



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**

**PETITION NO. 1 OF 2019**

**IN THE MATTER OF: ARTICLES 2(1) & 2, 3(1),10,19,20,21,22,23(1) & (3), 27(1),28,31,40(1) &(2),47(1) & (2), 48, 50(1),73(1) & (2) (b), 159(2) €, 249(1) (b) &(c) 258(1) AND 260 OF THE CONSTITUTION OF KENYA,2010**

**AND**

**IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, CAP 65 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT(CAP65A) LAWS OF KENYA**

**IN THE MATTER OF: THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT 2015**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3(1), 10, 19,20,21,22,23(1) &(3), 27(1), 31,35,40,47,48 AND 50(1) OF THE CONSTITUTION OF KENYA 2010.**

**BETWEEN**

**BENSON MUTETI MASILA.....1<sup>ST</sup> PETITIONER/APPLICANT**

**ZIPPORAH MWONGELI MUTETI.....2<sup>ND</sup> PETITIONER/APPLICANT**

**MUMBE JUNIOR ACADEMY.....3<sup>RD</sup> PETITIONER/APPLICANT**

**MUMBE GIRLS HIGH SCHOOL.....4<sup>TH</sup> PETITIONER/APPLICANT**

**MUMBE BOYS HIGH SCHOOL.....5<sup>TH</sup> PETITIONER/APPLICANT**

**MUMBE HARDWARE &**

**SUPPLIS LIMITED.....6<sup>TH</sup> PETITIONER/APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE MILIMANI LAW COURTS.....1<sup>ST</sup> RESPONDENT**

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

DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT

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

### RULING

1 The Petitioners are the Applicants in the application dated 3<sup>rd</sup> January 2019. The said application was filed alongside the Petition on 3<sup>rd</sup> January 2019. The application seeks the following orders: -

**1) Spent**

2) THAT the honourable court be pleased to grant an order prohibiting the respondents from charging in court or taking plea of the 1<sup>st</sup> Petitioner/Applicant and/or his prosecution and arraignment in court in any other manner whatsoever related to search warrants obtained on 18<sup>th</sup> December 2018 and in respect to the notice of motion application dated 18<sup>th</sup> December 2018 filed in Nairobi Chief Magistrate's Misc. Criminal Case No. 4758 of 2018 pending hearing and determination of the application and petition filed herein.

3) THAT the honourable court be pleased to grant an order of injunction restraining the respondents by themselves, their agents, servants, officers, employees from writing letters to tenants, occupants or patrons and from entering, inspecting, searching, seizing, confiscating and/or carrying away or undertaking any activity in the said premises and with the said properties, items and/or seeking to register and caveats, cautions, prohibitions, restrictions at the ministry of lands and/or any other registration offices on the following properties variously owned by the Petitioners /Applicants pending the hearing and determination of the application and the petition herein.

4) THAT the honourable court be pleased to grant a conservatory order staying any further execution of the search warrant dated 18<sup>th</sup> December 2018 issued in Nairobi Chief Magistrate's Misc. Criminal Case no. 4758 of 2018 by the 2<sup>nd</sup> Respondent herein or through its agents, officers and investigators pending the hearing and determination of this application and petition.

5) THAT the honourable court be pleased to order the release of cash totaling Kshs. 3,039,570/= and 750 Ethiopian birr the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Petitioners /Applicants seized and confiscated by the respondent on 20<sup>th</sup> December 2018 from the 1<sup>st</sup> Petitioner/Applicant's residence in Kilifi (Kshs. 2,250,070/=) from the 2<sup>nd</sup> Petitioners /Applicant handbag (Kshs.21,000/=) and from the 6<sup>th</sup> Petitioner /Applicant's business premises in Ruaraka, Nairobi (Kshs.83,500/=) and from the 2<sup>nd</sup> Petitioner /Applicants residence in Imara Daima Nairobi (Kshs 685,000) pending the hearing and determination of the application and petition herein.

6) THAT the honourable court be pleased to order the 2<sup>nd</sup> respondent to release to the 6<sup>th</sup> Petitioner/Applicant two(2) computer seized and collected from its business premises in Ruaraka, Nairobi and to further release to the 1<sup>st</sup> Petitioner/Applicant the 3 computers and mobile phone number 0722317257(Samsung note 8) collected from him in his house in Kilifi together with ATM cards from Barclays Bank Account no. 003812656, Bungoma branch, KCB bank account no. 1188155599, Wote branch, Co-operative bank account no. 0110014247800, Kilifi KCB account no. 1181223830, cheque book for the 3<sup>rd</sup> Petitioner /Applicant's bank account no. 1203306105 KCB Makindu and cheque book for the 1<sup>st</sup> Petitioner /Applicant's personal bank account no. 1132680522 KCB Makindu pending the hearing and determination of the application and petition.

7) THAT the honourable court be pleased to grant a mandatory order compelling the immediate surrender and release of all the Petitioners/Applicants properties searched and seized, including all documents, computer accessories, mobile phone, anything and everything carted away by the 2<sup>nd</sup> Respondent on 20<sup>th</sup> December 2018 as detailed in the schedule of inventories handwritten and listed by the 2<sup>nd</sup> Respondent from the 2<sup>nd</sup> and 6<sup>th</sup> Petitioner/Applicants business premises in Ruaraka, Nairobi, the 2<sup>nd</sup> Petitioner/Applicant's residence in Imara daima, Nairobi and the 1<sup>st</sup> Petitioner/Applicant's residence in Kilifi and 1<sup>st</sup> and 2<sup>nd</sup> Petitioners /Applicants Kilifi office and rural residence in Makindu, Makueni county respectively all marked as exhibits 'BMM1', BMM2, BMM3, BMM4 and BMM5 in support of the petition herein pending the hearing and determination of the application and petition herein.

**8) THAT the honourable court be pleased to order the respondents to pay the costs of this application.**

2 The Notice of Motion is predicated on the grounds on the face of the application, supporting affidavits of both the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners/Applicants dated 3<sup>rd</sup> January 2019.

3 Briefly, the 1<sup>st</sup> Petitioner/Applicant averred that on 20<sup>th</sup> December 2018, pursuant to *ex parte* warrants issued on 18<sup>th</sup> December 2018 in Chief Magistrates Court Misc. Criminal Application No. 4758 of 2018, the 2<sup>nd</sup> Respondent raided his residences in Kilifi, Makindu and Imara Daima estate Nairobi and the 2<sup>nd</sup> Petitioner/Applicant's business operated in the 6<sup>th</sup> Petitioner/Applicant's premises in Ruaraka, Nairobi. He averred that in blatant abuse of law they carried away everything in the pretext of searching for documents that would help them find evidence to implicate him on allegations that he has acquired and amassed wealth fraudulently through illegal corrupt payments made to him as a public servant.

4 He deponed that as a result of the Respondents actions, his engagements as the Kenya Rural Roads Authority (KERRA) Regional Manager in Kilifi and Mombasa were crippled as his tools of trade inclusive of computers, his personal mobile phone, Bank ATM cards, office and personal cheque books and title documents for his properties and for the 3<sup>rd</sup> to 6<sup>th</sup> Petitioners /Applicants were taken away by the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent also carried away road project funds in cash totaling Kshs. 2,066,521/= meant to pay road projects under his supervision and 1<sup>st</sup> Petitioner's/Applicant's personal cash of Kshs.183,550/= meant for Christmas holidays for his family.

5 He further contended that the 2<sup>nd</sup> Petitioner/Applicant's business at the 6<sup>th</sup> Petitioner's premises had been crippled by virtue of the fact that the 2<sup>nd</sup> Respondent carted away the 6<sup>th</sup> Petitioners tools of trade. These include two computers and all related accessories, together with cash totaling Kshs. 83,500/= collected from the 6<sup>th</sup> Petitioner/Applicant's business premises in Ruaraka Nairobi and Kshs, 21,000/= collected from the 2<sup>nd</sup> Petitioner/Applicant's handbag. From the 2<sup>nd</sup> Petitioner/Applicant's residence in Imara Daima, Nairobi, the 2<sup>nd</sup> Respondent seized and collected Kshs.685,000/= belonging to the 6<sup>th</sup> Petitioner /Applicant's business and Ethiopian Birr 750 belonging to the 1<sup>st</sup> Petitioner/Applicant.

6 He further argued that the search warrant dated 18<sup>th</sup> December 2018 is unconstitutional, defective and illegal because the orders were obtained through false averments, as no offence had been committed. That the orders had been obtained *ex-parte* yet were final in nature and have led to a lot of suffering by the Applicants.

7 Mr. Sumba for the Petitioners/Applicants submitted that the 2<sup>nd</sup> Respondent seized more than Kshs. 3M from the 1<sup>st</sup> Petitioner, Ksh. 21 M from the 2<sup>nd</sup> Petitioner, Kshs. 2,066,520/= public money meant for a project; Kshs. 181,550 personal money of the 1<sup>st</sup> Petitioner and others. He further submitted that his clients have a right to fair hearing and to own property which rights need to be protected.

8 Counsel further submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in doing their work must do so with dignity. He said the Petitioners have set out all that they own and that there is no response by any of the Petitioners on this. He referred to paragraph 73 of the Petitioners affidavit and submitted that its clear that the properties were acquired a long time ago. In reference to the account referred to, he submitted that the same is not a personal account but an official account operated by the 1<sup>st</sup> Petitioner.

9 Mr. Sumba also submitted that no one asked the 1<sup>st</sup> Petitioner to explain the deposits as Kshs. 2M was for payment to workers under a project. He contended that the schedules, cheque folios , statements are all annexed. He further argued that the 1<sup>st</sup> Petitioner had been voted as the best performing manager in the country and got other commendations. He therefore termed the search by the 2<sup>nd</sup> Respondent as a witch hunt.

10 Counsel contended that the 1<sup>st</sup> Petitioner has even been suspended on the 2<sup>nd</sup> Respondent's recommendation before he has been charged. It was his submission that from his salary and the businesses owned the 1<sup>st</sup> Petitioner could own such money and properties.

11 Mr. Sumba further submitted and urged the court to stop the 1<sup>st</sup> Petitioner's investigation, charge, arrest and contended that the 1<sup>st</sup> Petitioner was not in business with any other company. He relied on the Kidero case on the authority that this court can interfere in a case of this nature.

12 The application was opposed by the 2<sup>nd</sup> Respondent in a replying affidavit dated 21<sup>st</sup> January 2019 sworn by **Feiza Abdi** one of the investigating officers in this matter. He averred that sometime on 15<sup>th</sup> November 2018, the 2<sup>nd</sup> Respondent received an intelligence report alleging that the 1<sup>st</sup> Petitioner had fraudulently acquired public funds /illegally accumulated wealth while serving as a Regional Manager at KERRA.

13 Upon receipt of the report, the 2<sup>nd</sup> Respondent commenced investigations into the matter under Article 252 of the Constitution and Section 11(d) of the Ethics and Anti-Corruption Commission Act, 2011. Amongst the allegations made against the 1<sup>st</sup> Petitioner is that he had amassed unexplained wealth in excess of Kshs. 1.5 billion which was not commensurate to his own sources of income. Furthermore, there were allegations that the 1<sup>st</sup>Petitioner/Applicant was receiving bribes and kickbacks from road contractors.

14 They also undertook investigations into allegations that the 1<sup>st</sup> Petitioner had been using his private company, Mumbe Constructions Limited, to trade with KERRA which allegations were confirmed as true.( He attached a copy of tax returns for the months of July 2016, June 2017 , March 2018 and September 2018 marked FA 1, FA 2, FA 3 and FA 4 for Mumbe Construction Limited.

15 The 2<sup>nd</sup> Respondent deemed it necessary to search the 1<sup>st</sup> Petitioner's residences, offices and business premises through legal means in order to establish the truth of the allegations of corruption and economic crimes as information and documents relevant to the investigations could only be found at the said premises.

16 Subsequently, the 2<sup>nd</sup> Respondent made an application dated 18<sup>th</sup> December 2018 in Milimani Misc. Criminal No. 4758 of 2018 for search warrants in respect of the 1<sup>st</sup> Petitioner's premises a Makueni, Nairobi, Kilifi and Mombasa. The order was granted and the search warrants were executed professionally.

17 After scrutiny of the recoveries, the cheque books, ATM Cards, electronics and electronic devices mentioned in prayer number 6 of the Notice of Motion were returned to the 1<sup>st</sup> Petitioner/Ap[plicant as per exhibit (FA 13).

18 It was thus the 2<sup>nd</sup> Respondent's case that the grant of conservatory and mandatory orders as prayed will amount to interference with the 2<sup>nd</sup> Respondent's constitutional and statutory mandate to investigate allegations of corruption and economic crimes and it is therefore

necessary for the Commission to be allowed to continue with its investigations and to take the necessary steps as mandated under the Constitution and other laws.

19 M/s Kenduiywa for the 2<sup>nd</sup> Respondent in submitting stated that prayer no. 4 had been overtaken by events as warrants had already been executed and prayer number 6 had also been spent. On the order of prohibition, counsel submitted that this matter is in its early stages of investigations hence, the issue of charging the 1<sup>st</sup> Petitioner has not arisen, and he has not shown that he will not receive a fair hearing.

20 M/s Kenduiywa further submitted that any issuance of an injunction would stop prosecution and any asset recovery process. She further submitted that the Petitioners have failed to show prima facie why they should not be charged. It was her further submission that 21 accounts held by the Petitioners have already been searched. It has also been found that the companies mentioned belong to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners and have been trading with KERRA. For her there was good reason to suspect the Petitioners.

21 M/s Kenduiywa submitted that applications made under section 118 CPC, 23 and 29 of the ACECA are made *ex-parte* and it is not clear which rights of the Petitioners had been infringed upon. She explained that the inventories attached showed that the 2<sup>nd</sup> Respondent was in possession of documents and money for investigations and the same should not be released. She contended that neither KERRA nor the contractors have applied for release of this money. She additionally argued that the issues raised could only be properly addressed in a full trial.

22 She finally submitted that in as much as the 1<sup>st</sup> Petitioner has explained how the properties were lawfully acquired, this is not for this application. That the 1<sup>st</sup> Petitioner only declared to KRA tax for Kshs. 330,000/=. She argued that Mr. Sumba relied on Petition no. 25 of 2018 where the court granted conservatory orders in respect to search warrants but contended that that case was different from what is before this court. She submitted that the warrants have already been executed and so the said Petition was not applicable. She relied on **Petition no. 6 of 2018 Kephos Otieno and Another** determined by this court.

23 The application was also opposed by the 1<sup>st</sup> and 5<sup>th</sup> Respondents who filed grounds of opposition dated 15<sup>th</sup> January 2019. A summary of the grounds of opposition is that the Application does not meet the threshold as set out in **Giella v Cassman Brown & Co. Ltd [1973] E.A 358** case. Further, that what the Applicants were seeking was to curtail the Respondents constitutional mandate of investigating complaints. That the Application offended section 6 of the Judicature Act which insulates Judicial Officers against civil action for actions performed in the course of duty.

24 The grounds also state that the orders in **CM'S court Misc. Cr. App No. 4758/18 EACC (Ex-parte) v Benson Muteti Masila** have not been reviewed or set aside by any other court, and in any event, such an application does not require prior notice. There was therefore nothing to show that the Respondents had acted ultra vires their mandate.

25 Mr. Marwa for the 1<sup>st</sup> & 5<sup>th</sup> Respondents submitted that no order had been made against the 1<sup>st</sup> & 5<sup>th</sup> Respondents, and the Petitioners are yet to be charged. He did not in the circumstances make any submissions.

26 The application was also opposed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who filed grounds of opposition dated 18<sup>th</sup> January 2018. A summary of these grounds is that the Respondents have the mandate to investigate corruption and economic crime offences. That it has not been shown that they acted ultra vires this mandate. It has also not been shown that they were acting under the direction or control of another person or authority.

27 Another ground is that applications under section 118, 121 and 180 of the Evidence Act are *Ex-parte*. That the Court of Appeal in **Civil Appeal No. 284 of 2009 Kenya Anti- Corruption Commission v R 2013 eKLR** held that breach of natural justice does not arise in issuing *ex-parte* search warrant as section 180 Evidence Act, 121 CPC and 23(1) EACC Act permits such orders to be granted *ex-parte* thus leaving no room for the Respondent to be heard before the warrants applied are issued.

28 It was argued that upon conclusion of investigations the Director of Public Prosecutions(DPP) will receive the investigation file together with the recommendation from the Directorate of Criminal Investigations (DCI) or EACC and independently analyze the evidence for sufficiency to charge the Petitioners with an alleged offence with due regard to the law and evidence. That the decision to charge will be made independently based on sufficiency of evidence and the public interest underlying prosecution of criminal offences.

29 All in all the Respondents submit that the Petitioners have failed to prove violation of their fundamental freedoms and rights and/ or infringement of any law or regulation or abuse of discretion and breach of rules of natural justice and the application should therefore be dismissed with costs.

30 Mr. Ashimosi for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that this matter is still under investigations and the file has not been forwarded to the DPP, making the prayer and enjoinder of the DPP to be premature. Counsel further submitted that if the court allows prayer no. 2, it will be going against the mandate of the DPP.

31 He further submitted that in Petition no. 25 of 2018, the DPP was expunged as he had no role to play. He thus opposed the application particularly the prayer related to them.

32 Mr. Sumba for the Petitioners in rejoinder reiterated his earlier submission that a basis must be laid for the investigations, arrest and prosecutions, and that only one account was being investigated. Lastly, he contended that the 1<sup>st</sup> Petitioner is not a director of the company mentioned.

## **DETERMINATION**

33 I have considered the application, affidavits, the submissions and authorities filed by all the counsel. Prayer number 6 is already spent. It is not in dispute that no charges have been preferred against the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners. The matter complained of is still at an investigatory stage and no file has been forwarded to the DPP. In spite of that, the 3<sup>rd</sup> Respondent has been enjoined in these proceedings because the Petitioners want this court to stop the respondents from proceeding with any criminal charges against them.

34 In a nutshell, the Petitioners do not want to be investigated or to be charged with any criminal offences and they contend that any investigations and charges against them is a violation by the Respondents of their mandate and obligation under the Constitution.

35 The 2<sup>nd</sup> Respondent draws its mandate from Articles 79 and 252 of the Constitution, section 3(2) (b) 11 and 13 of the Ethics & Anti - Corruption Commission Act (EACC Act) and Part IV of the Anti-Corruption and Economic Crimes Act (ACECA). The commission may conduct investigations on its own initiative or following a complaint made by members of the public. Section 29 of the ACECA allows the Commission to search any premises with a warrant. The said section provides: -

**“29(1) The Commission may, with a warrant, enter upon and search any premises for any record, property or other thing reasonably suspected to be in or on the premises and that has not been produced by a person pursuant to a requirement under the foregoing provisions of this Part.**

**(2) The power conferred by this Section is in addition to, and does not limit or restrict, power conferred by section 23(3) or by any other provision of this Part.**

Section 23(3) of the ACECA provides:

**“23(3) For the purposes of an investigation, the Secretary and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Secretary or investigator has under this Part.”**

36 It is the Petitioners’ contention that the search warrants dated 18<sup>th</sup> December 2018 were obtained without following due procedure as there was no notice in writing to the 1<sup>st</sup> Petitioner/Applicant asking him to give particulars of which properties he owns and when he acquired them.

37 Under section 29 of the ACECA the 2<sup>nd</sup> Respondent may enter any premises for purposes of investigation as long as they are in possession of a lawful search warrant. It is not in dispute that the 2<sup>nd</sup> Respondent vide Misc. Cr. Appl. No. 4758 /2018 was issued with search warrants in respect to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners homes in Makueni, Kilifi, Mombasa and Nairobi. The 2<sup>nd</sup> Respondent therefore went to the homes of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners on the strength of the search warrants issued by the Magistrate’s Court in Nairobi. These investigators have under section 23 of ACECA been endowed with similar powers as those of a police officer.

38 The Supreme Court of Kenya dealt with the big question as to what to consider before issuing a conservatory order in the case of **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others Petition No. 32 of 2013** where Ojwang & Wanjala (JJSC) stated as follows:

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

39 The Petitioners are seeking conservatory orders to stop the Respondents from investigating and charging them. The mandate of the 2<sup>nd</sup> Respondent is investigative while that of the 3<sup>rd</sup> Respondent is to recommend and charge where it’s satisfied with the investigations. The mandate of both of them is anchored in the Constitution i.e Articles 79, 252 and 157. For the court to stop the Respondents from doing what the Constitution mandates them to do, there must be a clear violation or threatened violation of the Constitution.

40 Mr. Sumba relied on this court’s ruling in **ACEC Petition No. 25/18 Evans Kidero & Others v EACC & Others** to advance his case. This case can be distinguished from the Kidero case in that in this case the warrants have been executed and the investigators have the material but the ones in the Kidero case were still being executed.

41 As stated above the Petitioners have not been arrested, charged or even tried for any criminal offence. The 2<sup>nd</sup> Respondent is investigating a complaint of misappropriation of public funds. It is in the public interest that this matter be investigated fully. It has not been demonstrated by the Petitioners that the 2<sup>nd</sup> Respondent has done anything beyond its mandate in investigating the same. This is not a matter in which the court should interfere with the Respondents constitutional mandate.

42 In any case, the investigations could end up exonerating the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners, if they have done nothing wrong as they allege. My finding is that the search undertaken by the 2<sup>nd</sup> Respondent was lawful as it was authorized by the court under clearly set out provisions of the law. I cannot make an order for release of the money seized since I am not hearing the criminal elements of the case and I do not know the circumstances under which it was seized.

43 This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have

contravened provisions of the Constitution. I do not find any violation warranting any interference in this matter by this court, at this stage. To do so would be setting a bad precedent and curtailing the Respondents power to investigate and make decisions, in respect of corruption and economic crime cases.

44 I find the application to lack merit and dismiss it with costs.

**Dated signed and delivered this 12<sup>th</sup> day of February 2019.**

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**HEDWIG I. ONGU'DI**

**JUDGE.**