REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC PETITION. NO. 29 OF 2018

AMBROSE DICKSON OTIENO RACHIER,

JOTHAM OKOME ARWA, FRANCIS OLALO

AND STEPHEN LIGUNYA T/A RACHIER &

AMOLLO ADVOCATES.....PETITIONER

VERSUS

ETHICS AND ANTI-

CORRUPTION COMMISSION.....1ST RESPONDENT

CHIEF MAGISTRATE,

MACHAKOS LAW COURTS.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS....3RD RESPONDENT

JUDGMENT

Background

1. Through a petition dated 18th March 2016 and filed on 21st March 2016, Pursuant to Articles 2 (1), 3(1), 10, 19, 20, 27, 28, 31, 35 (1), 40(1), 41, 56, 258, 259 of the Constitution, Sections 26 (1), 27 (5), 28(1) (2), (7) and (10) of the Anti-Corruption and Economic Crimes Act, the petitioner sought the following reliefs:

(1) A declaration that the warrants to investigate the petitioner's account- account No. 200213009 held at Development Bank of Kenya Ltd, Wabera Street branch and to require the production for the respondent's scrutiny of any such book, account opening documents, mandate forms, withdrawal slips, bank statements, transfer instructions, paid cheques and to take certified copies of any relevant entry, statements or matter in such book or books made and issued on the 15th of March 2016 in the Chief Magistrate's court at Machakos under Miscellaneous Criminal Application No. 6 of 2016 breached the petitioner's rights and fundamental freedoms under the provisions of Articles 27 (1), 31, 35, 40 (1), 40 (2), 47 and or 50 (1) of the Constitution hence void for all intents and purposes.

(2) Judicial review by way of an order of certiorari.

(3) Judicial review by way of an order of prohibition.

(4) Stay of the order made by the Magistrate in Misc. Cr. Application No. 6 of 2016

(5) Damages.

(6) Costs.

(7) Any other order

2. The Petition is premised upon grounds set out on the face of it and a supporting affidavit sworn by Stephen Ligunya counsel for the petitioner on 18th March 2016. Contemporaneously filed with the petition is a notice of motion seeking:

(a) Spent.

(b) That this honourable court be pleased to stay the order made by the magistrate in Misc. Cr. Application No. 6/16 authorising the 1st respondent to investigate the petitioner's account – account No. 200213009 held at Development Bank of Kenya Ltd, Wabera Street branch and to require the production for the 1st respondent's scrutiny of any such book, account opening documents, mandate forms, withdrawal slips, bank statements, transfer instructions, paid cheques and to take certified copies of any relevant entry, statements or matter in such book or books pending the hearing and determination of the petition.

(c) An order of certiorari to remove into this court and to quash the order made by the magistrate in misc cr. application No. 6 of 2016.

(d) An order of prohibition against the 1st respondent, either by itself, its agents, its servants or its associates from executing the warrants for investigation made by the magistrate in Misc. Cr. Application No. 6 of 2016 pending the hearing and determination of the petition.

(e) Any other order that this honourable court deems fit and just to grant in the circumstances.

3. The application is supported by grounds reflected on the face of it and an affidavit of even date sworn by Mr. Stephen Ligunya counsel for the petitioner/ applicant. Upon being certified urgent, the honourable court granted prayer (b) pending interpartes hearing on 5th April 2016.

4. On 5th April 2016, the 3rd respondent filed a replying affidavit sworn on 4th April 2016 by Gitonga Murang'a prosecution counsel thus opposing the application. However, the reply is general and not specific as it does not state whether it was in response to the petition or the application. On the other hand, the 3rd respondent did file their response to the petition on 4th April 2016 vide a replying affidavit sworn the same day by Sophia Nyambu hence challenging the petition. She argued that there was no violation of any of the petitioner's constitutional rights by the 3rd respondent while executing its mandatory statutory duty of investigation.

5. On 19th April 2016, the court set the application dated 18th March 2016 for hearing on 9th May 2016. However, before then, on 23rd November 2017, the first respondent filed a notice of motion seeking to have exparte orders issued on 21st March 2016 set aside and the petition and notice of motion dated 18th March 2016 dismissed for want of prosecution. In reply, the petitioner filed a replying affidavit sworn by Kevin Wakwaya on 16th January 2018 and filed on 17th January 2018. From the record, there seems to have been no proceedings undertaken from 19th April 2016 till 7th February 2018 when the application dated 23rd November 2017 was heard in the absence of the petitioners and the same allowed thus dismissing the petition dated 18th March 2016 together with the notice of motion of even date for want of prosecution.

6. Aggrieved by the orders of 7th February 2018 dismissing the petition, the petitioner moved the court through a notice of motion dated 13th February 2018 and filed on 15th February 2018 seeking to set aside the said orders and reinstatement of the petition and the notice of motion of 18th March 2018 together with the exparte interim orders obtaining then.

7. When the application dated 13th February 2018 came for hearing on 6th March 2018, the court on its own motion set aside its own orders of 7th February 2018 after realizing that on that day the application dated 23rd November 2017 was coming for mention and not hearing. Effectively, the petition and notice of motion dated 18th March 2016 were reinstated and the hearing for the application dated 23rd November 2017 was then rescheduled for 2nd May 2018. However, on 12th June 2018, parties agreed by consent to compromise hearing of all pending applications in favour of the main petition. They further agreed to file their submissions within 30 days in disposition of the petition. However, on 22nd October 2018 this file was transferred from Constitutional Review Division to High Court Anti-Corruption and Economic Crimes division for hearing and determination. On the same day, the second respondent filed their grounds of opposition of even date opposing the petition thereby arguing that the application was an abuse of the court process and filed with the intention of curtailing the powers of the 1st respondent and that the 1st respondent lawfully and rightfully exercised its mandate.

8. Subsequently, the petitioner filed their submissions on 3rd October 2018 and the 1st respondent followed suit by filing theirs on 8th October 2018. Equally, the 3rd respondent filed theirs on 11th November 2018. When the matter came up for hearing on 13th March 2019 parties basically highlighted on their submissions.

Petitioner's Case

9. The institution of the petition herein is a culmination of an exparte court order issued at Machakos PM's Court vide Misc. Cr. Application No. 6/16 at the instance of the 1st respondent herein. They were authorized to investigate the petitioner's account – account No. 200213009 held at Development Bank of Kenya Ltd, Wabera Street Branch and to require the production for the 1st respondent's scrutiny of any such book, account opening documents, mandate forms, withdrawal slips, bank statements, transfer instructions, paid cheques and to take certified copies of any relevant entry, statements or matter in such book or books.

10. It is the petitioner's case that the impugned order was made without a substantive application having been served upon the petitioners to accord them a fair hearing to explain to the 2nd respondent of a similar application having been filed and a freezing court order issued before Kitui Law Courts in Misc. Cr. appl. No. 270/15 wherein allegations that irregular payments were made out of Kitui County Government's salaries account to the petitioner's account were made.

11. That just as in this case, the petitioner was not served with the application in Kitui Misc. Cr. Application No. 270/15 when the orders freezing their accounts were issued although overtaken by events now. It was further contended that, after being served with the orders of Kitui Court, they swiftly carried out internal investigation and discovered that indeed by error vide PT Ref. 152887 LR Kshs. 12,080,147/= and FT Ref. 15288D 38 LR a sum of Kshs.10,737,589/= was transferred from Central Bank to their account sometime on 5th November 2015.

12. It is the petitioner's averment through Mr. Ligunya's affidavit in support of the petition that, after discovering the error, they caused the transfer of the same money to Central Bank. Mr. Ligunya contended that the orders sought and obtained in Misc. Cr. Appl. No. 6/2016 at Machakos were malicious, grossly unfair and disproportionate yet the said orders in Kitui Misc. Cr. Application No. 270/2015 were reviewed and set aside. That the orders sought therein amounts to a gross violation of their constitutional rights to privacy, right to fair hearing and in contravention of clear provisions of the law touching on privileged advocates-client's relationship. It is further contended that, the orders by the Machakos Magistrate's Court amounts to an infringement into the petitioner's right to privacy under Article 3 of the Constitution in that:

(a) It unprocedurally denied the petitioner an opportunity through the rule of "Audi Alteram Parten" under the principles of natural justice to give explanations on the case against them.

(b) Unfairly restricting and limiting the petitioner's rights to protection of its property search and

(c) Unreasonably and unilaterally restricting and limiting the petitioner's right to privileged communication within the reach of not only banker – client confidentiality but also advocate – client confidentiality.

13. He averred that as a result of the issued orders, the petitioner risks disruption in carrying out its lawful business. Further, that the orders were obtained through material non-disclosure of an earlier application filed in Kitui Misc. Case No. 270/15.

14. Mr. Ligunya expressed himself that the orders seeking to investigate the account have been overtaken by events as the money wrongly transferred to their account is no longer in their account. That the 1st respondent have not verified nor properly investigated the matter, has violated the petitioner's right to fair administrative action and fair hearing entrenched under Article 47 of the Constitution.

1st Respondent's Case

15. Through their replying affidavit in response to petition sworn by Sophia Nyambu a forensic investigator, they averred that, the 1st respondent is empowered by law to investigate the conduct of any person and/or body which in its opinion constitutes corruption or economic crime and unethical conduct pursuant to Chapter 6 of the Constitution Article 252, ACECA Cap 65, EACC Act Cap 65A and leadership and Integrity Act Cap 182.

16. She stated that sometime in early 2016, the 1st respondent received intelligence reports that 95 million or thereabouts had been irregularly transferred from Kitui County Government recruitment account No. 1000170634 held at Central Bank of Kenya to various accounts held in various banks. That part of the money was transferred to A/C No. 0200213009 in the name of Rachier and Amollo Advocates held at Development Bank of Kenya Ltd.

17. She contended that, as an investigator, she commenced investigations into the allegations reported to the commission to establish whether an offence had been committed. That to achieve her objective, she made an application through Misc. Cr. App No. 6/16 Machakos Magistrate's Court to search the petitioner's account No. 0200213009 held at Development Bank where some of the irregularly withdrawn money from Kitui County Government account was deposited.

18. She contended that under Section 180 of the Evidence Act, the Magistrate has the mandate to issue exparte warrant to search any suspect account hence nothing unconstitutional. She asserted that, there is no statutory or constitutional requirement to make a prior demand or give notice for an application of that nature as such notice will jeopardise the objective of such investigations.

19. M/s Nyambu expressed herself that the right to privacy under Article 31 of the Constitution is not absolute and that the right to a fair hearing under Article 50 has not been infringed. That although Section 29 of the ACECA No. 2003 empowers the 1st respondent to apply for a warrant of arrest, it does not oust the process regulating provision under Section 118 of the CPC and Section 180 of EA. She further contended that if the applicant/petitioner was aggrieved by the orders they should have appealed or sought revision against the said orders and not file constitutional petition.

20. She went further to state that the purpose of seeking to investigate the bank account was to verify the veracity of the allegation so as to inform the commission circumstances under which more than 20 million was transferred from Kitui County Government recruitment account to the petitioner's account. That the alleged refund is immaterial as it does not mitigate an offence already committed hence the orders issued on 15th March 2016 have not been overtaken by events.

21. Touching on the reliefs sought, M/s Nyambu contended that the petitioner has not demonstrated any specific rights that have been violated and that the petitioner is using the constitutional court to subvert the investigation which are still ongoing and should not be interrupted through constitutional declarations. She termed the petition as frivolous, irregular and does not disclose any primafacie case

hence urged the court to dismiss it.

2nd Respondent's Case

22. The second respondent basically relied on their grounds of opposition filed on 22nd October 2018 which is merely a restatement of the 1st respondent's statutory mandate in conducting investigations.

3rd Respondent's Case

23. In response to the petition, the 3rd respondent through a replying affidavit sworn by Mr. Gitonga Mwangi prosecution counsel basically supported the 1st respondent's case by emphasising on the powers conferred upon the 1st respondent under Section 13 (2) (c) and 23 of the EACC Act to investigate corruption related complaints and that the petitioner has not been condemned as they will be given an opportunity when investigations are complete.

Submissions

Petitioner's submissions.

24. During the hearing, Mr. Wakwaya appearing for the petitioner basically reiterated the grounds upon which the petition is anchored, supporting affidavit and written submissions filed on 3rd October 2018.

25. Mr. Wakwaya submitted that the Misc. Criminal application No. 6/2016 Machakos was filed under Section 180 of the Evidence Act, Section 118 of the CPC and Section 28 of ACECA. Counsel opined that for a court to make orders under the aforesaid provisions, there has to be reasonable suspicion which cannot be ascertained via an affidavit without proof of facts. To support this position, counsel referred the court to the case of **Sanjay Shah Arunjain vs R (2002) eKLR** where the court held that:

> **"in the absence of any other document, the said affidavit stands alone. I am yet to come across a case where an affidavit perse can facilitate the issuance of a court order or where an affidavit is construed as both the application and the evidence to support the same. Further to the foregoing, the wording of Section 180 (1) of the Evidence Act aforesaid requires proof, and in criminal law, proof is beyond reasonable doubt. One does not have to go beyond paragraph 2 and 3 of the said affidavit to note that the letters thereof are wanting not only in substance, but also any proof as required in law".**

26. Learned counsel submitted that there was no factual evidence adduced by the 1st respondent either in the application of warrant of arrest or its replying affidavit proving that the petitioner had committed a crime or was suspected of having committed or having abated in the commission of an offence in the said transaction. He maintained that there was no reasonable suspicion established that an offence was about to be committed. Reference was made to the case of **Tom Ojienda T/A Tom Ojienda and Associates Advocates vs Ethics and Anti Corruption Commission and 5 Others (2016) eKLR** where the court stated that:

> **"...reasonable suspicion involves less than a mere possibility. There must be a basis for suspicion; reasonable suspicion is not arbitrary".**

To support the above preposition, further reliance was placed on the case of **Emmanuel Suipanu Siyanga vs R Cr. Appeal No. 124/2009 (2013) eKLR**.

27. The petitioner urged the court to find that the application for warrant having been instituted after the petitioner had conducted their investigations and returned money that was transferred to their account by error there is nothing remaining to investigate. He contended that the application was based on nonexistent facts hence a breach of the petitioner's right to privacy under Article 31 of the Constitution. To bolster this position counsel relied on the authority in the case of **Omwansa Ombati t/a Nchogu Omwansa and Nyasimi Advocates vs Cr. Investigations Department Emmanuel Kanyugu and 3 others(2017) eKLR** in which the court stated that:

> **"the right to privacy is expressly guaranteed by Article 31 of the Constitution while the statutory procedure for conducting search and seizure by the police has three in built requirements to be met. Such requirements ARE (a) Prior to search and seizure, the police should obtain a search warrant. (b) Such warrant should be issued by a judicial officer. (c) Lastly, there should be proof on oath that there is reasonable suspicion of commission of an offence".**

28. Turning into issuance of notice, the petitioner submitted that the law in Kenya is adversarial hence notice ought to have been issued before seizure as envisaged under Sections 27 and 28 of ACECA. They asserted that the 1st respondent did not comply with Section 28 of ACECA by issuing notice to petitioner to produce all necessary documents to assist in investigations. Counsel stated that investigation is an administrative function of the 1st respondent although sought through a judicial process.

29. Regarding abuse of office, the petitioner submitted that a similar application having been filed before a Kitui court vide Misc. Cr. No. 270/15 and the same having been reviewed and set aside, a similar application in the name of Misc. Cr. Appl. No. 6/16 cannot apply. Counsel accused the 1st respondent of forum shopping with the intention of frustrating the petitioner. He further opined that there are no investigations going on regarding the transfer of the money to their account given the fact that the money was transferred back to Central Bank.

30. Concerning the petitioner's entitlement to the orders sought, the petitioner urged the court to find that it has jurisdiction to grant the reliefs sought pursuant to Article 165 (1) (d) (ii) of the Constitution. That those powers encompasses its powers for revision under Section 362 of the CPC. As to whether the reliefs sought i.e. certiorari and prohibition are applicable, counsel referred the court to the provisions under Article 22 (1) and 23(3) which provides wide powers to the court to protect parties from violations of their constitutional rights.

31. To support this position, the court was referred to the case of **Arnacherry Ltd vs AG (2014) eKLR** where it was held that:

> **"Turning back therefore to the petition before me, I have already found that the petitioner's right to property under Article 40 of the Constitution had been violated. One of the remedies in that regard is found in Article 23 (3) (c) of the Constitution for an order of compensation including an award of damages. They therefore prayed for damages for violation of their rights".**

1st Respondent's Submissions

32. On their part, the 1st respondent relied on their written submissions filed on 8th October 2018 and replying affidavit to the petition sworn by M/s. Nyambu. M/s Ocharo appearing for the 1st respondent vehemently opposed the application arguing that the 1st respondent is mandated by Section 180(1) of the Evidence Act to carry out investigations where it is proved on oath before a magistrate that it is necessary or desirable to conduct such investigation by way of inspection of books of accounts in a bank. That Section 23(3) and Section 118 of the CPC further sanctions the same. Counsel opined that the orders obtained in respect of Misc. Cr. Appl. No. 6/16 exparte were in accordance with the law. M/s Ocharo submitted that the only recourse the petitioner had was to file an appeal or seek for revision under Section 362. To reinforce her submission, counsel referred to the case of **James Humphrey Oswago vs Ethics and Anti-Corruption Commission (2014) eKLR** where the court stated that:

> **"Similarly I can find no basis for impugning the warrants on the basis that the execution thereof extended beyond the purview of the warrants. The basis of this contention is that the warrants authorised the seizure of documents, while the respondent also seized electronics such as Ipads. While it can be properly argued that "documents" may extend to documents held in electronics such as Ipads and computers, that is also, in my view an issue that properly seek for determination or interpretation by the court that issued the warrant, and to the high court by way of revision".**

33. Concerning issuance of notice, counsel opined that, it was not necessary under Section 180 of the Evidence Act and Section 118 of the CPC. That it was not mandatory for EACC to apply Section 28 of ACECA. M/s Ocharo contended that such notice would compromise investigations in that the suspects may get an opportunity to tamper with crucial information or even interfere with the same. To support this argument she again referred the court to Oswago case (Supra).

34. Touching on the reliefs sought, the 1st respondent stated that the petitioner did not state the specific right that was violated and injury suffered. To support that contention the court was referred to the case of **Anarita Karimi Njeru vs R (001) 1970 – 80) IKLR.**

35. Turning to the right to privacy under Article 31, counsel submitted that the same was not absolute. Reference was made to the case of **JLN and 2 Others vs Director Children Services & 4 others (2014) eKLR** where it was held that there were certain instances when private information may be disclosed. Counsel asserted that money irregularly transferred from county government's account to the petitioner's accounts without any justification is reasonable suspicion to investigate their accounts through a lawful method.

36. As to the right to information under Section 35 of the Constitution, counsel stated that there was no proof of violation. Concerning fair administrative action, learned counsel opined that the process of investigation was fairly done involving a court of law to issue warrants to investigate hence due process. That the law under Section 180 of the Evidence Act and Section 118 of CPC does not provide for notice and that any attempt to issue notice would negate the essence of such investigation hence jeopardise the outcome. This position was expressed based on the decision in the case of **Mape Building and General Engineering vs AG and 3 others (2016) eKLR** and **Ombati t/a Nchogu Omwanza and Nyasimi Advocates vs Director Criminal Investigations Department Emmanuel Kanyungu and 3 others (Supra).**

37. With reference to fair hearing under Article 50 counsel opined that such a right cannot be claimed before the trial even commences **(See Mape Building and General Engineering vs AG and 3 others (Supra)**. Regarding Section 26 of ACECA M/s Ocharo urged the court to find that it is only applicable after the commission would have carried out investigations before it calls somebody to answer. To support that position counsel quoted the case of **Christopher Ndarathi Murungaru vs Kenya Anti-Corruption and another (2006) eKLR** where it was held:

> **"..... in the absence of reasonable suspicion of .... in corruption or economic crime, the commission and its director would have no power to issue a notice under Section 26 of the Act".**

38. As to whether the matter has been overtaken by events, by the return of the money to the Central Bank, counsel maintained that such evidence was not furnished in court. She further stated that, even if the money was returned back, there is need to know who authored transfer of the money to the petitioner's account, whether the money was being transacted in for over 1 month and how much profit has been realized for necessary proceedings to be instituted.

2nd Respondent's Submissions

39. Relying on their written submissions dated and filed on 13th November 2018, Mr. Moimbo appearing for the second defendant submitted that the petitioner had not proved any violation of their constitutional rights and that the petition herein is an abuse of the court process. Mr. Moimbo's submission is basically a replica of the 1st respondent's submission. He urged that the petitioner ought to have filed an appeal or

revision challenging the magistrate's order under Article 165 (6) and (7) and Section 363 of the CPC. Counsel relied on the case of **Speaker of National Assembly vs James Karume (1992) eKLR** where the court held that where there is a clear procedure for redress that procedure should be followed first. Further emphasis was laid on the same by quoting the case of **Hariksson vs AG of Trinidad and Tobago (P.G.) (1980) 265 272**.

40. Mr. Moimbo urged the court to find that the Constitution does not upset the other laws especially where there are clear remedies provided to cover such situation. To bolster this position counsel referred the court to the case of **Alphonse Mwangemi Munga and 10 others vs African Safari Club (2008) eKLR**. It is however important to note that the 3rd respondent did not file their submissions although Miss Sigei did associate herself with the 1st and 2nd respondent's submissions.

Analysis and Determination

41. I have carefully examined the petition herein, supporting affidavit, replying affidavits and grounds of opposition together with written and oral submissions by both counsel. The crux of the matter is the allegation that, the 1st respondent did obtain irregularly warrants to investigate and search the petitioners account through exparte orders thus denying them the right to be heard first before being condemned and that the same amounted to abuse of office under the Fair Administrative Actions Act. That the said action amounted to interference with their privacy by intruding into their private property (account) thus contravening privileged communication between an advocate and a client as well as client/ bank relationship. On the other hand, the respondents defended the issuance of exparte orders which were geared towards investigating a possible criminal conduct which was procedurally and lawfully carried out pursuant to the attendant provisions of the law in particular Section 180 of the Evidence Act and Section 118 of the CPC. Issues that emerge for determination are:

(a) Whether this court has jurisdiction to entertain the matter

(b) Whether the exparte orders issued by the magistrate's court required notice.

(c) Whether the 1st respondent complied with proper administrative actions Act in obtaining the order.

(d) Whether the petitioner's private rights were infringed.

(e) Whether the petitioner was denied right of hearing

Whether this court has jurisdiction to entertain the petition

42. The petition herein is basically anchored under Article 22, 23, 47 and 50 of the Constitution. Article 22 (1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened.

43. The High Court is then empowered to exercise jurisdiction under Article 23 (1) to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedomn in the bill of rights.

44. According to the petitioner, the high court has jurisdiction to determine a claim for redress under Article 23 (1) of the Constitution. Jurisdiction is the cornerstone in any judicial system or process without it, the court is rendered powerless and such court should down its tools and move no further step (See the celebrated case on jurisdiction **The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd (1989) KLR 1**.

45. To the respondent, this court is not properly seized of this matter as the petitioners should have appealed or sought review before the trial court or revision before the high court. Article 23 (1) of the Constitution specifically confers authority on the high court to hear and determine claims of violation of a right or threat to infringement of such right and if proven, it can grant appropriate reliefs including a declaration of rights, an injunction, issue conservatory orders, declaration or invalidity of any law that denies, violates, infringes, or threatens a right or a fundamental freedom in the bill of rights and is not justified under Article 24, an order for compensation and an order for review.

46. In view of the claims made and reliefs sought, Article 23 (3) comes to focus and therefore this court assumes jurisdiction. Assumption of jurisdiction is not pegged upon ultimate proof of success of a suit but rather it is an issue urged on points of law inter alia infringement on ones constitutional rights and particularly the right to fair hearing.

47. However, the onus to prove infringement or threat to infringement of one's rights squarely lies on the petitioner or claimant claiming such violation. Therefore, redress is not pegged on imagination or speculation or mere assertions. It must be proved to the required threshold by being factual and particularised so as to elicit proper response in order to assist the court to arrive at a proper verdict. In the case of **Anarita Karimi Njeru vs the Republic (Supra),** the court held:

> **"...we would however, again stress that if a person is seeking redress from the high court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to this case), that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed...".**

See **Mumo Matemu vs Trusted Society of H.R. Reliance & 5 others (2013) eKLR**.

48. It is the responsibility of the claimant in this case the petitioner to state with sufficient particularity and or specificity the acts complained of and the resultant injury suffered or likely to be suffered thus calling for court's intervention to remedy. The claim should not be an omnibus one stretching all over the Constitution without stating the injury suffered or likely to be suffered. Although what amounts to reasonable suspicion is quite relative and subjective hence debatable, the key determinant is due process, attainment of substantive justice and proper exercise of jurisdiction by the court seized of the matter. The issue regarding fair hearing on account of lack of hearing notice can be classified as a constitutional issue calling for this court's intervention.

Whether notice was necessary before the magistrate's court issued exparte warrant to search and investigate petitioners account

49. It is the petitioner's case that, the orders obtained on 15th June 2016 before the magistrate's court was without notice contrary to Section 26, 27 and 28 of ACECA. In response, the 1st respondent answered that the orders were obtained under Section 180 of the Evidence Act and Section 118 of the CPC which provides for exparte orders. I have carefully examined Section 180 of EA and Section 118 of the CPC. Section 180 (1) of the Evidence Act provides.

> **"where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or reasonable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorise a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production for any such banker's book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may taken copies of any relevant entry matter in such banker's book".**

Section 118 of the CPC further provides:

> **"where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be in any place, building, ship, aircraft, vehicle, box or receptacle, the court to a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that they and, if then they be found, to seize it and take it before a court having jurisdiction be dealt with according to law".**

50. Section 26 of ACECA also provides that, if, in the course of investigation into any offence, the commission secretary is satisfied that it could assist or expedite such investigation the secretary may, by notice in writing require a person reasonably suspected of corruption or economic crime to furnish a written statement in relation to any property the subject of investigation. Section 27 of the same Act also empowers the commission to issue similar notice to an associate of the person suspected under Section 26 to furnish similar information.

51. Section 28 of the same Act also empowers the commission to require a person issued with notice under Section 26 and 27 to furnish specified records in his possession for investigation. The point of contention is whether the 1st respondent should have utilised Section 26, 27 and 28 of ACECA instead of Sections 118 of the CPC and section 180 of the Evidence Act.

52. There is no dispute that both statutory provisions are applicable although they serve different purposes or objectives. None of them is unconstitutional or inferior hence any steps undertaken under either provision is lawful. In the instant case, the 1st respondent chose to apply Section 180 of the EA and 118 of CPC. The rationale was that, having received intelligence information that about 95 million withdrawn from Kitui County Government recruitment expenditure had irregularly and illegally been transferred to some individual private accounts, they opted to get exparte orders to freeze the affected accounts among them the petitioner's account for the sake of preservation before completing investigation.

53. It is trite law that, applications commenced under Section 180 of EA and 118 of the CPC are filed exparte before a magistrate or a judge under oath (**See Okiya Omtatah Okoiti and others vs Hon. A.G. and others petition No. 109/2016 consolidated with Pet. No. 8/17.** There is no denial that the orders of 15th June 2016 Machakos Magistrates court were obtained under oath. Was the petitioner then entitled to notice as provided under Section 26, 27 and 28 of ACECA? Under Section 180 and 118 of the E.A. and CPC respectively, issuance of notice is not mandatory.

54. In the case of **Christopher Ndarathi Murangaru vs Kenya Anti-Corruption Commission and Another (Supra)**, the court had this to say:

> **".we pause here to point out that in order to issue a notice under this Section (Section 26), the commission (KACC) and its director must be in possession of some material from which it is reasonably suspected that the person to whom the notice is being issued has been involved in corruption or economic crime. In the absence of reasonable suspicion of involvement in corruption or economic crime, the commission and its director would have no power to issue a notice under Section 26 of the Act".**

55. I do concur with the reasoning above that Section 26 of ACECA envisages a scenario where investigations into commission of an offence have commenced and the commission secretary is satisfied that some information would be necessary to assist or expedite such investigations. In such circumstances, the secretary is empowered to invite anybody reasonably suspected to be involved in any criminal conduct to supply some information. That is to say, some investigation must precede issuance of the notice for some information by the commission secretary.

56. In that context, it is the preceding investigation that informs the operation of Section 26, 27 and 28 of ACECA. Thus, it was not mandatory or necessary for the 1st respondent to have applied Sections 26, 27 & 28 of ACECA. It is within the discretion of the commission

or investigating officer to choose the most suitable or relevant statute to apply in investigating a crime depending on the nature and circumstances of each case. To that extent, the petitioner's contention that Sections 26, 27 and 28 of ACECA should have come first is a misrepresentation of facts.

57. Was notice necessary under Section 180 of the EA and 118 of the CPC? The wording of the two provisions presupposes institution of the application exparte. The logic behind this is to safeguard the integrity and objective of the intended investigation to avoid jeopardising or prejudicing the intended outcome. If notice were to issue in advance to a suspect of a crime under investigation where money involved is in a bank, the result would be obvious in that, the suspect would interfere or tamper with all necessary evidence including concealment or removal or transfer of such monies from the said bank account. It would not serve any purpose if such notice were to be issued and by the time the application is being canvassed the subject of the investigation ceases to exist. It will not be in the interest of justice if such a scenario were to arise especially where huge sums of money is involved and worse still public funds. In this case money was admittedly transferred to the petitioner's account under unclear circumstances which is not denied hence reasonable suspicion that a crime had been or was about to be committed.

58. In the cases of **Ombati Omwansa t/a Nchogu and Nyasimi Advocates vs Director of Criminal Investigations Department Emmanuel Kanyungu and 3 others eKLR (Supra) and Mape Building and General Engineering (Supra) and Humphrey Oswago(supra)**, it was held that, it is logical and understandable why search warrants and seizure orders are issued exparte. Advance notice will definitely jeopardise or prejudice incriminating evidence.

59. Having held as above, the issue of the petitioner having been condemned unheard under Article 50 of the constitution cannot apply as the orders in question were lawfully obtained. It would be a fallacy to generalize all exparte orders as being unconstitutional yet the petitioner did obtain exparte orders when they applied for interim orders in their application dated 21st March 2016 pending hearing and determination of the petition herein. At this stage proof of a case beyond any reasonable doubt is immaterial.

60. The petitioners had an opportunity however to challenge those orders by way of review before the trial court immediately the orders came to their knowledge. By the time the exparte orders were issued, the trial had not commenced for the petitioner to claim violation of their right to be heard. They actually moved to this court 6 days after the impugned orders were issued. They did not want to be heard by the same court that issued the same orders.

61. I must however add that for good order and fair practice it is necessary although not expressly provided for in Section 180 of the Evidence Act or section 118 of the CPC that upon serving an exparte order, the offended party or parties, be served with the application as well within reasonable time so that they be made aware of the orders and circumstances under which they are issued and where necessary file a response to the application to challenge the orders. Exparte orders under Section 180 of the EA and Section 118 of the CPC should not be open ended or indefinite. They must be issued for a short period so that the victim of the said order is not inconvenienced in his or her day to day operations especially when involving a frozen account. (**See Samuel Watatua and Another vs R CA Nrb. Cr. Appeal No. 2/2013)**.

62. However, in the instant case, I do not see any wrong committed in the 1st respondent obtaining the impugned order exparte while executing their statutory mandate of investigation and search pursuant to Sections 13 (1) (l) EACC and Section 23 (1) of ACECA.

Reasonable exercise of Administrative Actions by the 1st respondent

63. Having held that the 1st respondent properly executed their statutory mandate in obtaining the orders exparte, the issue of abuse of office and failure to exercise proper or reasonable Administrative Actions against the petitioners pursuant to Article 47 of the Constitution and Section 7 of the Fair Administrative Actions Act does not arise.

64. It is incumbent upon the petitioner to prove with particularity which administrative action was not complied with by the respondents to warrant an order for certiorari or prohibition. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. see **Commission of civil unions vs Minister for Service (1985) AC 2** and **Pastoli vs Kabale District Local Government Council and Others (2008) 2 EA 300**.

65. From the above stated reasons, the petitioner has not specifically identified the offending administrative actions taken against them other than implementation of the law. I do not find the claim of unreasonable and unfair administrative action as an issue in this case as the 1st respondent did what the law required them to do. That claim is therefore unfounded and the same is dismissed.

Whether the prayers sought are overtaken by events

66. It is the petitioner's claim that the money received in their account from Central Bank by error having been refunded, there is nothing to investigate further. In response, the 1st respondent argued that the refund of the money does not mean that no offence was committed. Further, that the money having been lying in the petitioner's account for one year, it must have attracted some interest which they can as well pursue for recovery.

67. I do agree with the respondents that, the return of the money which in the first place was paid in suspicious circumstances does not mark the end of investigation. Crucial to the investigation is the need to verify and ascertain the motive behind the transfer of public money to private account and under what circumstances was the payment made, for whose benefit and then returned under whose instructions. If the investigation reveals preparation of documentations for payment of non-existing and undeserving payees or services, then there will be need to prosecute or sue those responsible. That can only be done when full investigation is made by confirming whether indeed that money was received in the petitioners' account, who paid and under whose instructions and then the refund. There is need in ascertaining that chain of events. To that extent, that prayer is dismissed. However, the order freezing accounts is not necessary now that the money subject of the investigations has been refunded hence no risk of concealment.

68. Regarding the issue of privacy to private property, the applicant argued that, an order to search and investigate their account amounts to intrusion into private property. The view taken by the respondents is that privacy is not absolute under Article 24 and 25 of the Constitution. Indeed the right to privacy is limited. It does not fall in the category of unlimited rights under Article 25 of the Constitution. The right to privacy must be balanced against other people's rights and most importantly public interest in this case misappropriation of public funds. The right to privacy cannot be used as a panacea to circumvent a legal process intended to unearth a crime committed by a person or his associates being investigated. The same applies to alleged privileged communication which in this case does not apply as there is already disclosure by the petitioners that they received the money that was being investigated and that they have even refunded the same.

69. If courts were to absolutely protect such rights, criminals would with impunity continue to commit crimes or steal money, hide the same, run to an advocate's law firm and then plead the right to privacy and privileged communication. Equally, that ground has no basis in the circumstances and the same is dismissed.

Whether there was abuse of office

70. According to the petitioner, the orders sought in Misc. Cr. application No. 6/16 were previously challenged and reviewed in Kitui Cr. Misc. No. 270/15. Although the respondents did not submit on this issue in their submissions, this is an issue of resjudicata which ought to be raised before the court seized of Cr. Misc. Application No. 6/16 machakos law courts.

Whether the petitioner ought to have filed an appeal or revision

71. It is the respondent's contention that the petitioner ought to have exercised the right of appeal or revision first before filing a constitutional reference. Several authorities were quoted in support of that proposition among them **Alphonse Mwangemi Munga and 10 others vs African Safaris Club (2002) eKLR** and **Rashid Odhiambo Alloggoh and 245 Others vs Haco Industries CA 170/10** where the court stated that:

> **"violation of fundamental right or threat to violation is not a licence to file constitutional application even where there is no constitutional issues arising and where there are adequate remedies provided in other laws to cover such situations''**

72. Indeed, after weighing the issues advanced in this petition, one would not at a glance see any constitutional violations directed against the petitioner to warrant filing a constitutional petition. At least, a review before the trial court or revision before the high court under Section 362 of CPC would have been more ideal. This does not mean that constitutional remedy is completely shut out where there is proof. In the instant case, there is no proof of any injury suffered, infringement of or threat to violation of any rights capable of filing a constitutional petition. There is direct and clear redress provided in our statutes in particular Section 362 of the CPC for revision, Section 354 CPC for appeal or order 45 of the Civil Procedure rules for review.

73. I however note the sentiments of the respondents that since there is no proof of any violation or threat to infringe on the petitioners rights, revision or review were better options to avoid clogging the High Court with unnecessary constitutional petitions.

74. Having found that there is no proof of any violation or threat to the petitioners' rights, the issue of award of compensation or damages does not arise. No wonder, no specific submission was made on the damages to be awarded. Since the prayer of certiorari or prohibition have not been sufficiently proved, it is my finding that the petition herein is unmeritorious hence the same is dismissed.

Conclusion

75. Having found that the petition herein lacks merit in all aspects, the prayers of certiorari and prohibition are hereby disallowed and the interim exparte stay orders issued on 21st March 2016 set aside. The 1st respondent shall be at liberty to proceed with execution of the orders issued in Machakos PM's court Misc. Criminal application No. 6/2016 subject to serving the said application upon the petitioners (respondents) within 14 days from the date of delivery of this Judgement to enable them file a response if they wish.

76. Regarding costs, I direct that each party bears its own costs.

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 10TH DAY OF MAY, 2019.

J.N. ONYIEGO

JUDGE