REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC PETITION NO. 20 OF 2020

GICHE LTD...1ST PETITIONER

JOSEPH CHEGE GIKONYO..2ND PETITIONER

LUCY KANGAI STEPHEN..3RD PETITIONER

VS

THE DIRECTOR OF PUBLIC PROSECUTION.............................1ST RESPONDENT

ETHICS & ANTI CORRUPTION COMMISSION..........................2ND RESPONDENT

CHIEF MAGISTRATES COURT MILIMANI LAW COURTS.....3RD RESPONDENT

JUDGMENT

1. In their petition dated 29th July 2020, the petitioners seek orders to stop their prosecution in Milimani Anti-Corruption Case No. 13 of 2020. They assert that the proceedings against them relate to non-payment of taxes and accordingly, the issue is subject to resolution under the provisions of the Tax Procedure Act (TPA). They ask the court to allow their petition and grant them the following orders:

> **(a) A declaration that the Director of Public Prosecutions abdicated his constitutional duty by failing to prevent and avoid the abuse of the legal process and violated the provisions of Article 157 (11) of the Constitution by prosecuting the Petitioners in Anti-Corruption Case No. 13 of 2020 – Republic v Giche Limited & 2 others.**
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> **(b) A declaration that the 1st and 2nd Respondents violated the provisions of Section 80 (1) of the Tax Procedures Act, 2015 by instituting the criminal charges contained in the charge sheet dated 30 June 2020.**
>
> **(c) A declaration that there is no prosecutable case that the EACC or the Director of Public Prosecutions can mount against Giche Limited, Joseph Chege Gikonyo and Lucy Kangai Stephen in relation to the Kenya Revenue Authority's tax assessment dated 26 April 2017 or the documentary evidence and witness statements presented in Anti-Corruption Case No. 13 of 2020 – Republic v Giche Limited & 2 others.**
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> **(d) A declaration that by recommending and instigating the Petitioners' prosecution in relation to the tax assessment dated 26 April 2017, the Ethics and Anti-Corruption Commission abused its statutory powers in pursuit of a collateral and extraneous purpose not connected with criminal justice.**
>
> **(e) An order of Certiorari calling into this Hon. Court the decision of the Director of Public Prosecutions contained in the charge sheet dated 30 June 2020 in Anti-Corruption Case No. 13 of 2020 – Republic v Giche Limited & 2 others for the purposes of quashing the same forthwith.**
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> **(f) An order of prohibition directed at the Director of Public Prosecutions and the Kenya Revenue Authority from prosecuting Giche Limited, Joseph Chege Gikonyo and Lucy Kangai Stephen in respect of the tax assessment dated 26 April**

2017 issued by the Kenya Revenue Authority.

(g) An order of prohibition directed at the Chief Magistrates' Court, Milimani from proceeding and conducting the trial of Giche Limited, Joseph Chege Gikonyo and Lucy Kangai Stephen in Anti-Corruption Case No. 13 of 2020 – Republic v Giche Limited & 2 others.

(h) An order of general damages be issued against the Respondents as compensation to the Petitioners for the pre-trial incarceration imposed on them by the Respondents on account of mounting an unconstitutional, illegal and meritless prosecution.

(i) The 1st and 2nd Respondents to pay the costs of this Petition in any event.

The Parties

2. The 1st petitioner is a limited liability company established under the provisions of the Companies Act (now repealed). It is involved in real estate and farming business. The 2nd petitioner who, with the 3rd petitioner, are directors of the 1st respondent, is a civil servant employed by the Kenya Revenue Authority (KRA).

3. The petitioners have lodged their claim against the 1st respondent, the Director of Public Prosecutions (DPP) who exercises State powers of prosecution vested in his office by Article 157 of the Constitution and has instituted the impugned proceedings against them. The Ethics and Anti-Corruption Commission (EACC) is joined to the proceedings as the 2nd respondent. It is the body responsible for investigating corruption offences in Kenya. The petitioners assert that they have joined the EACC to the petition as it has abused the legal process by criminalising tax assessments notwithstanding express statutory provisions outlawing prosecution. Also joined as a party to the petition as the 3rd respondent is the Milimani Chief Magistrates' Anti-Corruption Court which is seized of the criminal prosecution against the petitioners.

The Petition

4. The petitioners' grievance is that they have been charged for allegedly fraudulently failing to pay tax amounting to Kshs 38,692,694. It is their case that their prosecution is an abuse of the legal process as it contravenes section 80 (1) of the TPA which prohibits prosecution whenever penalties are imposed on a taxpayer under any tax law. It is their case also that their prosecution has been instituted for ulterior and collateral motives which are far removed from the legitimate pursuit of criminal justice.

6. According to the petitioners, the DPP, in instituting their prosecution, is in blatant contravention of Article 157 (11) of the Constitution which requires that he has regard to the public interest and the need to prevent and avoid abuse of the legal process.

6. The petitioners argue that the DPP has, in a discriminatory manner, violated Article 27 of the Constitution and decided to prosecute them notwithstanding the existence of an express statutory provision prohibiting their prosecution. Their petition is anchored on the provisions of Article 27 which guarantees to everyone the right to non-discrimination and equality before the law, Article 28 which guarantees to all the right to dignity, Article 157 (11) which requires that the DPP should have regard to the public interest in making a decision on whether or not to prosecute, and Article 165 (3) (d), (6) and (7) with regard to the supervisory powers of the High Court.

7. The factual situation giving rise to the petition is set out in the petition and the affidavit in support sworn on 29th July 2020 by the 2nd petitioner. It is the petitioners' averment that EACC commenced an investigation into the 2nd petitioner's affairs sometime in 2016. In March, 2016, it lodged Misc. Application No. 98 of 2016 and obtained *ex parte* orders under section 56 (1) of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) freezing the 1st and 2nd petitioners' assets including immovable properties and all their bank accounts.

8. The petitioners thereafter lodged an application seeking to set aside the *ex parte* orders under section 56 (4) of ACECA. In order to succeed, they were required, under the provisions of section 56 (4) and (5) of ACECA, to convince the court that the assets were not acquired as a result of corrupt conduct. In a ruling delivered on 9th September 2016, the High Court set aside the freezing orders after finding that the petitioners had explained the manner in which the frozen assets were acquired.

9. The petitioners aver that sometime in July, 2018, EACC lodged ACECA Civil Suit No. 14 of 2018 seeking forfeiture of the petitioners' assets. It also froze all the petitioners assets, including the same assets and bank accounts that were before the High Court in Misc. Application No. 98 of 2016. The petitioners lodged a preliminary objection arguing that EACC's attempt to subject the same properties that were before the High Court in Misc. Application No. 98 of 2016 to another suit was *res judicata* and a collateral attack on the decision of the court in Misc. Application No. 98 of 2016. The High Court agreed with the petitioners and struck out all the properties that had been discharged by the Court in Misc. Application No. 98 of 2016. EACC has lodged an appeal against the High Court decision.

10. The petitioners aver that EACC has been pursuing them on account of unexplained wealth and assets since 2016. It is their contention that over four (4) years have lapsed and the EACC is getting frustrated with its losses in the High Court and through the civil process.

11. According to the petitioners, sometime in 2016, the 1st and 2nd petitioners were summoned by KRA to appear before it. The 2nd petitioner had appeared before the KRA on 15th September 2016 and was asked to disclose his financial affairs. He had disclosed to the KRA the nature of his business and had also supplied the 1st petitioner's financial records which included financial statements, general ledger and the rent schedules. The petitioners aver that unknown to them but disclosed two years later by the EACC in ACECA Civil Suit No. 14 of 2018, KRA's tax audit had been undertaken at EACC's request, and that EACC had requested that KRA issues a tax assessment against the

1st and 2nd petitioners.

12. The petitioners aver that simultaneously with KRA's tax audit, the 1st petitioner had instructed its financial advisers to begin their own internal audit of its affairs to determine whether there was any tax liability arising. Its internal audit revealed that there was income that had inadvertently been omitted and not brought to tax. On 30th September 2016, the 1st petitioner began self-assessing and paying taxes that were found not to have been paid.

13. By an assessment communicated in a letter dated 26th April 2017, KRA informed the 1st petitioner that it was bringing to tax some of the 1st petitioner's income which had not been subjected to tax. The assessment stated that a sum of Kshs 38,692,694 comprising of several tax heads which included principal tax, penalties, and interest had been found to be due. The 1st petitioner had chosen not to object to the assessment and instead complied by making payments towards discharging the amount stated in the assessment. It is the petitioners' case that at the date of filing this petition, the 1st petitioner has paid Kshs 23,795,099, an amount that covers the principal tax due.

14. The petitioners aver that on 29th June 2020, the 2nd and 3rd petitioners were arrested by EACC officers from their residence in Mombasa County. They were bundled into a car at the height of the COVID-19 pandemic and driven to Nairobi County. They were charged on 30th June 2020 before the 3rd respondent in Milimani Anti-Corruption Case No. 13 of 2020 – **Republic v Giche Limited & 2 Others** with a single count of fraudulent failure to pay taxes contrary to section 45 (1) (d) of the ACECA. The 2nd petitioner was only able to secure his release from pre-trial detention on 10th July 2020 after the High Court drastically revised downwards the punitive bond and bail terms imposed on him.

15. It is the petitioners' contention that their prosecution is unlawful, unconstitutional and a blatant abuse of process that is designed to bring into disrepute the administration of justice. They aver that the DPP has a constitutional duty under Article 157 (11) to prevent and avoid abuse of the legal process, which he has not done in this case. They further aver that section 80 (1) of the TPA outlaws prosecution in relation to tax when a penalty has been imposed on a taxpayer.

16. The petitioners aver that both the EACC and DPP were aware that the 1st petitioner had been making and was continuing to make payments on the assessment. By a letter dated 9th September 2019, KRA had written to the EACC, at its request, and informed it that the 1st petitioner had chosen not to challenge the assessment and had instead complied with it and made payments totalling, at that time, to more than Kshs 15 million. It is their contention therefore that it is absurd for the 1st and 2nd respondents to turn around, and more than four (4) years later, after the 1st petitioner has made substantial payments which they are aware of, prosecute the petitioners for "failing" to pay taxes.

17. The petitioners aver that the DPP and EACC have not demonstrated any reason why they had to wait for more than 3 years since the assessment was issued before they decided to prosecute the petitioners. They contend that EACC was the originator of the assessment having expressly requested KRA to investigate and issue a tax assessment against them. They contend that it is clear that the EACC's decision to criminalise the assessment resulted from the frustrations it has experienced in the civil suit it instituted for forfeiture against them.

18. According to the petitioners, EACC has therefore instituted the prosecution after seeing no other avenue in order to subject the petitioners to ignominy and harassment. It is their case that their prosecution has been mounted for a collateral purpose, which is to coerce them into acceding to the EACC's civil suit for forfeiture as a result of the frustration it has experienced in losing the litigation.

19. The petitioners aver that the actions of the respondents are unconstitutional for violating Article 27 (1). They contend that by prosecuting them notwithstanding the provisions of section 80 (1) of the TPA, the respondents are not only violating provisions of statute but are also depriving the petitioners of the benefit of the law.

20. According to the petitioner, It is a matter of judicial notice that KRA routinely conducts tax audits and investigations and issues assessments against taxpayers which in many instances end up being challenged before the Tax Appeals Tribunal. That such disputes are never brought for prosecution in criminal courts, and subjecting the petitioners to a criminal prosecution because a tax assessment has been issued against them is a manifestation of selective prosecution and a violation of Article 27 (1) of the Constitution which demands that the petitioners should be subjected to treatment similar to other taxpayers.

21. It is the petitioners' averment further that as their prosecution is illegal and barred by statute, the investigation against them and their subsequent arrest was illegal, null and void *ab initio*. Further, that their arrest on 29th June 2020, the limitation of their freedom of movement and their detention was also illegal, unconstitutional, null and void, and they are entitled to compensation for their illegal arrest and detention.

22. The petitioners further contend that as a result of the harsh bail terms imposed at plea taking, their fundamental rights and freedoms were further violated as a result of pre-trial incarceration. They aver that the 2nd petitioner was unable to secure the harsh cash bail terms imposed and was only released after the High Court reduced the bail terms on 10th July 2020, and he was on pre-trial incarceration for a period of 11 days between 30th June 2020 and 10th July 2020. As for the 3rd petitioner, she only managed to secure the bail terms imposed by the 3rd respondent on 3rd July 2020 and was in pre-trial incarceration for a period of 4 days. They are accordingly entitled to compensation for violation of their constitutional right to freedom of movement on account of illegal and unconstitutional criminal charges levelled against them.

23. The petitioners further aver that EACC is intruding into the jurisdictional mandate of the KRA. It is their case that determination of tax assessments and the course of action to take is the sole preserve of the KRA. Once a tax assessment is issued against a taxpayer and the taxpayer either decides to comply or object to the assessment, a criminal prosecution would amount to an abuse of process as the facts and circumstances of this petition demonstrate. It is their averment that if any prosecution is to be considered, such prosecution should be within the sole preserve of KRA and not EACC. It is their case that EACC is encroaching onto KRA's mandate and abusing its coercive powers to

subject taxpayers to double jeopardy and the ignominy of criminal prosecutions.

24. The petitioners contend that the KRA assessment did not mention any fraud or penal consequences against them. They had relied on the provisions of section 80 (1) of the TPA and decided to comply with the assessment instead of challenging it. For the respondents to turn around and prosecute them three years after the assessment when substantial payments had been made towards settling the assessment is a manifestation of bias, ulterior motive and malice. They urge the court to find that EACC not only encroached onto the KRA's express statutory mandate but abused the provisions of section 80 (1) of the TPA in prosecuting them.

25. The affidavit in support of the petition is sworn by the 2nd petitioner, Joseph Chege Gikonyo, on his own behalf, on behalf of his wife, the 3rd respondent, and on behalf of the 1st petitioner in whom he and his wife are directors. The affidavit reproduces substantially the contents of the petition.

26. The 2nd petitioner avers that he is an employee of KRA. He has been on suspension since 2016 as a result of the investigation commenced by the EACC in 2016. He also reiterates the factual background set out in the petition which I have summarized above and annexes to his affidavit the ruling in Misc. Application No. 98 of 2016 dated 9th September 2016 by which he avers, the court discharged the freezing orders against the petitioners' properties after it found that they had explained the manner in which the assets were acquired. He also annexed a copy of the ruling in ACECA No. 14 of 2018 dated 23rd November 2018 in which the court, on the petitioners' preliminary objection to the suit, struck out from the EACC's suit the properties whose manner of acquisition had been explained in Misc. Application No. 98 of 2016.

27. The 2nd petitioner further reiterates the contentions in the petition with respect to the tax assessment done by KRA at the request of the EACC. He avers that he was summoned to the investigations department of KRA where he was informed about the investigation into his financial affairs. He had informed KRA that the EACC's suit had been resolved in his favour and he informed them that he was ready to cooperate with KRA's investigation into the financial affairs of the 1st petitioner.

28. It is the 2nd petitioner's averment that while the 1st petitioner was provided with an opportunity to object to the tax assessments under the TPA, it elected to accept the assessment and comply by making payments as the KRA assessment accorded with its own position in relation to the outstanding tax liabilities. The 1st petitioner had begun to make payment of the tax in 2016, well before the assessment was issued, and between 2016 and July, 2020, has made payments in excess of Kshs 23 million. A schedule of all the payments made together with copies of the bank deposit slips and KRA payment slips is annexed to the 2nd petitioner's affidavit.

29. The 2nd petitioner reiterates the contents of the petition with respect to the arrest carried out on 29th June 2020 and their charging in court on 30th June 2020, He avers that he and the 3rd petitioner were committed to pre-trial detention as they were released on a cumulative bail amount of Kshs 10 million. They had not been able to raise it due to the COVID-19 pandemic. They had spent 3 and 10 days respectively in pre-trial detention before they were able to raise bail.

30. The 2nd petitioner avers that the evidence presented by the respondent in the criminal case against them consists of more than 2000 pages of documents which are clearly not connected with the single charge against them. He avers that the documents form part of the civil suit pending in the High Court which has been stayed at the instance of the EACC to allow it pursue its pending appeal.

31. The 2nd petitioner avers that during a pre-trial conference held before the trial court on 13th July 2020, the DPP had indicated that he is intending to rely on only four (4) witnesses. Two of these witnesses, according to the 2nd petitioner, remain unnamed but appear to be procedural witnesses from the Companies Registry and Barclays Bank of Kenya. He further avers that there is one witness from KRA. The final witness was the Investigating Officer, James Kamau Kariuki, who had sworn all the affidavits in the civil suits against the petitioners.

32. The 2nd petitioner avers that there are several allegations in the witness statement of James Kamau Kariuki which are inconsistent with the High Court's findings in Misc. Application No. 98 of 2016 regarding the manner in which the 1st and 2nd petitioner acquired their assets. That notwithstanding the express findings made by the High Court which EACC did not challenge on appeal, the said James Kariuki maintains an unreasonable position that the properties remain unexplained assets.

33. The 2nd petitioner further avers that the unreasonableness of EACC and the witness is evident. He illustrates this with the averment that he had always maintained that he had been employed sometime in 1991 by the predecessor of the KRA, the Customs and Excise Department, and that he had an income. For some inexplicable reason, however, though EACC acknowledges that he had an income, it was not interested in his past earnings. While it is indicated in James Kariuki's witness statement that the 2nd petitioner was employed by KRA on 1st February 1997 as Collector 1, he had calculated his earnings from 1st January 1998.

34. The 2nd petitioner therefore asserts that in light of the law and the evidence presented by the EACC in the criminal case, it is evident that the prosecution of the petitioners is not only unlawful as a result of section 80 (1) of the TPA but has also been mounted to achieve extraneous and ulterior motives which have no connection with the pursuit of criminal justice.

35. The 2nd petitioner avers that on 21st July 2020 when the criminal trial against the petitioners came up for pre-trial, the DPP had indicated that the respondents were open to a plea bargain. In his view, this offer, which he terms quite uncharacteristic, makes it clear that the respondents are not interested in pursuing a legitimate criminal prosecution but are using the criminal case as a 'pawn' in the settlement of the civil forfeiture suit in which EACC has been unsuccessful.

The Response by the DPP

36. The DPP filed Grounds of Opposition dated 5th August 2020 and an affidavit sworn by Ms. Faith Mwila, a Prosecution Counsel in the Office of the DPP. The DPP argues that the orders sought by the applicants seek to usurp the constitutional and statutory mandate of his office. Further, that no cogent evidence that demonstrates a violation of rights or abuse of the criminal justice process has been placed before the court to warrant grant of the orders sought.

37. He contends, thirdly, that there is no evidence demonstrating that the case complained of was filed in the absence of a proper factual foundation or basis or that it may be suspect for ulterior motive or improper purpose. It is his contention, finally, that this court lacks the requisite capacity to adjudicate on competing evidentiary facts as it cannot determine the culpability or otherwise of an individual properly charged, which is a mandate vested in the trial court.

38. It is averred on behalf of the DPP that the petitioners face one count of fraudulent failure to pay taxes contrary to section 45(1)(d) as read with section 48 of ACECA. The decision to charge them was made by the DPP in exercise of his constitutional mandate. By alleging that the DPP abdicated his constitutional mandate by issuing consent to charge them, the petitioners have misapprehended his mandate as well as the facts of the matter. The DPP explains in the affidavit the constitutional mandate of his office and avers that under Article 157(6), his mandate is not limited to institution and prosecution of criminal cases but also extends to the prosecution of all matters related thereto. He had, in making the decision to prosecute the petitioners, acted independently without any influence and or control by any person, body or authority as envisaged under Article 157(10) of the Constitution.

39. According to the DPP, based on the investigation conducted by the EACC which the petitioners had admitted in the affidavit in support of the petition, it had been established that between 2012 and 2015, they fraudulently and unlawfully failed to remit taxes due and owing to KRA. The DPP had therefore made a decision to charge them with fraudulent failure to pay taxes. The DPP avers that in alleging that section 80(1) of the TPA prohibits prosecution whenever penalties are imposed, the petitioners have adopted a selective reading and interpretation of section 80 of the TPA.

40. The DPP avers that section 80(2) of the TPA envisions both the prosecution for a tax offence and the imposition of a penalty. Further, that section 80(3) provides for the refund of a penalty where the penalty has been paid and a prosecution has been instituted. It is the DPP’s averment, however, that in this case, the petitioners cannot enjoy any protection under section 80(3) as no payment has been made towards any penalty imposed. Additionally, that under the TPA, there is no prohibition against institution of charges where taxes have not been paid.

41. It is the DPP’s case that if there had been any challenge to either the taxes being levied or the penalty imposed, the petitioners ought to have moved the Tax Appeals Tribunal. They had not challenged the decision of KRA informing them of their failure to pay taxes and the amounts due. Instead, they had began making payments towards settlement of the assessment, thus admitting the assessment. The DPP avers that under section 45(1)(d) of ACECA, it is an offence to fail to pay taxes or any amount due to a public body. In the circumstances, the decision to charge them was lawful and in good faith and based on the evidence available.

42. The DPP avers that though the petitioners have alleged violation of their constitutional right under Article 27, they have not demonstrated how their rights have been violated. It is not sufficient for the petitioners to claim that other unspecified persons have not been charged without placing before the court material particulars supporting these allegations.

43. The DPP also terms as unfounded the petitioners’ allegation that their arrest and detention after being presented to court for plea and granted bond terms amounted to a limit on their right to freedom of movement. The petitioners had not demonstrated violation of any law either during arrest or after plea taking. They had been presented to court within 24 hours of arrest, informed of the charges against them and promptly granted bail and bond. There was therefore no basis for their claim for damages. Further, no evidence of violation of Article 28 and 50 with regard to the right to dignity and fair hearing had been placed before the court.

44. It is the DPP’s averment that all the issues raised in the 2nd petitioner’s affidavit are matters that can be canvassed fully at the trial and therefore should not be a basis for determining the propriety of the charges at this stage. Further, that the matters raised in the petitioners’ affidavit relating to unexplained assets have no bearing on the issues before the trial court which relate to failure to pay taxes.

45. In the DPP’s view the petitioners’’ averments amount to a defence and grounds for mitigation, and accordingly, their petition does not meet the threshold set out under the law. It is intended, in the DPP’s view, to scuttle the hearing of the criminal matter and enable the petitioners avoid the due process of the law and should therefore be dismissed.

The Response by EACC

46. James Kamau Kariuki a Forensic Investigator working with the EACC, swore an affidavit in opposition to the petition on its behalf. Kariuki states that he was one of the investigators working on the case involving the petitioners.

He avers that EACC had launched investigations into alleged corrupt acquisition of assets by the 2nd petitioner, who was a Manager at KRA, through the 1st petitioner in which he and the 3rd petitioner were directors. Its investigations had revealed that the petitioners had accumulated assets valued at Kshs. 314,750,000 and cumulative cash deposits amounting to Kshs. 339,044,707 from the year 2010 to 2016.

47. Its investigations had also established that the petitioners had not paid taxes or filed any tax returns since 2009 on the monies received. The tax assessment received from KRA showed that the 1st petitioner had accumulated tax and penalties amounting to Kshs. 38,692,694/-. EACC had therefore recommended that the petitioners be charged with the offence of fraudulent failure to pay taxes.

48. EACC avers that the petitioners have not set out with a reasonable degree of precision their case with regard to the provisions of the Constitution which they allege have been infringed. They have also not demonstrated how the Articles of the Constitution set out in their petition have been infringed.

49. According to EACC, this petition is based on alleged violations of section 80(1) of the TPA which the petitioners purport prohibits the prosecution of a tax payer where a penalty has been imposed. Its position is that on the contrary, section 80(3) of the TPA provides that if a person has paid a penalty under a tax law and the Commissioner commences a prosecution based on the same Act, the penalty shall be repaid to the person as a refund of tax. It is the case of EACC that the petitioners have allegedly paid about Kshs. 22 million, an amount that only covers the principal tax. The petitioners have therefore not made any payments in respect of the penalties and interest that would be subject to refund.

50. EACC concedes that there had been previous proceedings between it and the petitioners. It avers, however, that in its proceedings against the petitioners in ACEC 14 of 2018, the court had only struck off some of the properties from the suit but the case still subsists with regard to the remainder of the properties. It was also still seeking to challenge the decision to strike off some of the properties on appeal. In any event, the law allows concurrent civil and criminal proceedings arising from the same issue, and the civil proceedings in ACEC 14 of 2018 are proceedings under section 55 of ACECA and do not affect the petitioners' culpability for failure to pay tax.

51. With respect to the averment by the petitioners that it had requested for a tax assessment from KRA, EACC avers that it was, in so doing, merely discharging its constitutional and statutory mandate. The petitioners had not adduced any evidence of impropriety on its part.

52. EACC avers that the conduct of the 1st petitioner of choosing to accept the tax assessment was a clear admission that it did not pay the taxes as and when they fell due. That having worked for the KRA for over three decades, the 2nd petitioner was well aware of his obligation to pay tax and the amounts due. It asserts that the failure to pay taxes is a criminal offence under section 45(1)(d) of ACECA and is prosecutable regardless of whether or not the petitioner has subsequently paid the taxes. It is also its position that the decision to prosecute the petitioners was exercised independently by the office of the DPP.

53. EACC takes the position that though the petitioners aver that they have been paying the tax assessed, the amount of Kshs 22 million allegedly paid is about half of the amount due. Its averment is that the petitioners cannot therefore be said to have made good the assessment while they have had over four years to repay the amount due. At any rate, in its view, the payment made can only be used as mitigation during the sentencing in the criminal case and does not negate the fact that the petitioners committed an offence punishable by law.

54. EACC denies that it initiated the criminal proceedings to settle the forfeiture proceedings. It is its case that the forfeiture proceedings are still on-going and the petitioner is yet to satisfy the Anti-Corruption court that it lawfully acquired the properties that are the subject matter of that suit.

55. EACC avers that in the present petition, the petitioners are delving into the evidence that is already before the trial court. It argues that the petitioners will be afforded an opportunity in that case to defend themselves, cross-examine witnesses and adduce evidence in support of their case. In its view, the forum to tender justifications concerning the tax assessment and test the nature and veracity of the prosecution case is in the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge, and this court should not usurp the function of the trial court, which should be allowed to deal with the matter on its merits.

56. EACC further avers that the petitioners have not demonstrated any violation of their fundamental rights by the respondents, and they are therefore not entitled to orders of stay of the criminal proceedings.

57. According to EACC, the prosecution of the petitioners is lawful in light of section 80(3) of the TPA. It avers that even if the petitioners had paid the penalties, section 80(3) provides that if a tax payer who had paid penalties is prosecuted, the penalties paid can be refunded to him, but the prosecution cannot be quashed.

58. Regarding the proposal for a plea agreement with the petitioners on 22nd July, 2020, EACC argues that it was a show of good faith by the respondents. Further, that it goes to demonstrate that the respondents are not motivated by any ulterior motive or malice.

Petitioners' averments in Response

59. In response to the averments by the EACC in the affidavits sworn by Faith Mwila on 18th September 2020 and James Kamau Kariuki on 13th August 2020, the petitioners filed a supplementary affidavit sworn on 25th September 2020 by the 2nd petitioner. He avers that the EACC's valuation of his assets is self-serving since he had submitted to it irrefutable evidence of the manner in which he had acquired his properties, which was through loans from his employer, a fact which EACC had verified, as well as from legitimate business.

60. He asserts that EACC has a hidden agenda to vex him for some inexplicable reasons. He denies that he has accumulated assets worth Kshs 314,750,000 and asserts that EACC has submitted skewed, sensational, current day valuations of his properties in order to justify their argument of unexplained assets and corruption.

61. The 2nd petitioner avers that the allegation that the 1st petitioner has not been filing tax returns is a falsehood. He contends that the 1st petitioner's tax returns were taken on 19th April 2018 by the EACC when it raided his premises in Mombasa and carted away several documents. EACC was also aware that the 1st petitioner was filing tax returns as he had, in an affidavit sworn on 3rd May 2016 in EACC's Misc. Application No. 98 of 2016, submitted its current tax compliance certificate issued by the KRA. According to the 2nd petitioner, while the allegation that the 1st petitioner had accumulated taxes and penalties is the reason why EACC decided to charge the petitioners with the offence of fraudulent failure to pay taxes, there is no fraud in such failure to pay taxes. He avers that KRA's audit of the 1st petitioner conducted in 2016 was based on its voluntary submission of financial documentation.

62. The 2nd petitioner further avers that contrary to the contention by EACC, the 1st petitioner had made payment towards the penalties. It had already, as evidenced by the schedule annexed to his affidavit in support of the petition, paid the principal tax of Kshs 22,529,720 in

full. As the 1st petitioner had already paid Kshs 23,795,099, it had already paid Kshs 1,265,379 towards the penalties, which is the equivalent of approximately a quarter of the penalties imposed. The 2nd petitioner avers that the 1st petitioner had not admitted that it did not pay the taxes due, nor is such admission an implicit admission of guilt. He avers that the decision to accept the assessment was based on an audit of its tax affairs both through its internal audit as well as KRA's audit, which revealed discrepancies that it was not aware of at the material time. In his view, if there was fraud, the 1st petitioner would not have voluntarily revealed its financial information and started paying the taxes even before the assessment was issued by KRA.

63. It is also the petitioners' averment that KRA did not impose a timeline within which the 1st petitioner was required to comply with the payment obligations set out in the tax assessment. Further, that the tax and penalty imposed was a large sum of money which the 1st petitioner could not clear within a short space of time. Its ability to clear the amount assessed was also affected by the fact that EACC had obtained freezing orders and had applied for forfeiture orders against its assets. The 2nd petitioner avers, however, that the status of the payment of the taxes assessed is immaterial to the issues of law raised in this petition, nor is it the role of EACC's to dictate payment terms to a taxpayer.

64. The petitioners aver that the DPP and EACC are focusing on a skewed misrepresentation and reading of Section 80 (2) and 80 (3) of the TPA which are not applicable to the circumstances of the case. Their averment is that whether or not section 80 (1) of the TPA prohibits prosecution of taxpayer where a penalty has been imposed is a matter for statutory interpretation by the court. He contends that it is undeniable that a tax assessment which contained penalties was issued to the 1st petitioner; that it is also undeniable that section 80 (1) of the TPA prohibits a prosecution in mandatory terms where a penalty has been imposed; and in his view, the arguments made by the DPP and EACC regarding section 80 (2) and (3) of the TPA are inapplicable to the facts of this case.

Issues for Determination

65. I have read and considered the written submissions filed by the parties in which they address their respective positions on the petition. They have identified similar issues for determination, which I have distilled as follows:

> **a. Whether the arrest and prosecution of the petitioners pursuant to the provisions of section 45 of ACECA violates section 80 (1) of the TPA;**
>
> **b. Whether section 80 of the TPA prohibits prosecution of a defaulter where penalties have been levied;**
>
> **c. Whether EACC was motivated by an ulterior motive in recommending the arrest and prosecution of the petitioners;**
>
> **d. Whether the DPP's decision to commence criminal proceedings against the petitioners was made in excess of his mandate;**
>
> **e. Whether the petitioners have demonstrated violation of their constitutional rights by the respondents;**
>
> **f. Whether the petitioners are entitled to the reliefs sought in the petition.**

66. Having read the pleadings and submissions of the parties and from the issues that they have identified which I have set out above, it is evident that a determination of this petition will turn on the answer to the question whether section 80(1) of the TPA contains a prohibition of prosecution of a tax payer who fails to pay tax and against whom penalties have been imposed. This question, however, must be considered against the provisions of section 45 of ACECA under which the petitioners have been charged.

Analysis and Determination

67. In determining the issues set out above, I will consider the respective submissions of the parties on each issue before rendering the court's determination thereon. In doing so, I will take into account the following summary of the factual basis and circumstances leading up to the petition, which is largely not in dispute.

68. The 2nd and 3rd petitioners are husband and wife. Together, they are the directors of the 1st petitioner, a limited liability company. They have been jointly charged in ACC No. 13 of 2020 with the offence of fraudulent failure to pay taxes payable to Kenya Revenue Authority contrary to section 45(1)(D) as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The particulars of the offence as set out in the charge sheet are that on diverse dates between 2010 and 2015 in Mombasa County within the Republic of Kenya, being a limited liability company and directors of Giche Limited, they fraudulently failed to pay taxes payable to the KRA to wit the sum of Kshs 38,692,694 arising from the company's taxable income and accrued penalties.

69. It is undisputed that the 2nd petitioner had been an employee of KRA for a period of 30 years or so. From his averments, he had been employed in 1991 in the Customs and Excise Department, the predecessor of the KRA.

70. It is also not in dispute that EACC had launched investigations into allegations that the 2nd petitioner, a Manager at KRA, through the 1st petitioner, had accumulated assets disproportionate to his known sources of income through corrupt conduct. The position of EACC is that its investigations had revealed that the petitioners had accumulated assets valued at Kshs. 314,750,000 and cumulative cash deposits amounting to Kshs. 339,044,707 from 2010 to 2016. This is disputed by the petitioners, who assert that they had established in civil cases brought by the EACC that the 2nd petitioner had legitimate sources of income as an employee of KRA for over 30 years.

71. EACC had also established, from an assessment by KRA, that the 1st petitioner had not paid taxes amounting to Kshs 38,692,694/-. The petitioners concede this failure to pay tax. They aver that their own internal audit had indeed confirmed the non-payment of these taxes. They deny, however, that they had not filed any tax returns since 2009 on the monies received as contended by the EACC. The tax assessment received from KRA showed that the 1st petitioner company had accumulated tax and penalties amounting to Kshs. 38,692,694/-. The petitioners had agreed to pay the amount, and had indeed been paying the money due.

72. Following its investigations, EACC had recommended that the petitioners be charged with the offence of fraudulent failure to pay taxes contrary to section 45 (1)(d) as read together with section 48 of ACECA. The 2nd and 3rd petitioners had been arrested in their home on 29th June 2020. They were charged in court on 30th June 2020 when they took plea, pleaded not guilty to the charges, and were admitted to bail or bond. The 3rd petitioner was able to raise the amount required and was released on 3rd July 2020. The 2nd petitioner was only able to raise the bail required on 10th July 2020.

73. Following their release on bail, they filed the present petition seeking, among others, the termination of the prosecution against them and damages for alleged breach of their constitutional rights for what they term their pre-trial detention. They contend that their arrest and prosecution is unlawful given the provisions of section 80(1) of the TPA, which they argue expressly prohibits their prosecution as a penalty has been imposed on them, and they have paid part of it.

74. According to the petitioners, as their arrest was unlawful, their prosecution was also unlawful, and consequently their incarceration pending their release on bail following their arraignment was in violation of their constitutional rights. The crux of their case, then, is that the respondents have violated the provisions of section 80(1) of the TPA in instituting the criminal proceedings against them. This is the issue that I will address first as its determination will have a large bearing on the other issues identified above.

Whether the prosecution of the petitioners is in violation of section 80 (1) of the TPA

75. The petitioners' submit that the response to this issue is in the affirmative. They argue that it is not in dispute that KRA issued a tax assessment to the 1st petitioner for the sum of Kshs 38,692,694. The charge sheet against them contains a charge for failing to pay taxes and penalties amounting to Kshs 38,692,694. The petitioners submit that the tax assessment issued by the KRA is one of the central documents that the respondents are relying on in support of their case at trial. Further, that in its assessment, KRA did not specify any fraudulent conduct against them. Its assessment was made and penalties applied in accordance with the provisions of the TPA, and at no point were they told that they would be prosecuted in respect of the assessment.

76. The petitioners submit that they had relied on the said section 80 (1) of the TPA which expressly forbids a prosecution where KRA has decided to impose penalties in assessing the taxes payable and decided to comply with the assessment and pay the taxes. They had a legitimate expectation that considering penalties were imposed on them as part of the assessment, they would not be prosecuted for the same acts or omissions that led to the issuance of the assessment. They argue that they legitimately expected that they would be accorded equal protection and benefit of the law by not being prosecuted in line with the provisions of section 80 (1) of the TPA.

77. The petitioners cite **Bennion on Statutory Interpretation** to support their submissions with regard to the manner in which the court should interpret the provisions of section 80(1) of the TPA. They submit that the position is that the law should be certain and predictable so that those affected by it will be able to order their affairs in accordance with the said law. They further rely on the decision in **Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] eKLR** (Hereafter ***"the Keroche case"***) in which the High Court, in considering the principle of certainty in tax laws, stated as follows:

> **"From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism. Certainty of law is a major requirement to business and investors. Imposition of a different tariff, to that an investor contemplated when setting up an industry is reckless, irrational and unreasonable and it violates the principle of certainty and the rule of law.**
>
> (Emphasis added)

78. It is the petitioners' submission that the meaning of the words in section 80 (1) of the TPA is crystal clear that where the KRA decides to impose a penalty in connection with an assessment of tax against a taxpayer, that taxpayers has immunity from prosecution for the act or omission that led to the assessment. They submit that by prosecuting them, the DPP and EACC are clearly violating the express provisions of statute. The prosecution is *ultra vires* the provisions of section 80 (1) of the TPA and is accordingly in violation of Article 47 and the Fair Administrative Actions Act, 2015.

79. The petitioners further submit that the DPP is under a constitutional duty under Article 157 (11) of the Constitution to ensure and prevent abuse of the legal process. They submit that by prosecuting them despite a clear statutory bar, the DPP is aiding an abuse of the legal process and in direct violation of the Constitution. The petitioners rely on the case of **Mohamed Gulam Hussein Fazal Karmali & another v Chief Magistrates Court Nairobi & another [2006] eKLR**. They further cite the decisions, among others in *ex parte* **Jared Benson Kangwana H.C. Misc 446 of 1995**; **ex parte Floriculture International Ltd H.C. Misc 144 of 1997**; **Samuel Kamau Macharia & Another v Attorney General Application No. 356 of 2000 (H.C)**; and **Republic v Attorney General & another** *exparte* **Kipng'eno Arap Ng'eny [2001] eKLR**.

80. The petitioners further submit that it is settled law that tax and penal legislation ought to be interpreted and construed strictly and accordingly, since section 80 (1) of the TPA is both a tax as well as a penal statute, it ought to be interpreted strictly. Reliance for this submission is placed on the case of **Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others [2019] eKLR** in which the

Court of Appeal, while interpreting tax legislation, stated as follows:

> **"48. The above principles apply to general interpretation of statutes. However, when it comes to interpretation of tax legislation, the statute must be looked at using slightly different lenses. With regard to tax legislation, the language imposing the tax must receive a strict construction. Judge Rowlett in his decision in Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB (cited by the appellants), expressed the common law position in this area when he stated;**
>
>> **'…in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'.**

81. The petitioners further cite **Scott v. Russell (Inspector of Taxes), [1948] 2 All ER** in which the court stated:

> **"… there is a maxim in Income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."**

82. It is their submission that tax laws should be construed strictly, and if there is any ambiguity, it should be resolved in favour of the tax payer.

83. With respect to sections 80(2) and (3) of the TPA, the petitioners argue that the provisions do not envision the existence of both a penalty and a prosecution but merely gives the Commissioner power to decide whether to impose a penalty or pursue a prosecution. It is their submission that section 80 (2) of the TPA bolsters and reinforces their argument that having had a penalty imposed on them, they cannot be prosecuted. Regarding section 80 (3) of the TPA, while submitting that at the time of their petition they had already paid approximately Kshs 1,265,379, being approximately a quarter of the penalties imposed, the petitioners argue that the section envisages a situation where a tax law itself imposes a penalty which the taxpayer has voluntarily paid.

84. In their view, section 80 (1) forms a statutory bar against prosecution of the taxpayer where a taxpayer has been subjected to imposition of a penalty. It is also their case that section 80 (2) of the TPA reinforces the provision of section 80 (1) of the TPA by stating that the Commissioner cannot impose a penalty and prosecute the taxpayer for an offence arising out of the same act or omission. They term an absurdity the position taken by the respondents that notwithstanding the provisions of section 80 (1) and (2), a prosecution can be mounted against a taxpayer by simply refunding the penalty paid. They argue that the imposition of a penalty is, in and of itself, a penal consequence.

85. According to the petitioners, the respondents are in abuse of process by imposing a penalty and then subsequently prosecuting the petitioners three years down the line, and it also amounts to double jeopardy in being vexed twice in respect of the same act or omission. They further note that in any event, there has been no refund of the penalty paid by the petitioners. Further, that it is not the Commissioner who has decided to prosecute the petitioners but the EACC and the DPP, who in the petitioners view cannot take refuge in the provisions of section 80 (3) of the TPA.

86. The petitioners contend that the law gives them an assurance that having placed reliance on the provisions of section 80 (1) and 80 (2) of the TPA, they cannot be prosecuted three years after issuance of the assessment for failing to pay taxes in respect of taxes that have already been paid. Reliance for this submission is placed on the case of **Stanley Munga Githunguri v Republic [1986] eKLR**. They ask the court to apply the reasoning in the **Githunguri** case and find that there exists a statutory prohibition to prosecution which applies in their favour, and that their prosecution is an abuse of the court process.

87. The DPP's response on this issue is that the petitioners have adopted a selective reading and interpretation of section 80 of the TPA. The DPP submits that a reading of section 80(2) of the TPA envisions the existence of either the prosecution of a tax offence or the imposition of a penalty. It is his submission further that section 80(3) of the TPA provides a remedy where a penalty has been imposed and a prosecution instituted, the remedy being the refund of the penalty where the penalty has been paid. In his view, sections 80(1), 80(2) and 80(3) are so clear that there is no need to inquire into the meaning of the legislation or the intention of the legislature.

88. The DPP submits that in the **Keroche** case relied on by the petitioners, the court was called upon to determine the legality of ex *post facto* laws and retroactive tariffs, and in determining that the law must have certainty, the court made reference to the specific facts of the matter. According to the DPP, in the **Keroche** case, KRA had retroactively levied additional taxes having changed the tariff through which taxes were to be calculated and levied upon the applicants, a situation that is radically different from the facts in the present case. In the DPP's view, what the court needs to address itself to is whether section 80(1) may be read and interpreted independently from the provisions of sub-sections 80(2) and 80(3). To do so, he submits, would not only be absurd but would go against established principles of law.

89. Regarding the decision in **Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others (supra)** relied on by the petitioners, the DPP submits that the reasoning in the case is sound and supports his position. In the DPP's view, nothing in the TPA is ambiguous; the respondents are not calling upon the court to 'read in' or extrapolate on the intention of the legislature in the drafting of the TPA. His submission is that the Act is so clearly drafted that the reasonable man can only understand that provisions in section 80 and its subsections must be read together and not independent of each other.

90. As for the petitioners' reliance on the **Githunguri** case to support their contention that criminal charges may not be levied three years after investigations were launched, the DPP argues, first, that there is no bar to the timeline for institution of criminal proceedings, reliance for this proposition being placed on section 42(a) of the Limitation of Actions Act which provides that the Act does not apply to criminal proceedings. He further distinguishes the facts of this case from the **Githunguri** case, noting that the facts in that case were materially different, the Attorney Generals having made public representations to the effect that Githunguri would not be charged, the subsequent decision to charge him thus being found to be tainted. No such representations have been made in this case, and the investigation and decision to charge have not been made maliciously or in bad faith.

91. EACC agrees with the position taken by the DPP with respect to the provisions of the TPA. It notes that the gist of this petition is that the respondents have violated section 80(1) of the TPA which the petitioners argue prohibits the prosecution of a tax payer where a penalty has been imposed. EACC submits that the section cannot be read in isolation, noting that section 80(3) of the TPA provides that if a person has paid a penalty under a tax law and the Commissioner commences a prosecution based on the same Act, the penalty shall be repaid to the person as a refund of tax.

92. EACC further submits that the TPA does not regulate proceedings under ACECA under whose provisions the petitioners have been charged. It notes that in its commencement section, the TPA is described ***'as an ACT of Parliament to harmonise and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected purpose'***. EACC notes that section 80(1) of the TPA relates to prosecution or penalty in respect to a tax law. Its submission is that the golden rule of statutory construction is that words should be read in their ordinary, natural and grammatical meaning as was stated in **Jaga v Donges No and Another [1950] (4) SA 653(a)**.

93. According to EACC, a plain reading of the provisions of the commencement portion of the TPA and section 80(1) shows that the TPA is applicable to laws on the administration of taxes, and ACECA under which the petitioners have been charged is not among the tax Acts. Further, that section 80(1) expressly refers to an act or omission in relation to a tax law. EACC submits further that the petitioners have been charged under ACECA, not under a tax law. That failure to pay taxes is a criminal offence under section 45(1)(d) of ACECA, and the offence is prosecutable whether or not the petitioners have subsequently paid the taxes.

94. In emphasizing its argument that section 80(1) of the TPA cannot be read in isolation but must be read alongside sections 80(2) and 80(3), EACC submits that in interpreting statutes, courts look at both the text and context in order to ascertain the true legislative intent. Further, that a statute should be interpreted in a holistic manner, within its context, and in its spirit. It refers to the decision of the Court of Appeal in **Engineers Board of Kenya v Jesse Waweru Wahome & others Civil Appeal No 240 of 2013** in which the court stated that:

> **"One of the canons of statutory interpretation is a holistic approach…. no provision of any legislation should be treated as 'stand -alone' An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act."**

95. EACC further cites the Supreme Court decision in **In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR** in which the Supreme Court stated:

> **"…But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."**

96. Also relied on by EACC is the case of **Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., 1987 SCR (2) 1** in which the Supreme Court of India stated:

> **"Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important… A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."**

97. EACC further asks the court to be guided by the decision of Ngcobo J in the Constitutional Court of South Africa case of **Bato Staff Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism and others [2004] ZACC 15** and the Supreme Court of India case of **Commercial Tax Officer, Rajasthan v M/s Binani Cement Ltd [2014] SCR** in which the need to pay attention to the context of legislation in statutory construction was underscored.

98. It is EACC's position therefore that section 80(1) of the TPA should be read alongside sections 80(2) and 80(3). It submits that while section 80(1) provides that a person shall not be subject to the imposition of a penalty and prosecution, section 80(3) gives guidelines on what should happen in the event that both imposition of a penalty and prosecution happens. It argues that the imposition of a penalty is not itself a bar to prosecution, and to hold so would be absurd since a person can opt not to pay the penalties and seek refuge in this section. It submits that there is no guarantee that once a penalty is imposed, it will be paid, which is why section 80 (2) and sections 80(3) gives the Commissioner the option of prosecuting and refunding any penalties already paid.

99. EACC observes that from the letter it had received from KRA dated 9th September 2019 annexed to the petitioners' affidavit, it can only confirm that the petitioners have paid Kshs. 15,490,230/- out of Kshs. 38,692,694/-. It submits that in computation of tax due, the tax payer is required to pay the principal tax, the interest and the penalty in that order. For the penalty paid to be refunded upon prosecution, the taxpayer must have paid it in full. It is its submission that the petitioners have not paid any amounts towards the payment of penalties imposed that would be subject to a refund in the instant case and therefore the relief provided in section 80(3) of the TPA is not available to them. It urges the court to find that section 80(1) should be read in this context and not in isolation, and to also find that the petitioners have not paid any penalties that would warrant a refund or exemption from prosecution.

100. I have considered the submissions of the parties set out above as well as the authorities relied on. The starting point, I believe, in

determining this issue is the legislation under which the petitioners have been charged, read alongside the provisions of the TPA under which the petitioners seek relief.

101. The petitioners are charged with the offence of fraudulent failure to pay taxes payable to KRA contrary to section 45(1)(d) as read with section 48 of ACECA. Section 45 is titled ***'Protection of public property and revenue etc.'*** It provides as follows:

> **(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully—**
>
> **…**
>
> > **(d) fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.**

102. The amount of tax that the petitioners are charged with failing to pay is Kshs. 38,692,694. The petitioners do not deny that they had failed to pay this amount. Indeed, they explicitly concede that they had not paid the said amount which the KRA had assessed as against them. They aver that they had carried out their own internal audit, and had realized that they had indeed not paid the amount to KRA. They therefore decided to pay the arrears and the penalties, and had paid all the tax arrears and about a quarter of the penalties due. They therefore contend that as a penalty has been imposed on them and they have paid it, the respondents are prohibited from prosecuting them by section 80(1) of the TPA, which they ask the court to read in isolation from sections 80(2) and (3).

103. The TPA is described as an Act of Parliament '***to harmonise and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected purposes.'*** At section 2, the object and purpose of the Act is given as being the following:

> **(1) The object and purpose of this Act is <u>to provide uniform procedures</u> for—**
>
> > **(a) consistency and efficiency in the administration of tax laws;**
> >
> > **(b) facilitation of tax compliance by taxpayers; and**
> >
> > **(c) effective and efficient collection of tax.**

104. At section 80(1) titled ***'General provisions relating to administrative penalties and offences'***, the TPA provides that:

> **1. A person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to <u>a tax law</u>.**

105. The petitioners ask the court to find that this section contains a bar to their prosecution for the failure to pay taxes. They further ask the court to read this provision in isolation, independently of the provisions of section 80(2) and (3), which provide as follows:

> **(2) If a person has committed an act or omission that may be liable under a tax law to both the imposition of penalty and the prosecution of an offence, the Commissioner shall decide whether to make a demand for the penalty or to prosecute the offence.**
>
> **(3) If a person has paid a penalty under a tax law and, in respect of the same act or omission for which the penalty was paid, the Commissioner commences a prosecution, the penalty shall be repaid to the person as a refund of tax under section 47, and the person shall not pay a penalty, in the case of a prosecution, unless the prosecution is withdrawn.**

106. The petitioners submit, and I agree with this submissions, that the principles that emerge from our jurisprudence and all the cannons of statutory interpretation require that taxation legislation should be certain. It is noteworthy that in the **Keroche case**, the court was concerned with the imposition of a tariff different from what was in statute and that the investor was aware of at the time it commenced its operations, the court stating that:

> **"Imposition of a different tariff, to that an investor contemplated when setting up an industry is reckless, irrational and unreasonable and it violates the principle of certainty and the rule of law.**
>
> **…**
>
> **Of great significance is the principle of certainty of law especially on taxation in a democratic state such as ours. Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well."**

107. In **Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others** (supra) also relied on by the petitioners as well as the DPP, albeit for different reasons, the Court of Appeal stated that:

> **"With regard to tax legislation, the language imposing the tax must receive a strict construction."**

108. The Court of Appeal went on to cite the words of the court in **Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB 64** in which the court had stated that:

> **'…in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'.**

109. Finally, the petitioners have cited **Scott v. Russell (Inspector of Taxes), [1948] 2 All ER** in which the court stated:

> **"… there is a maxim in Income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."**
>
> Emphasis added)

110. My reading of the authorities cited by the parties above is that a tax payer should not be subjected to payment of tax that had not been imposed on him in clear and unambiguous language. To this extent, the petitioners are correct in their assertion that the law is that taxes cannot be levied except on the basis of legislation that is couched in language that is clear and unambiguous. Which brings me to the facts of the present case.

111. The petitioners were required to pay taxes in respect of their income. The assessment from KRA dated 26th April 2017 indicates that they did not pay corporation tax, value added tax, PAYE and withholding tax for the period 2010 to 2015. The petitioners do not dispute their liability to pay the taxes. The language imposing the obligations on them under the respective legislation imposing the tax obligations is not contested. What the petitioners seek is to rely on the TPA, legislation whose object and purpose is to provide uniform procedures for consistency and efficiency in tax collection, when confronted with a prosecution under anti-corruption legislation for unlawful failure to pay taxes.

112. In considering the merits of the petitioners' arguments, one must bear in mind the context of the legislation at issue in this petition. The argument that the petitioners advance, as I understand it, is that although they have failed to pay taxes, they should not be prosecuted as section 80(1) of the TPA does not allow the imposition of a penalty by the Commissioner, as well as a prosecution. The question, however, is whether that provision would override the provisions of ACECA, which deals with fraudulent failure to pay taxes. In my view, it does not. The provisions of the TPA were intended to regulate procedures for tax collection, as the object and purpose provisions indicate. They were not intended to apply to circumstances where a tax payer deliberately fails to meet his tax obligation, an act that is expressly defined in the ACECA as amounting to corruption, and is an offence under section 45 of ACECA. The overriding concern in ACECA is deterring corruption in public officers, one element of which, as defined in section 1(g)(i) of ACECA, involves ***'an offence involving dishonesty in connection with any tax, rate or impost levied under any Act.'***

113. The 2nd petitioner in this case is a long-term employee of the revenue collecting body, the KRA. As a Manager in KRA, he knew the obligations of a tax payer under the various tax regimes implemented by KRA. Should the allegations made against him and his co-petitioners be established, he had unlawfully failed to pay taxes due. He and his co-petitioners have been charged under anti-corruption legislation for fraudulent failure to pay taxes. It is my view that in so far as such charges are based on ACECA, section 80(1) of the TPA is of no avail to the petitioners. My finding on the first issue, therefore, is in the negative: the respondents have not violated section 80(1) of the TPA as it does not apply to prosecutions under ACECA.

114. A further question is whether section 80(2) and (3) would be applicable in respect of matters commenced under ACECA. Put differently, would the Commissioner be required to make an election in respect of prosecutions undertaken by the DPP for corruption offences, and to refund penalties properly due on taxes withheld by a tax payer unlawfully? The DPP and the EACC submit that this is the position. While it is not a question I am required to address in this petition, its implications would appear to be that a wrong doer who fraudulently denies the public of revenue gets to retain the tax and penalties following prosecution. It seems to me that that could not have been the intention behind sections 80(2) and (3) of the TPA.

115. In the result, it is my finding and I so hold that the response to the first and second issues in this matter are in the negative: the arrest and prosecution of the petitioners are not in violation of section 80(1) of the TPA, nor does the section prohibit the prosecution of a tax payer, under ACECA, on the basis that penalties have been levied by the Commissioner.

Whether EACC has an ulterior motive in prosecuting the petitioners

116. A further issue raised by the petitioners is whether their prosecution emanated from an ulterior motive on the part of EACC. They submit that EACC was aware that the KRA had issued the assessment against the 1st petitioner and that it had already started making payments towards the taxes due. More than three years had elapsed from the time the assessment was issued in 2017 to the date EACC decided to arrest the petitioners. The petitioners submit that EACC does not explain why it decided to wait for three years before taking action to prosecute them, assuming it had the mandate to do so.

117. According to the petitioners, EACC started investigating the 2nd petitioner sometime in 2016 for alleged possession of unexplained assets and alleged corruption. It had obtained *ex parte* freezing orders against the 1st and 2nd petitioner's assets and bank accounts. A ruling had been made in favour of the petitioners on 9th September 2016 in which the court held that the petitioners had explained the manner in which they had acquired their assets and discharged the freezing orders.

118. The petitioners argue that EACC did not appeal the ruling of the court. It had instead filed ACEC Suit No. 14 of 2018 in which it sought forfeiture of the petitioners' assets, including the same assets that had been the subject of the freezing orders. The petitioners submit that their prosecution has been undertaken because EACC has been frustrated in its attempt to seek forfeiture of their assets as its entire narrative of corruption has so far failed. They submit that the witness statement of James Kamau Kariuki presented before the trial court show that the EACC was aware of the tax assessment since 2017 or at least from June 2018. They submit that there is no explanation regarding what the EACC was doing for a period of two years before filing the criminal charges against them. They argue that EACC conceived a plan to abuse their coercive powers to descend into the arena of criminalizing the assessment after it lost its attempt to forfeit the petitioners' properties.

119. The petitioners submit that they have demonstrated that EACC has an ulterior motive and hidden agenda against them which is not connected with the pursuit of its mandate under ACECA resulting from its frustration in the civil cases. It is this frustration that has resulted in their prosecution notwithstanding the fact that they have paid the taxes and the clear prohibition of prosecution in section 80 (1) of the TPA. The petitioners rely on Commissioner **of Police & the Director of Criminal Investigations Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR** in which the Court of Appeal decried the use of the criminal justice process where the civil process has failed. Reference is also made to **Republic v Chief Magistrates Court at Mombasa ex parte Ganijee & another [2002] eKLR** for a similar proposition.

120. The petitioners further cite the case of **Rosemary Wanja Mwagiru & 2 others v Attorney General & 2 others [2013] eKLR** on the same issue. (It is worth noting that the decision of the High Court in the matter was reversed by the Court of Appeal in **Tatu City Limited & another v Rosemary Wanja Mwangiru & 4 others [2019] eKLR**). Their submission is that the acts of the respondents exemplify abuse of process of the criminal justice system for ulterior motives, and this court should not allow the abuse of the criminal justice system.

121. In its response on this issue, EACC submits that what is pending before the court in ACEC 14 of 2018 is not a tax issue but proceedings under section 55 of ACECA. Its case is that the defendants in the case, the present petitioners, have accumulated assets that are disproportionate to their known sources of income and have not given a satisfactory explanation despite being given an opportunity to do so. EACC submits that the forfeiture proceedings are still on-going and the petitioners are yet to satisfy the Anti-Corruption court that the assets the subject matter of that suit were not acquired through corrupt conduct. It submits therefore that the petitioners should desist from misleading this court and arguing a case that is still pending before a competent court of concurrent jurisdiction. At any rate, in its view, even were the petitioners to be convicted of the offence with which they are charged, it would have no effect on the civil case as the issues are independent and mutually exclusive.

122. EACC further submits that it is its practice, during investigations of corrupt acquisition of public properties and any allegations of corruption and economic crimes provided under ACECA, to inquire if the suspects are tax compliant. Under section 11(3) of the Ethics and Anti-Corruption Commission Act 2011, it is required to collaborate and cooperate with other institutions in the fight against corruption and economic crimes. It is its submission therefore that by requesting for the tax assessment from KRA, it was merely discharging its constitutional and statutory mandate, and there is therefore no impropriety on its part.

123. EACC distinguishes the present petition from the decisions relied on by the petitioners. It notes that the respondents never made any promise to the petitioners that they will not be prosecuted if they paid the taxes. It is its submission, secondly, that it did not recommend the prosecution of the petitioners to enforce a civil debt. It is merely discharging its constitutional and statutory duty, and the petitioners have not demonstrated any personal vendetta, malice or ill will on its part that would motivate it to act inappropriately against them in exclusion of all other Kenyans.

124. I have considered the submissions of the parties on this point. That the High Court is empowered to stop a prosecution when such prosecution has been instituted for a reason other than for the advancement of criminal justice is not in dispute. This is the essence of the jurisprudence emerging from our courts as held in the cases cited by the petitioners, as well as recently in **Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others [2016] eKLR; Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR; Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR and Prof. Njuguna S. Ndungu v EACC & 3 others (2018) eKLR**.

125. In this case, however, I am not satisfied that the petitioners have established that their prosecution is actuated by malice on the part of the respondents. They have based their case entirely on the provisions of section 80(1) of the TPA. It is my finding that the section does not apply with respect to prosecutions of corruption offences related to tax and revenue under ACECA. Further, under section 55 of ACECA, EACC is also entitled to pursue a claim for unexplained assets. The fact that it pursues a prosecution under section 45 and a claim for unexplained assets, in my view, does not demonstrate malice. There is no evidence also that any representation was made to the petitioners that they would not be prosecuted. Further, the lapse of three years from the start of the EACC investigations, in my view, does not give rise to an inference of malice on the part of the investigative bodies.

126. Which leads me to a consideration of the next issue identified by the parties relating to the exercise of the powers of the DPP.

Whether the decision of the DPP to prosecute the petitioners was made in excess of his mandate.

127. Underlying the contention that the prosecution of the petitioners was motivated by malice and an ulterior motive puts to question the exercise of the prosecutorial discretion vested in the DPP by the Constitution.

128. The DPP submits that his office exercises state powers of prosecution vested in his office by the Constitution and the Office of Director of Public Prosecutions Act No. 2 of 2013. Article 157 (6) (a) and (c) of the Constitution vest in his office power to institute and undertake criminal proceedings against any person before any court, and to discontinue criminal proceedings at any stage before judgment is delivered. It is his submission that in light of these provisions, he has power to institute proceedings against the petitioners.

129. The DPP further submits that the National Prosecution Policy published by his office provides guidelines on the test to be applied before a decision to prosecute is taken. The considerations provided in the policy include whether the evidence placed before him discloses a prosecutable case and whether it is in the public interest to commence a prosecution.

130. The DPP submits that it is incumbent upon him, when acts of a criminal nature are brought to his knowledge, to ensure that the allegations are thoroughly investigated and appropriate action taken in exercise of the mandate reposed in his office. He is not, in the exercise of his mandate, subject to the direction or control of any person, body and authority. Accordingly, the contention by the petitioners that the decision to prosecute them was made without evidence and was tainted by malicious intent is misguided and fallacious.

131. According to the DPP, the decision to prosecute is discretionary, and it is his submission that his discretion should not be unnecessarily fettered by the courts or any other authority except where it can be proved with concrete evidence that the DPP's action is irrational, unreasonable, disproportionate, borne out of irrelevant considerations, actuated by spite, malice and ill will.

132. The DPP submits that based on the investigations by EACC, which the petitioners had admitted, his office had established that between 2012 and 2015, the petitioners fraudulently and unlawfully failed to remit taxes due and owing to KRA. The DPP had therefore made a decision to charge them with fraudulent failure to pay taxes contrary to section 45(1)(d) of ACECA. He submits that the petitioners have not demonstrated that his actions are *mala fides* and unlawful to warrant the grant of the orders that they seek.

133. The DPP cites the case of **Republic v Attorney General & 4 others *ex parte* Kenneth Kariuki Githii [2014] eKLR** in which the court cited the decision in **Ezekiel Waruinge v Director of Public Prosecutions & 2 Others [2017]** where the court had observed that:

> **"The court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail it has been held time and again, is not a ground for halting these proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process."**

134. He further relies on **Pauline Adhiambo Raget v Director of Public Prosecutions and 5 others (2016) eKLR** held that:

> **"The Court should not involve itself in a minute and detailed analysis of facts and evidence to determine whether or not a criminal offence has been committed to warrant a return of the decision to prosecute. That truly is the recluse (sic) of the 1st Respondent and ultimately of the trial court. Even whether the 1st respondent is of the independent view that the prosecution ought to be instituted, the trial court may still return a verdict of no case to answer. It is enough for the Respondent to show that on the facts as investigated and returned, it is reasonable to conclude that an offence has been committed worthy of prosecution and worthy of closer interrogation by a court of law. The satisfaction must be with the 1st respondent and not this court sitting as a constitutional court over a constitutional question."**

135. In response to the petitioners' contention that their prosecution was actuated by malice and is an abuse of the process of law, the DPP relies on the decision in **Ronald Leposo Musengi v Director of Public Prosecutions & 3 others (supra). [2015] eKLR** in which the court had cited the case of **Jago vs. District Court (NSW) 106** where the court stated:

> **"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is not abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."**

136. According to the DPP, the petitioners' claim that the institution of the criminal case was made with the aim of coercing them to capitulate to the case relating to unexplained assets is unfounded. The DPP notes that the case is still pending before the Court of Appeal and is unrelated to the charges against the petitioners. It is also his case that the respondents and any other governmental agency is not barred from lodging any case against an individual or institution where it is disclosed that an offence has been committed and due process of law ought to be followed.

137. Regarding the petitioners' contention that they had a legitimate expectation that they would not be charged upon settling the taxes due from them, the DPP submits that the petitioners had not placed before the court evidence to show that either the respondents or KRA made any promise or representations in that regard. They had also not produced any evidence to show that the criminal proceedings are being commenced in lieu of civil proceedings or with an ulterior motive.

138. The DPP further submits that as was held by the court in **Ronald Leposo Musengi v Director of Public Prosecutions & 3 others** (supra), the fact that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit is no ground for staying or halting the criminal process. Further, that the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court.

139. To the petitioners' contention that they were not notified by KRA following the assessment of taxes due that charges would be levied, the DPP submits that neither the respondents nor KRA are under a legal obligation to notify them that they may be charged where they have

committed a criminal offence. The DPP cites the case of **Kipoki Oreu Tasur vs. Inspector General of Police & 5 others (supra) Ors (2014) eKLR** in which the court held that:

> **"The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated".**

140. The DPP submits that the present petition is intended to curtail and usurp his constitutional and statutory mandate in the exercise of his lawful functions and avoid the due course of law. It is, in his view, an abuse of the court process intended to delay the criminal trial and should be dismissed with costs.

141. I have considered the submissions made on this point. The exercise of State powers of prosecution is vested in the DPP. Under Article 157(10) and (11), the Constitution provides that:

> **(10)The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.**
>
> **(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.**

142. There is nothing placed before this court that suggests that the DPP, in exercising his discretion to prefer charges against the petitioners in this matter, acted under the control of any person or body, or that he acted in a manner that was not consistent with the public interest or the interests of the administration of justice. There is no evidence also, in my view, to suggest that the actions of the DPP are inimical to the need to prevent and avoid abuse of the legal process. Accordingly, I must respond to this issue also in the negative.

Whether the Petitioners Have Demonstrated Violation of Their Rights by the Respondents

143. The petitioners allege violation of Article 27 (1) and (2) with respect to their right to non-discrimination and equal protection before the law. They submit that they have a right to the protection and benefit provided by section 80 (1) of the TPA and relief from prosecution. It is their submission that by being prosecuted despite the express prohibition in section 80 (1) of the TPA, their right to equal protection and benefit of the law guaranteed under Article 27 has been violated. The 2nd and 3rd petitioners also allege violation of their rights as they were held in pre-trial detention as they were unable to raise bail following their being charged in court.

144. EACC and the DPP respond that there has been no violation of rights demonstrated. They submit that the pre-trial incarceration of the 2nd and 3rd petitioners was lawful and within the confines of the Constitution. They note that the two petitioners were presented before court within 24 hours of arrest, were informed of the charges against them and were promptly granted bail and bond. The petitioners are therefore not entitled to the payment of any damages.

145. I have considered the arguments made by the petitioners with respect to the alleged violation of their rights, and the response thereto. I noted earlier in this analysis that the determination of this petition will turn on the interpretation given to the application of section 80(1), (2) and (3) of the TPA. I have found that the provision relied on by the petitioners, section 80(1), does not apply to a prosecution under section 45 of ACECA for fraudulent failure to pay tax. That being the case, and in the absence of evidence to the contrary from the petitioners demonstrating that other tax payers similarly situated have been treated differently, I am unable to find a violation of the right to non-discrimination and equal benefit of the law.

146. Regarding the allegation of pre-trial detention and consequent violation of rights, I note from the material before me that the 2nd and 3rd petitioners were arrested on 29th June 2020 and charged in court the following day, 30th June 2020. Upon taking plea, they were granted bail and bond immediately. They were thus accorded all the constitutional protections guaranteed to an arrested or accused person under Article 49 and 50 of the Constitution.

147. Additionally, the petitioners' claim of violation of rights is predicated on their contention that their arrest and prosecution was in violation of section 80(1) of the TPA. In light of my findings on that issue, there is no basis for an allegation or finding that the petitioners' rights were violated in any way.

Whether the Petitioners are entitled to the orders that they seek

148. The final issue to consider is whether the petitioners are entitled to the orders that they seek. The grant of the said orders was dependent on the determination in their favour of the issues identified earlier. As the issues have all been answered in the negative, it follows that the petition fails, and the petitioners are not entitled to the orders that they seek.

149. The petition is accordingly hereby dismissed, but with no order as to costs.

Dated Signed and Delivered electronically this 6th day of November 2020.

MUMBI NGUGI

JUDGE