was therefore that there was no issue of harassment or violation of rights, an allegation that the petitioners made for the first time in this petition.

163. Regarding the challenge to the valuation of the properties, EACC referred to the affidavit of Mulki Umar of 11<sup>th</sup> February 2019 to which was annexed a document which confirmed that Pius Nyange Maithya is a registered valuer. Its submission was that the absence of Maithya's name in the Gazette Notice relied on by the petitioner is not conclusive proof that he is not a registered valuer. EACC further observed that Mr. Maithya had deposed on oath that he is a registered valuer.

164. It was EACC's submission that the documents in contention were recovered in the presence of the 1<sup>st</sup> petitioner, either from his house or his office. Further, that some of the offices from which the documents were recovered are of companies associated with the 1<sup>st</sup> petitioner, which goes to the relevance of its investigations.

165. With regard to the 2<sup>nd</sup> petitioner, the position of EACC was that she was not being investigated as the wife of the 1<sup>st</sup> petitioner, nor was she being targeted because she was a woman. Its case was that its investigations indicated that she was a co-shareholder and a director in companies with the 1<sup>st</sup> petitioner.

166. EACC submitted that it had filed a return with the court showing the assets recovered. It was its submission that documents which formed part of the inventory but were found not to be relevant to its investigations were returned either to the 1<sup>st</sup> or the 2<sup>nd</sup> petitioner, and an inventory of the returned items filed in court. Its inventory also included a list of documents dealt with by the EACC.

167. Regarding the complaint by the petitioners that passports had been seized, in an attempt in the view of the EACC, on the part of the petitioners to emphasize the issue of relevance or lack thereof in the investigations, its case was that what is relevant is within its ambit. It illustrated this submission by pointing out that a passport is relevant to show the movement of a person as persons can transact business legally or illegally outside the county. It observed, however, that its position was not that this is what the petitioners had done, only that the issue was under investigation.

168. Regarding the allegation by the petitioners that their rights had been violated, EACC's response was that what it did is in tandem with Article 24 of the Constitution. In the view of the EACC, a consideration of the totality of the allegations in this case would show that the petitioners have instituted various cases to stop any investigations against them or their companies since 2010.

169. To the petitioners' contention that restrictions had been placed on the properties unlawfully, EACC noted that as had been deposed in the affidavit of Mulki Abdi Umar, there was an intention on the part of the petitioners to transfer some of the properties. This could have been in a normal transfer, or in an attempt to defeat the investigation. EACC submitted that while the petitioners had made reference to section 78 of the Land Registration Act on the power of the Registrar to remove the restrictions, they had not used the procedure provided in the Act for the removal of restrictions. It noted further that there were no prayers sought in the petition for the removal of the restrictions, and while the prayers are sought against the Registrar, he is not a party to the petition, nor are prayers sought against the AG as the advisor of the government.

170. As for the petitioners' prayers for damages, EACC's position was that no damages should issue as there was no violation of rights. It submitted that it was engaged in an investigation and it is exercising a public duty in investigating economic crimes and no order for damages should be made against it.

171. On the petitioners' reliance on the **Tom Ojienda** decision in the Court of Appeal, EACC submitted that the Supreme Court has addressed that decision in its ruling, holding that it should not be relied on. It urged the court not to rely on it but to dismiss the petition.

#### **Analysis and Determination.**

172. I have considered the respective pleadings and submissions of the parties as well as the authorities relied on. What triggered this petition is a search conducted pursuant to a search warrant issued by the Chief Magistrate's Court in Milimani in Misc. Application No. 3459 of 2018. The warrant was issued on 19<sup>th</sup> September 2018 and executed on 20<sup>th</sup> September 2018. Thereafter, the EACC entered into and carried out what it refers to as desktop valuations of properties belonging to the petitioners.

173. What is before this court, however, is a somewhat perplexing prolixity of pleadings, averments and submissions. So prolix are the materials placed before the court that there is a danger of obscuring the real issue or issues before the court. I will begin this analysis therefore by unravelling the threads presented for argument by the parties.



174. There are two petitions by the 2<sup>nd</sup> petitioner filed in 2016 resulting from an execution of warrants issued by the Chief Magistrate's Court in Makadara in 2016, as well as the petition arising from the 2018 search warrant. The petitioners in all the petitions raise a range of arguments directed at the respondents generally. However, it is evident from the pleadings and submissions that the petitioners' grievances are against the EACC. In the petitions by the 2<sup>nd</sup> petitioner filed in 2016 which were consolidated with the main petition on 15<sup>th</sup> October 2018, allegations are made that the EACC has no jurisdiction to carry out investigations other than in respect of the code of conduct for public officers, and that various provisions of the EACC Act and ACECA are unconstitutional.

175. Additionally, an argument is advanced in all the petitions that the EACC violated the 2<sup>nd</sup> petitioner's rights under Article 27 and 45 of the Constitution and that she was targeted on the basis of her gender. It is also contended that the execution of the search warrants violated the 2<sup>nd</sup> petitioner's right to privacy, dignity, fair administrative action and fair hearing.

176. With regard to the 1<sup>st</sup> and the 3<sup>rd</sup> to 10<sup>th</sup> petitioners, it is alleged that the searches have violated their rights under Articles 28, 31, 47 and 50, which guarantee the right to dignity, privacy, fair administrative action and fair hearing respectively. These violations result from what the petitioners allege is the illegality of the warrant which they argue was issued contrary to the provisions of sections 23, 26 and 29 of ACECA. An argument is also made that the EACC has no jurisdiction to investigate the 1<sup>st</sup> petitioner with respect to the period he served as the Managing Director of MSC. The basis of this argument is that MSC is not a public entity or state corporation as defined in the State Corporations Act or the EACC Act.

177. The petitioners also challenge the placement of caveats and restrictions on their properties. They filed an application dated 4<sup>th</sup> September 2019 and directions were given that the arguments in respect of the restrictions will be considered alongside the issues raised in the main petition.

178. I turn first to consider the issues raised by the 2<sup>nd</sup> petitioner in her consolidated petitions.

#### **Petition Nos. 79 and 137 of 2016**

179. These petitions were filed, together with Petition No. 78 of 2016, following searches conducted by the EACC pursuant to warrants issued by the Chief Magistrate's Court in Miscellaneous Application Nos.113, 114, 115 and 116 of 2016, EACC vs Evans Odhiambo Kidero & 2 Others. As noted earlier in this judgment, Petition No. 78 of 2016, which had been transferred to this Division as ACEC No. 8 of 2017, was consolidated with **Petition No. 109 of 2016- Okiya Omtatah Okoiti & 2 others v Attorney General**. The consolidated petitions were heard and dismissed in the decision of the court dated 8<sup>th</sup> June 2018.

180. In determining the petitions, the court identified the following as the issues arising for determination:

- a. Whether or not the impugned provisions are unconstitutional to the extent that they mandate the EACC to investigate corruption cases;
- b. Whether or not EACC was enjoined to give notice to the 3<sup>rd</sup> Petitioner prior to applying for the search warrants;
- c. Whether EACC violated the 3<sup>rd</sup> petitioner's rights under Articles 31, 40, 47, 48 and 50 (1) of the Constitution.

181. The statutory provisions impugned in the consolidated petitions were sections 23 to 36 and sections 56B, 56C, 72 and 73 of ACECA, as well as section 11(d) and (k) of the EACC Act. Specifically, the 1<sup>st</sup> petitioner in this matter, who was the 3<sup>rd</sup> petitioner in the consolidated petitions, sought a declaration that section 23 of ACECA was unconstitutional as it contravenes the provisions of Articles 79, 244 and 245 of the Constitution. He also sought a declaration that the EACC's mandate is limited to enforcing the provisions of Chapter Six of the Constitution and does not extend to investigating offences other than those specified under Chapter Six.

182. The 1<sup>st</sup> petitioner had also sought a declaration that the EACC acted outside its constitutional mandate in purporting to undertake investigations on him and in applying for the warrants issued in Misc Crim. Application Nos. 113, 114, 115 and 116 of 2016- Ethics and Anti-Corruption Commission vs Evans Odhiambo Kidero & 2 Others. The 3<sup>rd</sup> petitioner also sought an order that the warrants issued in the matter dated 24<sup>th</sup> February and given to Dennis Joseck Mare breached his rights and fundamental freedoms under Articles 31, 40, 47(1) and (2), 48 and 50(1) of the Constitution and were void for all intents and purposes. He also sought an order to quash the warrant, as well as exemplary damages against the respondents.

183. A perusal of the 2<sup>nd</sup> petitioner's consolidated Petitions No.79 and 137 of 2016 shows that the 2<sup>nd</sup> petitioner raises essentially the same issues and makes the same arguments as were raised by the 1<sup>st</sup> petitioner in Petition No 78 of 2016 which was consolidated with Petition No 109 of 2016, heard and determined by a three judge bench in the judgment dated 8<sup>th</sup> June 2018. She challenges in the petitions the same warrants that were issued by the Chief Magistrate's Court in Makadara. She also alleged violation of her rights under Articles 27, 31, 47 and 50 of the Constitution. She further alleges that the EACC did not have power to conduct criminal investigations in relation to illegal acts of corruption or economic crimes.

184. The 2<sup>nd</sup> petitioner also raises the same issues that she raises in Petition No. 25 of 2018. She alleges violation of her rights under Articles 27 and 45 of the Constitution, contending that she has been discriminated against on the basis of her gender and marital status. It is her contention that by investigating her account because she is married to the 1<sup>st</sup> petitioner, the EACC violated her rights under Article 27(4).

185. She further contends that the EACC had purported to investigate her accounts on the basis that it had found that the 1<sup>st</sup> petitioner's

accounts had millions of shillings. Her case is that she is not a signatory to the accounts nor has she a say in their operations. She is a financially independent woman and to link her with her husband's criminal activities is the highest form of discrimination.

186. The 2<sup>nd</sup> petitioner cites the provisions of various international covenants, *inter alia* the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which she submits prohibit discrimination on the basis of gender and sex.

187. The 2<sup>nd</sup> petitioner submits at length on the legal mandate of the EACC, contending that the jurisdiction of EACC is limited to state officers and if it extends its jurisdiction to non-state actors, it acts illegally.

188. With respect to the warrants issued on 24<sup>th</sup> February 2016, the 2<sup>nd</sup> petitioner argues that they were obtained in complete violation of her rights to privacy. She further accuses EACC of material non-disclosure in that it did not disclose to the court that issued the warrants that it had sought and been denied warrants from the Milimani Chief Magistrate's Court in Misc. Criminal Application No. 443 of 2016, EACC vs Evans Odhiambo Kidero & Another, on 22<sup>nd</sup> February 2016.

189. The 2<sup>nd</sup> petitioner further alleges that the EACC obtained the warrants against her without issuing notice to her. No factual basis or reasonable ground was advanced to the court in the application dated 24<sup>th</sup> February 2016 yet the court went ahead to grant warrants to search her account number 6661230013 held at Commercial Bank of Africa. She asserts that no grounds were presented to the court except that the 2<sup>nd</sup> petitioner is an associate of the 1<sup>st</sup> petitioner. She further argues that she was treated as a suspect and not as an associate of the 1<sup>st</sup> petitioner, and thus the EACC totally ignored the provisions of section 27 of ACECA. She also alleges that the EACC acted in contravention of section 28 of ACECA, reliance being placed on the decision in **Petition No. 122 of 2016 Tom Ojienda T/A Tom Ojienda & Associates Advocates vs EACC & 5 Others**.

190. Violation of the right to fair administrative action under Article 47 is also cited on the basis that the 2<sup>nd</sup> petitioner was not given notice under section 28 of ACECA. In addition, the 2<sup>nd</sup> petitioner alleges violation of Article 50, arguing that she should have been present when the warrants to search her account were issued. She submits that section 28 of ACECA does not talk of an *ex parte* hearing.

191. A further argument advanced by the 2<sup>nd</sup> petitioner is that the EACC does not have the legal mandate to conduct criminal investigation. She advances the same argument made by the 1<sup>st</sup> petitioner in Petition No 109 of 2016: that the EACC's mandate is limited to ensuring that state officers comply with Chapter 6 of the Constitution on leadership and integrity. It is also her submission that sections 11(1) (d) of the EACC Act and section 23 of ACECA are unconstitutional to the extent that they allow EACC to conduct criminal investigations. She submits, as did the 1<sup>st</sup> petitioner (3<sup>rd</sup> petitioner in Petition No. 109 of 2016) that the role of conducting criminal investigations is exclusively vested in the National Police service. The 2<sup>nd</sup> petitioner also argues that section 26, 27 and 28 of ACECA are unconstitutional as they violate Article 50 of the Constitution which protects an accused person against self-incrimination.

192. I have read the arguments advanced by the 2<sup>nd</sup> petitioner and the decision of the court in **Petition No. 109 of 2016**. It is evident that the issues raised by the 2<sup>nd</sup> petitioner were considered and determined by the three judge bench that was addressing itself to the matter. The question is whether this court can then address itself to the same matters.

193. Section 7 of the Civil Procedure Act sets out the principle of *res judicata* by providing that:

***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

194. In its decision in **Theresa Costabir v Alka Roshanlal Harbanslal Sharma & another [2015] eKLR**, the Court of Appeal set out what was required in order for the provisions of section 7 of the Civil Procedure Act to be applicable to a matter. It stated as follows:

***“Accordingly, section 7 aforesaid raises four pre requisites to be met for a matter to be deemed res judicata. These were defined in the case of Uhuru Highway Development Limited v. Central Bank of Kenya & 2 others [1996] eKLR to mean that there has to be:***

- 1. A previous suit in which the same matter was in issue.***
- 2. The parties are the same or litigating under the same title***
- 3. A competent court heard the matter in issue and determined***
- 4. The issue has been raised once again in a fresh suit”***

195. The principle of *res judicata* applies also to constitutional petitions. However, it is applicable only in the clearest of cases, as the Court of Appeal stated in **John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**:

***“On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not***

***accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.”***

196. As I observed earlier, the 2<sup>nd</sup> petitioner filed the consolidated petitions contemporaneously with Petition No. 78 of 2016 which was lodged by the 1<sup>st</sup> petitioner before me. Her petitions arose out of the same facts and circumstances as the said Petition- the warrants issued by the Chief Magistrate’s Court in **Misc Criminal Application Nos.113, 114, 115 and 116 of 2016, EACC vs Evans Odhiambo Kidero & 2 Others**. She raised the same issues and made the same arguments against the provisions of the EACC Act and ACECA as were made by the 1<sup>st</sup> petitioner, were addressed and determined in **Petition No 109 of 2016- Okiya Omtatah Okiiti & 2 others v Attorney General & 4 others** and were dismissed as being without merit.

197. That being the position, it is my finding that the arguments and prayers sought in Consolidated Petitions Nos. 79 and 137 of 2016 are devoid of merit. All the issues raised therein were addressed, with one exception, in **Okiya Omtatah Okiiti & 2 others v Attorney General & 4 others** (supra). The sole issue that remained live in the petitions is the argument that the EACC was violating the 2<sup>nd</sup> petitioner’s rights against non-discrimination on the basis of gender, and that it was violating her rights as a married woman guaranteed under Article 45. This argument has also been made and substantially argued in the main petition before me, and I will consider it in the context of that petition.

198. Accordingly, Petition Nos. 79 and 137 of 2016 filed by the 2<sup>nd</sup> petitioner are without merit for being *res judicata* and are hereby dismissed.

199. I now turn to consider the arguments raised by the petitioners in the main petition in this matter.

#### **Petition No. 25 of 2018**

200. The petitioners have identified four areas for consideration by the court. The first relates to the legality of the search and seizure warrant and secondly, whether the entry into their premises was lawful. The third issue relates to the validity of the notices and restrictions placed on the properties, prayers in respect of which contention are not sought in the petition but in an application dated 4<sup>th</sup> September 2019.

201. The fourth area, which underlies most of the arguments by the petitioners, is the contention that the 1<sup>st</sup> petitioner is not a public officer as MSC is not and was not a public body at the time the 1<sup>st</sup> petitioner was its Managing Director. Accordingly, the EACC has no jurisdiction to investigate any property acquired at the time the 1<sup>st</sup> petitioner was its Managing Director between 2003 and 2012.

202. On the part of the 2<sup>nd</sup> petitioner, allegations of discrimination on the basis of gender and marital status have been made, as well as allegations of violation of the right to privacy and fair administrative action.

#### **Validity of the Search Warrant**

203. The search warrant at issue was issued on 19<sup>th</sup> September 2018 in Misc Criminal Appl No 3459 of 2018. It was issued pursuant to an application under section 118 of the CPC and section 23 and 29 of ACECA. In the application, EACC indicated that it was investigating allegations of misappropriation of public funds and illegal acquisition of wealth by the 1<sup>st</sup> petitioner at the Nairobi County Government and at MSC as Governor and Managing Director respectively. The allegation made in the affidavit in support of the application sworn by Shadrack Kaberia Mwenda was that the 1<sup>st</sup> petitioner had, in these two capacities, amassed a lot of wealth which is not commensurate to his known source of income. The affidavit further stated that the 1<sup>st</sup> petitioner’s unexplained wealth was fraudulently acquired through illegal payments made to him and his companies whilst he was a public official.

204. The petitioners contend in the Amended Petition that the EACC was established for the sole mandate of ensuring compliance with Chapter Six of the Constitution, and to ensure the compliance by public officers with the Constitution and the Leadership and Integrity Act. As submitted by the EACC however, this is an argument that was canvassed and determined in Petition No. 109 of 2016 in which the court, on the petitioners’ challenge to the constitutionality of ACECA and the EACC Act, held as follows:

***“98. Even if we were to find that there is no express power conferred on the EACC to conduct investigations in respect of criminal offences, Article 259 of the Constitution enjoins us to interpret the Constitution in a manner that, inter alia, promotes its purposes, values and principles and contributes to good governance. On our part we see no inconsistency between the powers donated to the EACC under the ACECA and the provisions of Article 79 as read with Article 252 of the Constitution. In other words a holistic interpretation of Articles 79 and 252 aforesaid leads us to the conclusion that the Legislature acted within its powers when it enacted the ACECA.”*** (Emphasis added)

205. In submissions, however, that are at variance with the averments in the petition, the petitioners submit that they do not contest the right of the EACC to seek search warrants in respect to investigations on the 1<sup>st</sup> petitioner, nor do they dispute the power of the court to issue the warrants. They contend that their concern is the manner in which these entities exercised their powers. They challenge the issuance of the warrant on the basis that MSC is not a public body in respect of which the EACC had investigative powers. The court that issued the warrant is faulted on the basis that it should have ascertained first whether or not MSC was a public body and the 1<sup>st</sup> petitioner a public officer when he served as its Managing Director.

206. The petitioners further fault the warrant on the basis that it was vague, open-ended and prone to abuse by the EACC. They reference the rejection of an application by the EACC on 22<sup>nd</sup> February, 2016 in **Misc. Crim. Case No 443 of 2016, EACC v Evans Kidero Odhiambo**

**& Susan Akello Mboya** on the basis that the duration and scope of the information sought had not been stated.

207. EACC responds that the warrant was issued properly under the provisions of section 118 of the CPC and section 23 and 29 of ACECA. It had established a reasonable basis for carrying out a search of the 1<sup>st</sup> petitioner's premises and the threshold for issuance of the orders was met.

208. In **Petition No. 109 of 2016** which involved a challenge to the issuance of search warrants against the 1<sup>st</sup> petitioner in this matter, the court considered similar arguments as are now presented before me by the petitioners. In its decision in the matter, the court observed as follows:

***"111. In ...Minister of Safety and Security vs Van der Merwe & others[83] Mogoeng J, delivering the unanimous judgment of the court, in paras 55 and 56 stated:-***

***"What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligible manner:-***

***(a) states the statutory provision in terms***

***(b) of which it is issued;***

***(b) identifies the searcher;***

***(c) clearly mentions the authority it confers upon the searcher;***

***(c) identifies the person, container or premises to be searched;***

***(d) describes the article to be searched for and seized, with sufficient particularity; and***

***(e) specifies the offence which triggered the criminal investigation and names the suspected offender.***

***In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:-***

***a. the person issuing the warrant must have authority and jurisdiction;***

***b. the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;***

***c. the terms of the warrant must be neither vague nor overbroad;***

***d. a warrant must be reasonably intelligible to both the searcher and the searched person;***

***e. the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and***

***f. the terms of the warrant must be construed with reasonable strictness."***

209. In rejecting the challenge to the warrant in the case before it, the court concluded 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." 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." ...***

***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. (Footnotes omitted)***

210. In my view, the only additional challenge to the warrant issued in Misc. Application No. 4359 of 2018 that was different from the

arguments made in Petition No. 109 of 2016 is that the warrant was “*vague and overbroad*”. The petitioners have not, however, explained in what manner the warrant was either vague or overbroad. The ordinary meaning of the word ‘*vague*’ is ‘unclear’ or ‘uncertain’. The Concise Oxford English Dictionary Twelfth Edition, defines ‘*vague*’ as ‘*of uncertain or indefinite character or meaning*’. ‘*Overbroad*’ is not defined, but I understand it to refer to something that is too widely applicable or excessively broad.

211. The order which authorized the search stated in part as follows:

***NOW THEREFORE I authorize SHADRACK KABERIA MWENDA, an investigator with Ethics and Anti-Corruption Commission or any other investigator duly appointed by the applicant, by this warrant to have access and/or gain entry into the residential premises, offices and business premises of EVANS ODHIAMBO KIDERO situated along Tchui Road, Muthaiga and wherever they may be situated within the Republic of Kenya and to use if necessary reasonable force for that purpose, and search the said premises believed to contain useful information and documents that may assist the Commission to carry out full investigations in the commission of corruption and economic crimes and other related offences that are suspected to have been committed by the said EVANS ODHIAMBO KIDERO and carry away the original and copies of documents, property or other things necessary and relevant for the conduct of the subject investigations.”***

212. It seems to me that the impugned warrant met the criteria set in the cases cited above. It identifies the person authorised to search-Isaac Kaberia Mwenda and any other officer authorised by the applicant- and the premises to be searched, as well as the reasons for the search. The court issuing the warrant had the legal authority to issue the warrant and the provisions of the law under which it issued the warrant are not in dispute. I am not therefore persuaded that the warrant was either vague or overbroad.

#### **Whether Notice should have been issued to the Petitioners**

213. The petitioners complain that the application for the warrant by EACC was not preceded by a notice to the 1<sup>st</sup> petitioner in terms of section 26 of ACECA. They further argue that the petitioner had not failed to comply with such notice to warrant the *ex parte* application for the search warrant. The petitioners allege violation of the right to privacy guaranteed under Article 31 of the Constitution, as well as violation of the right to fair administrative action and fair hearing by the EACC. They rely on the decision in **Samura Engineering Limited & 10 Others v Kenya Revenue Authority (supra)** in which the court stated that since searches infringe the right to privacy, they must be conducted in accordance with legislation that is in accord with Article 24. They also rely on the decision in **Standard Newspapers Limited & another v Attorney General & 4 others (2013) eKLR** in which the court decried the unjustified entry into the petitioners’ premises. The petitioners submit that in both these cases, the court made an award in damages to the aggrieved parties.

214. Also cited is the decision in **Abubakar Shariff Abubakar v Attorney General & another (2014) eKLR** which the petitioners submit is authority for the proposition that the grant of a warrant of search is not a perfunctory exercise and the court considering such a request must be satisfied that the request is bona fide, justified and reasonable.

215. The response from the EACC is that it properly applied for the warrant under section 29 of ACECA and section 118 of the CPC. That section 29 of ACECA empowers it to apply for the warrant, while section 118 of the CPC provides the procedure for so doing. It denies violation of the rights of the petitioners, noting that the right to privacy can be limited. EACC relies on the decisions in **Mape Building & General Engineering v Attorney General & 3 others [2016] eKLR**, **Nchogu, Omwanza & Nyasimi Advocates V Director of Criminal Investigations & 3 Others [2017]eKLR** and **Okiya Omtatah Okiiti & 2 others v Attorney General & 4 others [2018] eKLR** with respect to the question of notice. It further submits that the petitioners have refused to employ the proper channel to contest the issuance of the warrant by the Chief Magistrate’s Court, relying in support of this submission on the case of **James Humphrey Oswago vs EACC [2014]eKLR**.

216. The parties in this matter recognise that the right to privacy, as well as the right to property and fair administrative action, violation of which the petitioners allege, are not among the non-derogable rights set out in Article 25 of the Constitution. They can be limited in the circumstances set out in Article 24. As the petitioners submit, in relation to the right to privacy, the provisions of section 118 of the CPC, as indeed the provisions of section 23 and 29 of ACECA, do limit these rights, and they are permissible limitations under Article 24.

217. In its decision in **Okiya Omtatah Okiiti vs EACC (supra)** in which the 1<sup>st</sup> petitioner in this matter was a party, the court expressed itself as follows with regard to allegation of violation of the right to privacy:

***“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. To us, the above inbuilt requirements are present in this case.***

***116. What is clear from the position of the law is first, that Police officers or other state agents therefore cannot without a search warrant, lawfully enter upon and search any premises, nor can they carry away any property without the authority of the Court. Second that from the provisions of the Criminal Procedure Code set out above, the onus is on the person seeking the search warrant to prove the necessity for such warrant. To us, the above requirements have not been proved to be absent in the proceedings leading to the issuance of the warrant.***

218. The court went on to cite the decision in **Vitu Limited v. The Chief Magistrate Nairobi & Two Others, H.C. Misc. Criminal Application No. 475 of 2004** in which the court stated:

***“It is therefore expected that when a police officer or any other investigator approaches the Court for a warrant, there must be***

*reasonable suspicion of an offence being about to be committed or having been committed...*"

219. To the question whether the 3<sup>rd</sup> petitioner in that case, the 1<sup>st</sup> petitioner before me, should have been given notice, the court stated as follows:

*117. On whether the third petitioner ought to have been given notice prior to the issuance of the warrant, we are persuaded that the Criminal Procedure Code provides a simple yet effective mode of obtaining authority through the court. The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of the investigations. Section 118A of the Criminal Procedure Code provides that "An application for search warrant shall be made ex-parte before a Magistrate."*

*118. The order or warrant is never to be granted as a matter of course. To us, to give the notice to the person to be investigated can easily jeopardize the incriminating evidence. On this ground, we entirely agree with Onguto J. in the earlier cited decision in Mape Building & General Engineering vs A.G & 3 Others. Clearly, it is understandable why warrants or seizure orders are obtained ex parte when any matter is still at the investigation stage. The justification seems to fall within the provisions of Article 24 (1) of the Constitution, hence, we find that the allegation for breach of Article 50 fails." (Footnotes omitted)*

220. The court went on to cite the decision of Onguto J in **Mape Building & General Engineering vs Attorney General & 3 others (supra)** in which the Learned Judge stated:

*"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 2<sup>nd</sup> Respondent was, in my view, justified in making the application for both the warrants and freezing order ex parte."*

221. I agree with the sentiments of the court cited above. As I stated earlier, there has been no demonstration that the warrant issued in this case did not meet the criteria set in jurisprudence that has emerged from our courts with respect thereto. This jurisprudence is clear that notice is not required in circumstances such as are present in this case.

222. The petitioners have relied on the decision of the Court of Appeal in **Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others (2016) eKLR** in which the Court of Appeal held that a party should be given notice prior to a search under section 23-28 of ACECA. This argument had also been advanced, unsuccessfully, in Petition No. 109 of 2016. The position currently, as I understand it, flowing from the decision of the Supreme Court in **Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others; Law Society of Kenya (Amicus curiae)** is that the Court of Appeal decision in the **Tom Ojienda** matter is of no avail to the petitioners. As I understand the position to be, a notice to a party against whom a search warrant is sought under section 118 of the CPC and section 29 of ACECA is not required. To require such notice, as was captured succinctly in **Mape Building & General Engineering v Attorney General & 3 others** would be to defeat the entire purpose of the investigations.

223. It will be noted that I have referenced the decision of the 3 judge bench in **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others** a great deal in reaching my decision on the issue under consideration. This is because, in virtually every respect, this petition is a rehash of the averments in that petition. The 1<sup>st</sup> petitioner, who was the 3<sup>rd</sup> petitioner in the petition, challenged the warrant issued in the Chief Magistrate's Court in Makadara in Miscellaneous Criminal Case No. 116 of 2016. As in the present case, he alleged violation of his rights under Article 31, 47 and 50 of the Constitution on the basis that the warrant had been obtained without notice to him. I have considered this argument above, and I have found no violation of the right to privacy, or that there was an obligation on the part of the EACC to issue notice. That being the case, I can find no violation of the right to fair administrative action, or to fair hearing, which, as the provision of Article 50(2) make clear, is guaranteed to an accused person in a criminal prosecution.

### **The Status of Mumias Sugar Company**

224. There are a few respects in which this petition differs from the **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others**. First, the 1<sup>st</sup> petitioner has brought in the argument that MSC was not a public company, and he was therefore not a public officer and accordingly, the EACC had no jurisdiction to investigate any properties acquired in the period between 2003 and 2012 when he was the MSC Managing Director. The position taken by the EACC is that it has jurisdiction, in accordance with the provisions of ACECA, to investigate the 1<sup>st</sup> petitioner, and that the question whether or not the EACC can investigate the 1<sup>st</sup> petitioner is *res judicata* having been determined in **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others**. With regard to the status of MSC, it contends that that is an issue for the trial court.

225. The petitioners respond that the court in the **Okiya Omtatah Okoiti** case did not determine the question whether the EACC can investigate matters related to private entities. The petitioners further submit that EACC is mandated to investigate corruption, economic crimes and related offences only; that such investigations must relate to offences committed in respect to the affairs or property of a state corporation or a public body and not a private entity. In their view, the EACC can only investigate offences by public officers from public or state corporations and entities.

226. I have considered these opposing arguments and before making a determination in respect thereof, I make two observations. First, at the time the petitioners challenged the warrants that were the subject of determination in the **Okiya Omtatah Okoiti** case the 1<sup>st</sup> petitioner was aware of the period covered by the warrant, and that EACC was seeking to investigate him for acts allegedly committed in the period when he was the Managing Director of MSC. He had already received letters from the KACC in this regard, which had led him to inquire from the AG about the status of MSC. Thus, the question of whether or not the EACC had power to investigate the 1<sup>st</sup> petitioner for alleged offences committed during his tenure as Managing Director of MSC was live then, and should properly have been placed before the court dealing with the challenge to the powers of the EACC. It is not open to a party, in my view, to raise such challenges piecemeal. Section 7 of

the CPC set out above would, even in the case of a petition alleging violation of constitutional rights, cover that situation and demand that parties bring their entire case on a matter before the court.

227. Assuming, however, that the petitioners could again properly raise the issue of the mandate of the EACC in relation to MSC, are they correct in alleging that the mandate of the EACC would not extend to the 1<sup>st</sup> petitioner in his capacity as the Managing Director of MSC? In considering this issue, I ask what the EACC placed before the Chief Magistrate's Court in requesting for the warrant against the 1<sup>st</sup> petitioner.

228. It was averred in the affidavit of Shadrack Kaberia Mwenda in support of the application for the warrant that the EACC was investigating allegations of misappropriation of public funds and illegal acquisition of wealth by the 1<sup>st</sup> petitioner at the Nairobi County Government when he was Governor and at the MSC when he was the Managing Director. It was further averred that the 1<sup>st</sup> petitioner had, while serving in these two capacities, amassed a lot of wealth, and that such wealth was not commensurate with his known source of income. It had also been alleged in the said affidavit that the 1<sup>st</sup> petitioner's unexplained wealth was fraudulently acquired through illegal payments made to him and his companies whilst he was a public official.

229. Under section 2 of ACECA, corruption is defined as follows:

***“corruption” means—***

***(a) an offence under any of the provisions of sections 39 to 44, 46 and 47;***

***(b) bribery;***

***(c) fraud;***

***(d) embezzlement or misappropriation of public funds;***

***(e) abuse of office;***

***(f) breach of trust; or***

***(g) an offence involving dishonesty—***

***(i) in connection with any tax, rate or impost levied under any Act; ...or***

230. Section 55 of ACECA grants the EACC power to recover unexplained assets from 'a person'. It states as follows:

***The Commission may commence proceedings under this section against a person if—***

***(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and***

***(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.***

231. To my understanding and judging from the application for the search warrant and the affidavit in support, the intention of the EACC was to carry out investigations in respect of 'unexplained assets' held by the 1<sup>st</sup> petitioner and that were not commensurate with his known source or sources of income. This, in my view, is a power that is properly vested in the EACC. It can be exercised in relation to any person, whether a public officer or a private individual working in the private sector. There is nothing that dictates that such powers should be exercised only in relation to public officers, or in respect of persons working in state corporations. The argument in relation to the legal status of MSC being a bar to the exercise of investigative powers by the EACC is therefore, in my view, untenable.

232. I further take the view, and in this I agree with the EACC, that this is not the court to make the determination whether or not MSC is a public or private entity. Nor, in my view, was the Chief Magistrate's Court bound to inquire first and establish whether MSC was a public or private entity. In support of their argument that it is a private company, the petitioners have relied on two letters which emanated from the office of the Attorney General. The first, dated 31<sup>st</sup> January, 2011, was in response to an inquiry by the 1<sup>st</sup> petitioner. The response was that MSC was not a public entity as the government had a minority interest.

233. The second letter relied on is also from the office of the AG and is dated 25<sup>th</sup> August 2015. This letter is quite equivocal- it was to the effect that an answer to the question was dependent upon establishing whether the majority shareholding in MSC is treated as a single vote or cumulative vote comprising of all of the rest of the shareholders constituted thereby. In other words, as would appear from the AG's response in the second letter, it would be necessary to take evidence and consider the manner in which shareholders exercise their voting power in MSC.

234. In my view, however, what is before this court is a challenge to the issuance of a warrant for searching the 1<sup>st</sup> petitioner's premises in respect to unexplained assets. Such a warrant can be issued irrespective of the status of MSC. But should the need to address that question

arise, it must be addressed in a forum where matters of fact are presented to the court, and properly interrogated. Whether at a criminal trial of the 1<sup>st</sup> petitioner or in a suit for recovery of unexplained assets, an in-depth inquiry would need to be entered into to establish whether MSC is a public entity or not.

235. Without seeking to delve too much into the issue, however, in my view, it is not enough to assert that MSC is a private company, and that the government does not have a controlling interest. It would be necessary to enter into an analysis of the history of the organization and consider its relationship with the state. In taking this view, while noting that the question has not been addressed in our courts, I take cognizance of the guidelines set in the case of **United States v Esquinazi 752 F.3d 912 (11th Cir. 2014)**. While the court was concerned with determining who a ‘foreign official’ under the United States Foreign Corrupt Practices Act (“FCPA”) was and determining what an ‘instrumentality’ of a foreign state under the said Act meant, it does offer some persuasive guidelines on what a court may consider in determining whether an entity such as the MSC is a public entity, and whether or not it can be considered a state corporation for purposes of the EACC Act and ACECA.

236. Such guidelines include the question whether the entity performs a function the controlling government treats as its own. The court in **United States v Esquinazi** set out the factors to be considered in determining whether a government ‘controls’ an entity as including the foreign government’s formal designation of the entity; whether it has a majority interest in the entity; the government’s ability to hire and fire the principals, and the extent to which the government profits from or subsidizes the entity. The court may also consider the length of time these indicia have existed-in the case of MSC for instance, has it always been a limited liability company, or did its status change at some point in its history?

237. Also to be considered is whether the entity has a monopoly over the function it exists to carry out, whether the government subsidizes the costs associated with the entity providing the services, and whether the entity provides services to the public at large, and finally, whether the government generally perceives the entity to be performing a governmental function. These factors can, with the necessary modifications, be considered in determining whether an entity such as the MSC is a public or state entity. The question of the government having or not having a controlling interest cannot be the only factor in determining the issue.

238. In any event, as I have found earlier in this judgment, the status of the MSC is not a question for determination in this petition, nor does it bar the EACC from carrying out investigations against the 1<sup>st</sup> petitioner.

#### **Whether the Investigations are intended to support on-going criminal prosecution**

239. The petitioners complain that the search was intended to sustain an ongoing criminal case, ACC Case No 32 of 2018. They note that the EACC has stated that the criminal case is just one of the cases that is being investigated against the 1<sup>st</sup> petitioner. The petitioners then go on to make submissions on the alleged violation of their right to privacy. No attempt is made to demonstrate how the investigations with relation to the properties will further the ongoing criminal case, and how that amounts to a violation of rights. I observe, however, that the warrant impugned in this case was obtained specifically in order to ascertain whether or not the 1<sup>st</sup> petitioner had unexplained assets which were accumulated corruptly and were not commensurate with his known source of income. I am not satisfied therefore that this complaint has any basis.

#### **Restrictions and Caveats**

240. In their amended petition and in the application dated 4<sup>th</sup> September 2019, the petitioners raised the issue of the caveats and restrictions which were placed on their properties by the EACC. They contend that the warrant of search issued on 19<sup>th</sup> September, 2018 did not authorise EACC to place caveats and restrictions or to inspect or value their properties. They argue that the restrictions have been placed on their properties without sufficient cause and or notice to them as required under section 76 (1) of the Land Registration Act No 2 of 2012.

241. The petitioners submit that EACC has registered the restrictions on the claim that it is undertaking investigations of corruption against the 1<sup>st</sup> petitioner. They note that the Land Registrar has power under section 76 (1) of the Land Registration Act to make an order restricting or prohibiting dealings with land either on his own motion or on the application of any person interested in the land. They further note that in a letter dated 4<sup>th</sup> August, 2018, EACC had written to the Chief Land Registrar claiming that it was conducting investigations on allegations of corrupt conduct against the proprietors of the thirteen properties named in the letter and seeking information from the Registrar of Lands in respect thereof. The petitioners contend that the 1<sup>st</sup> petitioner has expressed reasonable apprehension that restrictions may be placed on the fifty-eight properties listed in his affidavit.

242. The petitioners argue that they are entitled, under section 75 of the Land Registration Act, to damages for the unlawful placement of restrictions on property number Nairobi Block 91/156. They further complain about the desktop valuations of the properties.

243. While not disputing that the EACC has a right to request the Land Registrar to place a caveat or restriction on the property, they submit that such restriction should not have been placed without notice to them. They contend that they are entitled to such notice by virtue of Articles 47 and 50 (1) of the Constitution and section 76 of the Land Registration Act. It is their case that EACC cannot interfere with their right to property guaranteed under Article 40 without following due process, and its investigations cannot be a licence to violate property rights. They cite in support the decision in **Itrade Company Limited v Jane Mukami Mwangi & another (2015) eKLR** in which a caveat placed on a property without notice to the registered owner was removed by the court, the court noting that under section 78(2) of the Land Registration Act, it is empowered to intervene and either remove or vary the restriction or issue any other appropriate order.

244. The petitioners also cite the decision in **Susan Sambai Choge & 4 others v Land Registrar & another (2016) eKLR, Republic v Chief Land Registrar & another Exparte Patrick Mbau Malika & 6 others (2017) eKLR** and **Geoffrey Kirimi Itania v Chief Land Registrar & 3 others (2018) eKLR** in which they submit that the court removed caveats registered without notice to the registered owners and awarded damages.



245. EACC responds that it has power, under section 11(4) of the EACC Act to place the restrictions on the properties and to carry out valuations thereof. It had also established, pursuant to its search, that the 1<sup>st</sup> petitioner was in the process of transferring the properties to camouflage its ownership. The restrictions are accordingly intended to preserve the properties pending conclusion of investigations. EACC relies on section 11 of the EACC Act which provides that:

***Additional functions of the Commission***

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

***(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution;***

...

***(j) ...institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.***

246. EACC notes that the petitioners argue that the properties in question were acquired before the 1<sup>st</sup> petitioner became a public officer. Its response in this regard is that it is still in the process of investigation, and whether or not property was acquired lawfully or unlawfully can only be done through the adduction of evidence.

247. In its submissions in response to the application dated 4<sup>th</sup> September 2019, EACC argues first, that the application is intended to delay the hearing of the main petition, and that it seeks to introduce matters that were not in the main petition. No orders are sought against the AG, and no application was made to join the Registrar of Titles as a party. Further, the petitioners have not invoked the procedure for removal of caveats provided in law. It is its submission further that, contrary to the submissions of the petitioners, it is not restricted to the provisions of section 56 of ACECA and it can invoke other provisions of statutes in placing restrictions on property.

248. I have considered the submissions of the parties on this point. As I observed earlier, this petition challenges the search warrant issued by the court in Miscellaneous Application Number 4359 of 2018. The warrant authorized the EACC to investigate alleged unexplained assets on the part of the 1<sup>st</sup> petitioner. To my mind, such investigation must require assessment of the value of the properties in question, and protection of the properties in question from disposition.

249. As to whether or not the EACC was entitled to require that the Land Registrar places restrictions on the petitioners' properties, and whether notice with respect thereto was issued, that is a matter that can only be addressed by the Registrar of Lands, and not in this matter. As the petitioners have submitted, the power to place restrictions on property is vested in the Registrar of Lands. Section 76(1) of the Act provides that:

***(1) For the purposes of compulsory acquisition the prevention of any fraud or improper dealing or for any other sufficient cause the Registrar may, either with or without the application of any person interested in the land, lease or charge, , and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.***  
(Emphasis added).

250. As the above section states, a restriction may be placed on a property by the Registrar for, *inter alia*, 'other sufficient cause'. Whether a notice is to be served on a party and which party is to be heard is left to the discretion of the Registrar. Section 77 requires that the Registrar gives notice, in writing, of a restriction to the proprietor affected by the restriction.

251. In their submissions in respect of the application for removal of the restrictions, the petitioners argue that the Land Registrar was represented by the office of the AG. It is noteworthy, however, that the office of the AG did not file a response to the application, nor did it participate in the hearing of the petition. To be noted also is that in the Amended Petition, no orders are sought against the office of the AG in respect of the restrictions.

252. Given, however, that the Land Registrar is not party to these proceedings, no orders were sought in respect to the restrictions in the petition and the AG appears not to have been served with the application in which the prayers for removal of the restrictions are sought, it is not possible to determine whether the Registrar considered the correspondence from the EACC 'sufficient reason' for placing the restrictions on the petitioners' property, whether the Registrar gave notice to the petitioners, and whether any party was heard with respect to the restrictions.

253. Further, section 78 of the Land Registration Act provides the procedure for removal of restrictions. The Registrar is empowered to remove a restriction on property on the application of any person interested in the property, or on the Registrar's own motion, and after giving the parties affected by the restriction an opportunity to be heard. The Registrar has power under the section to order the removal of a restriction entirely, or to order its variation. The court is also empowered under section 78(2), upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, to order that a restriction be removed or varied. The 'court' in which such power is vested, as provided under section 2 of the Land Registration Act, is the Environment and Land Court established by the Environment and Land Court Act.

254. The petitioners have not indicated whether they applied to the Registrar for removal of the restrictions, and what the result of that application was. It is my finding, however, that the pleadings in the petition with respect to the restrictions, as well as the application dated 4<sup>th</sup> September 2019 seeking removal of the restrictions, are improperly before this court and are hereby dismissed.

### **Violation of the Petitioners' Rights**

255. The petitioners have alleged violation of their rights under Articles 31, 47 and 50 of the Constitution. I have already addressed myself substantially to their arguments, which were essentially grounded on the contention that they were entitled to notice under section 23-29 of ACECA. The allegations were also grounded on the allegation that the warrant was vague and overbroad, which I have found not to have been established. A core plank of the petitioners' case is that the EACC had no mandate to investigate any acts of the 1<sup>st</sup> petitioner in the period when he was Managing Director of MSC, an argument that I have found is not tenable in this petition.

256. An allegation of violation of the right to property has been made on relation to the seizure of documents such as expired passports and death certificates belonging to the 1<sup>st</sup> petitioner's wife and son. The 2<sup>nd</sup> petitioner also complains about the alleged seizure of her documents, including tenancy agreements. The EACC submits that the documents in question were retrieved from the 1<sup>st</sup> petitioner in execution of a warrant lawfully issued by a court. It denies violation of the right to property of any of the petitioners, submitting that its exercise of its constitutional and statutory mandate does not amount to violation of the rights of any party.

257. In its ruling in this matter on 6<sup>th</sup> November 2018, the court directed that any documents that the EACC found not to be relevant to its investigation of the 1<sup>st</sup> petitioner was to be returned to the petitioners. I note from the pleadings before me and the record of the court that there was some back and forth regarding these documents. I note in particular the letter dated 26<sup>th</sup> November 2018 from the EACC to the firm of Prof. Tom Ojienda & Associates Advocates which enumerates the documents already released to the petitioners, documents released, and documents that the EACC indicated had never been in its possession. Among these latter documents are the death certificates of the 1<sup>st</sup> petitioner's wife and son, as well as his will.

258. I further note that the EACC had filed an inventory in court of the documents on 9<sup>th</sup> November 2018. The EACC's position is that it made the documents not relevant to its investigations available to the petitioners, while the petitioners maintain their argument that document which should not have been taken were seized.

259. The question to be posed though, is whether the seizure in a search of documents or items which may not be germane to an investigation amounts to violation of rights, and merits being the subject of a petition such as this. In its decision in the **Okiya Omtatah** case, the three judge bench observed as follows:

***“133. In this case we do not see any difficulty, and none has been given to us, in the 3<sup>rd</sup> petitioner moving the Court which issued the search warrants ex parte to have the same set aside if the same were improperly obtained instead of transforming such grievance into a constitutional issue.”***

260. The search warrants impugned in this case were issued under section 118 of the CPC. If the warrants were improperly issued or if any documents were seized that ought not to have been seized, then nothing prevented the petitioners returning to the court that issued the warrants to challenge the matter.

261. I observe that courts have consistently decried the practice of parties converting every matter into a constitutional question. As the court in the **Okiya Omtatah Okoiti** case observed with respect to the challenge of the warrants by the 1<sup>st</sup> petitioner in this case, the constitutional jurisdiction of the court ought not to be invoked in matters which can properly be dealt with in the ordinary course of litigation:

***“127. We must further point out that this Court's jurisdiction sitting as a constitutional Court ought not to be invoked in matters which can properly be dealt with in the ordinary course of litigation. In our view, our current Constitution pervades all aspects of life so much so that any action taken by a party may easily be transformed into a constitutional issue by simply citing some provision of the Constitution however remote.”***

262. The petitioners allege that the search warrant was executed at 4.00 a.m., and that there was false imprisonment of the 1<sup>st</sup> petitioner and the security guards in the 1<sup>st</sup> petitioner's premises. The EACC denies this, and gives a very detailed account in the affidavit of Mulki Abdi Umar and Pius Maithya of the manner in which the execution was carried out. It also gives the names of the persons in the 1<sup>st</sup> petitioner's premises in whose presence the searches and inspections were carried out, accounts which have not been controverted by the petitioners. Taking the respective contentions and accounts of the parties on this issue, I am not satisfied that the petitioners' claim that there was violation of their rights in the manner of execution of the warrants has merit.

263. Violation of the rights of the 2<sup>nd</sup> -10<sup>th</sup> petitioners have been alleged. With regard to the 2<sup>nd</sup> petitioner, it is contended that she was subjected to discrimination on the basis of her gender and marital status. She contends that she is the wife of the 1<sup>st</sup> petitioner but the search warrant issued in Mis Crim Appl No 3459 of 2018 was not directed at her. Her premises were, however, searched and her personal documents seized and retained by the EACC. She submits that the documents and property have not been released notwithstanding the orders made in the matter on 6<sup>th</sup> and 20<sup>th</sup> November, 2018.

264. The 2<sup>nd</sup> petitioner alleges violation of her rights under Article 31 of The Constitution. She asserts that she is not an associate of the 1<sup>st</sup> petitioner, but that in any event, section 27(1) of ACECA requires that a search warrant be sought against her if she was considered an associate of a suspect. It is her contention that none of the properties in the list of properties is in her name. Accordingly, the search and seizure of her documents and properties was undertaken unlawfully.

265. The EACC's response is that the documents and properties in contention were found in the premises and in the possession of the 1<sup>st</sup> petitioner, and they were relevant to the ongoing investigations. There was therefore no violation of the 2<sup>nd</sup> petitioner's rights under the Constitution.

266. With regard to the 5<sup>th</sup> to 9<sup>th</sup> petitioners, it is submitted that they are private limited liability companies which are the registered owners of various properties purchased for various amounts on diverse dates. The petitioners submit that contrary to the averments by the EACC, while the 1<sup>st</sup> petitioner is a shareholder and director of the 5<sup>th</sup> and 6<sup>th</sup> petitioners, he is not a shareholder or director of the 7<sup>th</sup> and 9<sup>th</sup> petitioners. They submit that these companies were not subject to the search warrant issued on 19<sup>th</sup> September, 2018 in Misc Crim Appl No 3459 of 2018. The EACC was therefore not entitled to seize and retain their documents.

267. The petitioners further submit that a limited liability company is a separate legal entity from its shareholders and directors and that their properties are distinct. They rely on the case of **Omondi v National Bank of Kenya Ltd and others (2001) 1 EA 177** in which it was held that:

***“It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even where the directors happen to be the sole shareholders (see Salomon v A Salomon and Co Ltd (1897) AC 22). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own.”***

268. Reliance is also placed on the decision in **Joseph Kamau Musa & others v Ireri Company Ltd & 3 others (2018) eKLR** where it was held as follows:

***“At the heart of the determination of this matter is the truism or basic principle expressed and upheld since SALOMON vs. SALOMON & CO. LTD [1897] AC 22 that a company is a juristic person with an existence separate and distinct from its directors and shareholders, even where the directors are its sole shareholders. Precisely because of that distinction, it is fallacious for shareholders of a company to equate its property as their own when in actual fact they have no proprietary rights thereto apart from the shares they own. Likewise, since the company is a person in the eyes of the law, it has the capacity to sue and be sued in its own name so that it alone, through its directors as its recognized agents, indeed its alter ego, can file suit to protect its proprietary interests and to enforce its rights.***

269. I believe that there is no dispute with regard to the position in law elucidated in the above cases.

270. The petitioners concede, however, that the EACC can trace assets and for that purpose pursue what is owned by relatives or associates of a suspect or by limited liabilities companies in which a suspect is a shareholder or a director. It is their argument, however, that the warrants issued on 19<sup>th</sup> September, 2018 were not directed at the 3<sup>rd</sup> to 10<sup>th</sup> petitioners, and they could therefore not be enforced against them. They submit that the EACC should have sought a warrant of search specific to the 3<sup>rd</sup> to 10<sup>th</sup> petitioners if they were suspected of committing offences similar to those committed by the 1<sup>st</sup> petitioner.

271. As the petitioners concede, the EACC is empowered, in its investigations, to trace assets held by a person. In doing so, it is empowered to pursue property held by relatives of the person, or by associates of such person. In addition, it is empowered to investigate limited liability companies in which the suspect is a shareholder or a director. From the pleadings before me, the 1<sup>st</sup> petitioner and his wife, the 2<sup>nd</sup> petitioner, are the shareholders in the limited liability companies that are their co-petitioners, and the court notes that the affidavits in support of the claims by the 5<sup>th</sup> to 9<sup>th</sup> petitioners are sworn by the 2<sup>nd</sup> petitioner.

272. It must be acknowledged, and the petitioners tacitly accept this, that a person engaged in corruption or economic crimes is wont to conceal gains from corrupt activities with relatives or in corporate entities formed for that purpose. This is why, in my view, the entire structure of the legal regime for combating corruption and economic crimes, as well as proceeds of crime and anti-money laundering legislation, expressly recognises the need for investigation of those who are closely related to or associated with a person suspected of corruption or economic crimes. In this regard, the term ***'politically exposed persons'*** is used in legislation-see for instance Regulation 22 of the **Proceeds of Crime and Anti-Money Laundering Regulations, 2013** in which a person in the position of the 1<sup>st</sup> petitioner is defined as a ***'politically exposed person,'*** that is a person who has been entrusted with a prominent public function in a country. The term is also defined to include any immediate family members or close business associates of such a person.

273. It will be noted also that under section 55(7) of ACECA, ***'unexplained assets'*** is defined to include:

***'any assets of another person that the court finds—***

***(a) are held in trust for the person whose assets are in question or otherwise on his behalf; or***

***(b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration.***

274. In my view, there was no violation of the 2<sup>nd</sup> petitioner's rights in the search mounted on the residential premises in which she and the 1<sup>st</sup> petitioner reside. Nor was there a violation of her rights under Article 27 or 45 of the Constitution. While the rights of women, whether within marriage or outside must be jealously safeguarded, it has to be acknowledged that they can be complicit, wittingly or otherwise, in the concealment of corruptly acquired public assets. Investigation of their assets in such circumstances is in the public interest and cannot be deemed violation of their rights.

275. Having said that however, it may be prudent for the EACC, in pursuing investigations in matters such as this, to ensure that it specifically names the person or persons against whom it seeks to carry out searches in order to avoid challenges such as have been mounted by the petitioners in this case.

276. It is argued with regard to the 3<sup>rd</sup> and 4<sup>th</sup> petitioners that their right to privacy was violated as the death certificates of the deceased were seized by EACC. This is denied, and in the correspondence exchanged between EACC and Counsel for the 1<sup>st</sup> petitioner, it is expressly stated that no such documents had been taken by EACC. Nonetheless, the court is unable to discern, and the petitioners have not demonstrated how, even assuming that the EACC had seized the death certificates, this amounts to invasion of privacy. Does the estate of a deceased person have a right to privacy? Is the estate a 'person' for the purposes of the constitutional protection of rights in the Constitution? Does the 1<sup>st</sup> petitioner, as the administrator of the estate of his wife and son have a right to privacy distinct to his capacity as administrator? It seems to me that while the seizure of such documents may displease the administrator of the estate, it is difficult to see, and the petitioners have not demonstrated, whether the estate of a deceased person has a constitutionally guaranteed right to privacy, and how such right has been violated.

277. The petitioners also allege violation of the rights of the 10<sup>th</sup> petitioner, an associate of the 1<sup>st</sup> petitioner. They submit that the warrants were not directed at him, yet his documents and properties were searched and seized by the EACC. The petitioners have not, however, either in the affidavit in support of the petition or in their submissions elucidated which these documents and properties are, and I am accordingly unable to make any findings with respect to the alleged violations.

278. With regard to the allegation that the valuation of the petitioners' properties was a violation of their right to property, specifically on the basis that the valuer was not a registered valuer, I take the view that this is not a matter for consideration at this stage. The EACC was undertaking the valuation in the process of investigation, and no action has been taken one way or other with respect to the said properties or their value. Should such action be taken, then the petitioners can properly raise the issue of the proper value of the properties and the qualifications of the person undertaking the valuation.

279. Accordingly, taking all the above matters into account and my findings under respective heads, I am not satisfied that there was a violation of any of the rights of the petitioners as alleged. It follows therefore that none of the prayers sought in the petition is merited, and the consolidated petitions are hereby dismissed with costs.

**Dated Delivered and Signed at Nairobi this 4<sup>th</sup> day of June 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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent and pursuant to a notice issued on 2<sup>nd</sup> June 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**