



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

PETITION NO. 109 OF 2016

Consolidated with

ACEC PETITION NO. 8 OF 2017

(Formerly Constitutional Petition No. 78 of 2016)

IN THE MATTER OF ARTICLES 1, 2, 3, 4 (2), 10, 19, 20, 21, 22, 23, 24, 27, 43, 47, 48, 49,50 (1),79,93 (2), 157 (4) & (11),159, 165, 201 (D), 243, 244, 245 (2) (A) & (4) (A) & (B), 247, 252 (A), 258 AND 259 (1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 47, AND THE ALLEGED VIOLATION OF THE VALUES, PRINCIPLES, PROCEDURES AND PROCESSES OF GOVERNANCE IN ARTICLES 1, 2, 3 (1), 4 (2), 10, 79, 93 (2) 157 (4) & (11), 201 (D),245 (2) (A) & (4) (A) & (B),AND 259 (1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED VIOLATION OF SECTIONS 6 (10, 8 (1), 24 AND 35 OF THE NATIONAL POLICE SERVICE ACT 2011

IN THE MATTER OF CONSTITUTIONAL VALIDITY OF SECTIONS 23, 24, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56B, 56C, 72 AND 73 OF THE ANTI- CORRUPTION AND ECONOMIC CRIMES ACT (CAP 65), AND SECTION 11 (D) & (K) OF THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT, 2011

IN THE MATTER OF THE LAW ENFORCEMENT MANDATE OF NATIONAL POLICE SERVICE ND THE CONSTITUTIONAL VALIDITY OF THE ETHICS AND ANTI-CORRUPTION COMMISSION USURPING AND/OR DUPLICATING POLICE WORK BY CONDUCTING CRIMINAL INVESTIGATIONS

BETWEEN

OKIYA OMTATAH OKOITL.....1STPETITIONER

NYAKINA WYCLIFE GISEBE.....2NDPETITIONER

DR. EVANS ODHIAMBO KIDERO.....3RDPETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1STRESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2NDRESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION..3RDRESPONDENT

NATIONAL POLICE SERVICE.....4THRESPONDENT

JUDGMENT

Introduction

1. This judgment disposes two consolidated Petitions, namely; Petition No. **109** of 2016 (hereinafter referred to as the first Petition) and No. ACEC No. **8** of 2017 (formerly Pet. No. **78** of 2017) (herein after referred to as the second Petition).
2. The first Petition was instituted by the first and second Petitioners, who are members of the Kenya for justice and Development Trust, a trust incorporated in Kenya whose objects include promoting democratic governance, economic development and prosperity.
3. The second Petition was instituted by the third petitioner on his own behalf and on behalf of the Evans Kidero Foundation against the first three Respondents and the Chief Magistrate, Makadara Law Courts.
4. The first Respondent is the Honorable Attorney General, the Principal government legal adviser and representative pursuant to Article **156** of the Constitution. He represents the national government in court or in any legal proceedings to which the national government is a party, other than criminal proceedings.
5. The second Respondent is the Director of Public Prosecutions established under Article **157** of the Constitution with constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.[\[1\]](#)
6. The third Respondent is the Ethics and Anti-Corruption Commission, a constitutional Commission established pursuant to Article **79** of the Constitution, with the status and powers of a commission under Chapter Fifteen of the Constitution, for purposes of ensuring compliance with, and enforcement of, the provisions of Chapter Six of the Constitution.
7. The fourth Respondent is the National Police Service established under Article **243** of the Constitution and Section **4** of the National Police Service Act.[\[2\]](#) The fifth Respondent is the Chief Magistrates Court, Makadara, Nairobi.
8. The point of intersection between the two Petitions is that they both challenge the constitutionality of some provisions of the Anti-Corruption and Economic Crimes Act[\[3\]](#) (herein after referred to as "**ACEC Act**") and the Ethics and Anti-Corruption Commission Act[\[4\]](#) (hereinafter referred to as "**EACC Act**") to the extent that the impugned provisions confer power to Ethics and Ant-Corruption Commission (**EACC**) to investigate corruption cases. The Petitioners argument is that the power to investigate corruption cases is constitutionally vested upon the National Police Service and the DPP. The Petitioners seek declarations that the EACC's mandate is limited to enforcing the provisions of Chapter Six of the Constitution and does not extend to investigating offences other than those specified under Chapter Six of the Constitution. Notwithstanding the similarity of the two Petitions, we find it appropriate to summarize the Petitioners cases in the two Petitions separately.

The first Petition

9. The first and Second Petitioners challenge the constitutionality of the provisions of Sections **23, 24, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56b, 56C, 72** and **73** of the ACEC Act[\[5\]](#) and sections **11 (d) & (k)** of the EACC Act[\[6\]](#) to the extent that the said provisions confer the EACC power to undertake criminal investigations which functions they aver are vested by the Constitution to the National Police Service and the Director of Public Prosecutions.
10. They aver that the role of the EACC must be understood within the context of Article **79** of the Constitution and that the EACC was not designed to replace or supplant the National Police Service but to help it to build the capacity including setting up of systems and mechanisms to better its functions. They aver that under Article **79** of the Constitution, the mandate of the EACC is limited to human resource function of ensuring compliance with, and enforcement of, the provisions of Chapter Six, which is a Code of Conduct for State officers and other public officials and has no role in enforcement of criminal law, a function which under Article **157 (4)** and **245 (4) (a) & (b)** of the Constitution (the enforcement of Criminal law, including conducting criminal investigations) is the exclusive mandate of the National Police Service, hence the EACC acts *ultra vires* the Constitution whenever it conducts criminal investigations.
11. They urge the court to find that Criminal Investigations are the exclusive mandate of the National Police Service, and that the EACC should stick to its mandate of enforcing the Code of Conduct in Chapter Six. They also aver that under Article **252(1)(a)** of the Constitution, the Commission may receive and investigate complaints about non-compliance with the code of conduct in Chapter Six, but where a crime is suspected or has been committed, it must refer the issue to the National Police Service for Criminal investigations. They also aver that by directing EACC to conduct Criminal Investigations, the DPP contravenes Article **157(11)** of the Constitution.
12. As a consequence, they pray for the following reliefs:-

a. A declaration be and is hereby issued that under the Constitution the enforcement of criminal law is the exclusive mandate of the National Police Service and the DPP.

b. A Declaration be and is hereby issued that the mandate given to the EACC in Article 79 as read with 252 is to ensure compliance

with, and enforcement of, the provisions of chapter six does not empower the commission to enforce criminal law, including conducting criminal investigations

c. A declaration be and is hereby issued that parliament violated Article 93(2) of the Constitution by enacting Sections 23, 24, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56B, 56C, 72 and 73 of the Anti-Corruption and Economic crimes Act (Cap 65- Revised Edition 2014[2012], and subsections 11(d) and (k) of the Ethics and Anti-Corruption Commission Act 2011.

d. A declaration be and is hereby issued that sections 23, 24, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56B, 56C, 72 and 73 of the Anti-Corruption and Economic Crimes Act (Cap 65- Revised Edition 2014 [2012], and subsections 11(d) and (k) of the Ethics and Anti-Corruption Act 2011 are unconstitutional and, therefore null and void and of no purpose in law.

e. A declaration be and is hereby issued that the EACC should hand over to the Directorate of criminal investigations all matters of criminal law enforcement, including criminal investigations, which it is handling.

f. A Declaration be and is hereby issued that the EACC should hand over to the National Police Service the assets it has established for conducting criminal investigations.

g. A declaration be and is hereby issued that the national police service should reclaim its exclusive mandate of investigating all crime.

h. The Honourable Court be pleased to issue and hereby issues a mandatory order ordering the EACC to hand over to the National Police Service the assets it has established for conducting criminal investigations

i. The Honourable Courts do issue and hereby issues a mandatory ordering the EACC to hand over to the National Police Service the assets it has established for conducting criminal investigations.

j. The Honourable Court do issue and hereby issues a mandatory order ordering the National police service to reclaim its exclusive mandate of investigating all crime.

k. The honourable court be pleased to issue any other or further remedy that the honourable court shall deem fit to grant in the interests of justice in the circumstances of this petition.

l. The Honourable Court be pleased to issue an order ordering the 2nd, 3rd and 4th Respondents to bear the costs of this petition for being the parties directly responsible, through actions and/or omissions, for the violation of the constitution and the law which necessitated the petitioners to seek remedy from the Honourable court.

The Second Petition

13. The third Petitioner avers that he served as the Managing Director of Mumias Sugar Company Ltd. between the years 2003 and 2012 and that the EACC summoned him regarding investigations on the said company. He avers that he appeared before it and furnished its officers with all the necessary information they sought. He also avers that EACC summoned him regarding a Memorandum of Understanding signed between the Nairobi City County Government and a Chinese firm and he provided all the required information.

14. He further avers that on 22nd February 2016, EACC, through a one Inspector Mulki Abdu Umar filed Milimani Chief Magistrates Courts in Misc. Criminal Application No. 443 of 2016, *EACC vs Evans Odhiambo Kidero & Another* seeking warrants to investigate his accounts, search his houses and or premises for information required for the purposes of an alleged investigation, but the Court declined to allow it. He states that his advocate perused the court file but found that the said application and supporting affidavit were missing.

15. He further states that on 24th February 2016, EACC through a different officer filed Misc Criminal Application Nos. 113, 114, 115 and 116 of 2016, *EACC vs Evans Odhiambo Kidero & 2 Others* at the Chief Magistrates Court, Makadara, seeking warrants to investigate his account Numbers Standard Chartered Bank A/C Nos. 0150160208600; 010016208600; USD A/C No. 8700560208600 and Sterling Pound A/C No. 2851260208600; Commercial Bank USD A/C No. 6722130028 as well as Evans Kidero Foundation Family Bank A/C No. 046000018545. He states that the warrants were to inspect and lift copies of statements, account opening documents, original cheques, mandate cards, bankers books and other relevant materials in respect of his Bank Accounts and that the application was premised on allegations that EACC was investigating his alleged fraudulent transfer of public funds to his personal accounts and his alleged involvement in corrupt practices and or economic crimes. He avers that he was neither given notice of the allegations nor was he asked to provide documents or records regarding his aforesaid accounts.

16. Mr. Kidero further avers that on 24th February 2016, the court issued warrants permitting EACC to investigate his above accounts, and failed to disclose to the court that its previous similar application at the Chief Magistrates Court Milimani was refused.

17. He avers that EACC's constitutional mandate is limited to enforcing the provisions of Chapter Six of the Constitution, and it has no powers to investigate offences other than those specified under Chapter Six of the Constitution. He also states that the investigative power donated by Article 252(1)(a) to constitutional commissions can only be pursuant to their primary mandate and not otherwise and that under Article 244(b), the power to conduct investigations, prevent corruption and promote transparency and accountability is expressly vested in the National Police Service and not EACC, hence Section 23 of the Anti-Corruption and Economic Crimes Act[7] that purports to vest in EACC the investigative powers and privileges is unconstitutional as it contravenes Articles 79, 244 and 245 of the Constitution.

18. Consequently, he further avers that EACC acted *ultra vires* its legal mandate in purporting to undertake the said investigations and applying for the said warrants. He also states that Article 47 (1) of the Constitution read with Section 4 (1) & (2) of the Fair Administrative Action Act[8] entitles him to a fundamental and inalienable right to a lawful and procedurally fair administrative action, while Article 47 (2) of the Constitution enjoins EACC to furnish him with written reasons for their action where the administrative actions affect or threaten to affect his rights or fundamental freedoms.

19. He further avers that Sections 27, 28 (1)(2)(3)(7) of the ACEC Act[9] as read with Section 4 (3) (a) (b) (d) & (g) of the Fair Administrative Action Act[10] enjoin EACC to issue a notice to him or any of his alleged associates of their application for an order to access his bank record and afford him an opportunity to be heard before the warrants could be issued. Further, he avers that Article 50 (1) of the Constitution as read with Section 4(4) of the Fair Administrative Action Act[11] entitles him to a fair hearing in every dispute that requires to be resolved by application of the law. Similarly, he avers that by obtaining the aforesaid warrants without notice to him, EACC patently breached his right to a fair administrative action decreed and protected under Article 47 of the Constitution and the provisions of Sections 3, 4 (1), (2),(3) (a) (b) (d) & (g), (4),6, 7 (1) (a) & (2) of the Fair Administrative Action Act[12] and his right to a fair hearing and access to justice decreed and protected under Article 48 and 50 (1) of the Constitution.

20. He also avers that the Hon. A.G.'s failure to advise EACC on the lawful procedure for issuance of search warrants or investigate accounts, is a breach of his mandatory constitutional obligations to advise state organs.[13] Also, he stated that by removing pleadings from the Court file,[14] EACC denied him access to justice and a violation or threat to his rights under Articles 31 and 40 of the Constitution.

21. As a consequence of the foregoing, the third Petitioner avers that he has suffered and continues to suffer loss and prays for the following reliefs:-

a. **A declaration** that Section 23 of the Anti-corruption and Economic Crimes Act is unconstitutional as it contravenes the provisions of Articles 79, 244 and 245 of the Constitution.

b. **A declaration** that under the Constitution of Kenya, 2010, the 1st Respondent's mandate is limited to enforcing the provisions of Chapter Six of the Constitution and does not extend to investigating offences other than those specified under Chapter Six of the Constitution of Kenya, 2010.

c. **A declaration** that the 1st Respondent acted outside its constitutional mandate in purporting to undertake investigations on the Petitioner herein and in applying to the 3rd Respondent to obtain warrants in the Chief Magistrates Court at Makadara in Misc Crim. Application Nos. 113, 114, 115 and 116 of 2016, *Ethics and Anti-Corruption Commission vs Evans Odhiambo Kidero & 2 Others*.

d. **A declaration** that the warrants to investigate account Nos. Standard Chartered Bank A/C No. 0150160208600; 0100160208600; USD A/C No. 8700560208600 and Sterling Pound A/c No. 2851260208600; Commercial Bank USD A/C No. 6722130028 as well as Evans Kidero Foundation Family Bank A/C No. 046000018545 all dated 24th February and given to Dennis Joseck Mare in Makadara Chief Magistrate Miscellaneous Criminal Case Nos. 113, 114, 115 and 116 of 2016: *Ethics and Anti-Corruption Commission versus Evans Odhiambo Kidero & 2 Others*, breached the Petitioner's rights and fundamental freedoms under the provisions of Articles 31, 40, 47(1)&(2), 48 and 50(1) of the Constitution of Kenya, 2010 hence void for all intents and purposes.

e. This Honourable Court be pleased to issue an Order of Certiorari to remove into the Honourable Court and quash warrants to investigate account Nos. Standard Chartered Bank A/C No. 0150160208600; 0100160208600; USD A/C No. 8700560208600 and Sterling Pound A/c No. 2851260208600; Commercial Bank USD A/C No. 6722130028 as well as Evans Kidero Foundation Family Bank A/C No. 046000018545 all dated 24th February and given to Dennis Joseck Mare in Makadara Chief Magistrate Miscellaneous Criminal Case Nos. 113, 114, 115 and 116 of 2016: *Ethics and Anti-Corruption Commission vs Evans Odhiambo Kidero & 2 Others*.

f. This Honourable Court be pleased to issue an Order of Judicial Review by way of an order of prohibition directed to the Ethics and Anti-Corruption Commission neither by itself, agents and or associates from obtaining any warrant or Order from any Court against or lifting copies of account opening documents, statements, cheques, deposit slips, telegraphic money transfers, client instructions, bankers books and or any other information in respect of Account Numbers Standard Chartered Bank A/C No. 0150160208600; 0100160208600; USD A/C No. 8700560208600 and Sterling Pound A/c No. 2851260208600; Commercial Bank USD A/C No. 6722130028 as well as Evans Kidero Foundation Family Bank A/C No. 046000018545 or any other account held by the Petitioner without giving the Petitioner Notice and due process as protected and decreed by Articles 47, 48 and 50(1) of the Constitution and Sections 23-28 of the Anti-Corruption and Economic Crimes Act, 2003.

g. Exemplary damages against the 1st Respondent herein.

h. Costs of and incidental to this Petition; and

i. Any other order that this Honourable court deems fit and just to grant in the circumstances.

The First Respondents' grounds of opposition

22. The Hon. Attorney General filed grounds of opposition to the consolidated Petitions stating that:- (i) the impugned sections enjoy a general presumption of constitutionality; (ii) the Petitioners have failed to demonstrate how the impugned sections violate any provisions of the Constitution; (iii) the Petitioners have not pleaded with specificity how their constitutional rights have been violated; (iv) EACC cannot be barred from lawfully discharging its mandate; (v) the judgment in Pet.122 of 2015 cannot operate as a bar to future issuance of similar

warrants; (v) Proceedings in Magistrates court should not be arbitrarily expunged where they were properly undertaken; and (v) the consolidated Petitions are unmeritorious.

23. The Hon. A.G. filed a preliminary objection stating that by challenging the constitutionality of the said sections, the petitioners are in fact challenging Article 252(1)(a) of the Constitution which grants the impugned investigative powers, and by dint of Article 2 (3) of the Constitution, the validity of Article 252(1)(a) of the Constitution, which grants investigative powers to EACC through the impugned sections is not subject to challenge by or before any court or State organ.

The Second Respondents' grounds of opposition

24. The DPP filed grounds of opposition to the first Petition stating:- (a) that the Petition is intended to curtail the constitutional functions and mandatory duties of EACC; (b) that the second Respondents' mandate stems from Article 157 of the Constitution; (c) that EACC has powers to investigate under Article 252 (1) (a) & (d) of the Constitution, hence the Petitioners seek to challenge the validity of the said Article, (d) that the impugned sections are constitutional and in tandem with Article 79 of the Constitution; (e) that EACC and the DPP cannot be barred from lawfully performing their functions; (f) that the alleged violation of constitutional rights has not been demonstrated with precision; (g) that the Petition offends the doctrine of presumption of constitutionality of acts of Parliament.

25. In opposition to the second Petition, the DPP filed grounds stating that the impugned warrants were lawfully issued pursuant to Section 180 of the Evidence Act^[15] as read with Section 23 of the ACEC Act;^[16] that the Petitioners rights are not absolute; that the purpose of search warrants is to protect a person from an illegal search; and, that there was a reasonable basis upon which the investigations were sought and in any event the application for search does not require a prior notice.

EACC's Replying Affidavit to the first Petition

26. Halakhe Waqo, the Chief Executive Officer of EACC swore the Replying Affidavit dated 13th January 2017. He avers that pursuant to Article 79 of the Constitution, Parliament enacted legislation establishing the EACC, and whereas Chapter six of the Constitution deals with leadership and integrity of State Officers, EACC is mandated to deal with both matters of ethics and it is also an Anti-Corruption Commission.

27. He averred that pursuant to Article 252 of the Constitution, EACC has powers to conduct investigations either on its own initiative or on a complaint made by a member of the public in addition to the functions listed under Section 11 of the Act. In particular, he avers, EACC is mandated to investigate cases of corruption and economic crimes.

28. Mr. Waqo averred and that Sections 23, 24, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, of the Act relate to conduct of investigations by the EACC in respect of corruption and economic crimes, hence the sections are constitutional. He averred that Section 56B permits out of court settlements in civil suits, hence the same is not unconstitutional and that sections 72 and 73 of the act are in conformity with the mandate and functions of EACC, hence they are constitutional.

29. He also avers that other constitutional commissions such as the Kenya National Human Rights Commission and the National Land Commission have powers to investigate and stated that this Petition seeks to undermine the fight against corruption.

EACC's Reply to the second Petition

30. M/s. Mulki Abdi Umar, an advocate and an investigator with EACC and a member of the team that commenced the impugned investigations, in response to the third Petitioners original Petition, swore the Replying Affidavit filed on 14th March 2016. She averred that:- (i) EACC is empowered in law to conduct investigations and that it received several allegations of corruption and or unethical conduct against the third Petitioner among them reports about impropriety regarding an MOU signed between the Nairobi County Government and a Chinese firm details of which the third Petitioner is aware; (ii) that DPP instructed EACC to investigate the Evans Kidero Centre associated with the third Petitioner on allegations that the third Petitioner bribed a Supreme Court Judge to influence the bench to decide in his favour in an appeal involving the Nairobi Gubernatorial Elections; (iii) that EACC received information that the third Petitioner fraudulently transferred public funds to his personal accounts acting in concert with others at Mumias Sugar Co Ltd and Nairobi City County; (iv) that EACC had information to the effect the third Petitioner received millions of shillings in bribes from sugar traders and dealers while serving as the Managing Director of Mumias Sugar Co Ltd.

31. She also averred that the purpose of investigating the accounts was to establish the veracity of the said allegations. Further, she averred that preliminary investigations revealed that the third Petitioner had received tens of millions of shillings into his several bank accounts held in different currencies and that he acquired several assets in Nairobi and elsewhere during his tenure as the Managing Director of Mumias Company and Governor Nairobi City County. She stated that the warrants were properly obtained and that the bank statements for account number 06800004475 reflected large cash deposits on a regular basis.

32. She averred that the initial investigation for warrants was rejected on grounds that it did not specify the time frame it covered, and its refusal was not a bar to filing another one. She denied removing papers from the court file and averred that notwithstanding that the application was made *ex parte*, the same day the Petitioners advocate called EACC asking for details about the application. Further, she averred that there is no legal requirement that such an application be served and that the right to privacy is not absolute. She denied violating the third Petitioners Rights under Article 50 of the Constitution and averred that EACC was justified in taking the action it did.

33. In response to the same Petition is the further Affidavit of Dennis Kosek Mare, an advocate and a Forensic Investigator with EACC and a member of the team that commenced the impugned investigations. He avers that he received instructions from M/s Mulki Abdi Umar to investigate several bank accounts among them the Petitioners accounts held at the Standard Chartered Bank and Commercial Bank of Africa. He states that upon learning that the Petitioners counsel got wind of the application for warrants which was *ex parte*, they opted to

prepare fresh warrants and filed the same at Makadara Court.

34. In response to the Amended third Petitioners Amended Petition, **Mr. Charles Ayoo**, an advocate of the High Court of Kenya employed by the EACC and an investigator appointed under section 23 of the Anti-Corruption and Economic Crimes Act avers that Article 79 enjoined Parliament to enact legislation to establish an independent Ethics and Anti-Corruption Commission which was to have a status and powers of a commission under Chapter 15 of the Constitution. He states that EACC is established pursuant to provisions of Article 79 of the Constitution, and it is the successor to the defunct Kenya Anti-Corruption Commission which had been established under the ACEC Act. He also averred that investigating economic crimes was one of the functions of the defunct Kenya Anti-Corruption Commission under the repealed Act.

35. He also avers that Article 252 (1) (d) of the Constitution provides each holder of an independent office may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by the Constitution.

36. He further avers that the functions of EACC to investigate corruption and economic crimes to facilitate criminal prosecution and or civil recovery are prescribed by legislation, namely sections 11(1)(d) and (k) of the EACC Act as contemplated under Article 252(1)(d) of the Constitution, hence, the impugned provisions have a constitutional underpinning. He averred Article 244 of the Constitution has not given an exclusive mandate to the National Police Service to prevent corruption and promote transparency and accountability. Further, he averred, that the second Petitioner has not demonstrated unconstitutionality of Section 23 (3) of the ACEC Act and in any event he argued, the said powers are limited to enabling the EACC to perform its constitutional mandate. He also argued, that several pieces of legislation which are complimentary are enforced by different law enforcement agencies among them the Anti-Money Laundering Act, The EACC Act, the Penal Code, the ACEC Act, the Income Tax Act and the National Police Service Commission Act, hence, in recognition of the overlapping role, section 11 (3) of the EACC Act empowers the EACC to co-operate and collaborate with other state agencies.

37. **Mr. Ayoo** also averred that the guiding principles of leadership and integrity are set out under Article 73 (2) (b) of the Constitution, hence, the investigations giving rise to this Petition are within the legal mandate of the EACC. He averred that the Petitioners rights under Articles 31 and 41 are not absolute; and that access to the accounts was legal; and that the warrants were issued by a competent court. Also, he averred that in applying Article 47, a distinction must be made between an administrative decision and a criminal investigation. He also averred that it is not a legal requirement that applications for search warrants be heard *inter partes* and that Section 118 of the Evidence Act^[17] is aimed at granting the investigator access without giving the suspect an opportunity to conceal or destroy the evidence. Further, he states that a person dissatisfied with the issuance of the warrant can apply for revision.

First & Second Petitioners' Further Affidavit

38. **Mr. Okiya Omtata Okoiti** in a further Affidavit filed on 16th October 2017 avers that the EACC anticipated under Article 79 must operate within the confines of Chapter Six and Chapter Fifteen of the Constitution.

Issues for determination

39. Upon analyzing the opposing facts presented by the parties in the two Petitions, we find that the following issues fall for determination, namely; (a) *Whether or not the impugned provisions are unconstitutional to the extent that they mandate the EACC to investigate corruption cases;* (b) *Whether or not EACC was enjoined to give notice to the third Petitioner prior to applying for the search warrants, and/or whether EACC violated his rights under Articles 31, 40, 47, 48 and 50 (1) of the Constitution.*

40. Determining the above issues inevitably involves interpreting the relevant constitutional and statutory provisions. Accordingly, we find it imperative to briefly outline the governing principles of constitutional and statutory interpretation.

Principles governing Constitutional and Statutory Interpretation

41. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. The 'inevitable point of departure is the language of the provision itself,' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.^[18]

42. Article 259 of the Constitution obliges courts to promote 'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance. This approach has been described as a mandatory constitutional canon of statutory and Constitutional interpretation. That the Court has a duty to adopt an interpretation that conforms to Article 259 is mandatory.

43. Constitutional provisions must be construed purposively and in a contextual manner and that courts are simultaneously constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained"^[19] but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to the enactment of a particular provision.^[20]

44. It is by now trite that the EACC Act ^[21] having been enacted pursuant to Article 79 of the Constitution must be understood purposively because it is umbilically linked to the Constitution. As we do so, we must seek to promote the spirit, purport and objects of the Constitution. We must prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional meanings and guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the Constitution as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the

ordinary meaning of the provision to be construed is clear and unambiguous. That the social and historical background of a legislation is important in seeking to identify the mischief sought to be remedied was appreciated in *Commissioner of Income Tax vs. Menon*^[22] where it was held that one of the canons of statutory construction that a court may look into is the historical setting of an Act, to ascertain the problem with which the Act in question has been designed to deal. It was the Supreme Court's view in *Matter of the Kenya National Human Rights Commission*^[23], at paragraph 26 that:-

“...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.”

45. Therefore, in construing the provisions prescribing the constitutional and statutory mandate of the EACC and the constitutionality or otherwise of the impugned provisions, we are obliged not only to avoid an interpretation that clashes with the constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance. We are also obliged to be guided by the provisions of Article 159 (e) which requires us to promote and protect the purposes and principles of the Constitution.

46. It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.^[24]

47. It is thus clear that it is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article 259.

48. Courts have on numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual which is certain to subvert the societal goals and endanger the public good.

49. Words, spoken or written, are the means of communication. Where they are possible of giving one and only one meaning there is no problem. But where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out. The Legislature, after enacting statutes becomes *functus officio* so far as those statutes are concerned. It is not their function to interpret the statutes. Legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.

50. Therefore, a court must try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but in our view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

51. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself.

52. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature.

53. It is trite law that in interpreting the provisions of a statute the Court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.^[25]

54. The Supreme Court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others*^[26] observed that:-

“Interpretation must depend on the text and the context. They are the bases 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. That interpretation is best which makes the textual interpretation match the contextual.”

55. The touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.^[27] To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.^[28] Courts generally assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean.^[29] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In other words as was appreciated by the Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others*^[30] while citing with approval *The Discipline of Law* 1979 London Butterworth at page 12 by **Lord Denning**:

“The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”

56. It is an acceptable and established principle of statutory interpretation that the intention of the drafters of the Constitution or legislation can be gathered from the history leading to the enactment of the Constitution. This position was also appreciated by the Supreme Court of Kenya in *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*^[31] cited below.

57. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

Whether or not the impugned provisions are unconstitutional to the extent that they mandate the EACC to investigate corruption cases

58. Citing Article 79, 252 (1) and 93 (2) of the Constitution, the first and second Petitioners submitted that the entity Parliament was required to create pursuant to the above provisions is an Ethics and Anti-Corruption Commission, not an Anti-Corruption and Crime Commission and that the corruption to be addressed is "ethical corruption" and not "criminal corruption." They submitted that Chapter Six of the Constitution is a code of conduct for State officers and other public officials, and it does not at all affect private citizens. It has absolutely nothing to do with the active enforcement of criminal law, and no provisions of Chapter Six involve the enforcement of criminal law. They argued that under Chapter Six of the Constitution, the EACC's mandate does not include criminal law enforcement.

59. Further they submitted that under Articles 157(4) and 245(4)(a)&(b) of the Constitution, the enforcement of criminal law, including conducting criminal investigations, is the exclusive mandate of the National Police Service. Hence, the EACC acts *ultra vires* the Constitution whenever it conducts criminal investigations. They submitted that enforcing Chapter Six does not require criminal investigations, and the investigations referred to in Article 252 of the Constitution are civil investigations not criminal investigations. They submitted that Parliament cannot by legislation assign any commission functions outside the prescriptions of the Constitution. They argued, Parliament acted *ultra vires* by empowering the 3rd respondent to usurp the powers and functions of the National Police Service by mandating EACC to conduct criminal investigations contrary to the Constitution and the National Police Service Act.^[32]

60. They argued that Parliament violated Article 93(2) of the Constitution by enacting Sections 23, 24, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56B, 56C, 72, and 73 of the ACEC Act, and Section 11(d) & (k) of the EACC Act which they argued created an "anti-corruption and crime commission" and not an "ethics and anti-corruption commission", hence, the above sections are unconstitutional and, therefore, invalid, null and void and of no purpose in law.

61. They urged the court to find that the Court of Appeal findings in *Boniface Katana Kalaveri vs Ethics and Anti-Corruption Commission & Another*,^[33] that EACC's mandate was greatly enhanced by the enactment of the 2010 Constitution and by formulation of an Act of parliament by dint of Article 79 of the Constitution was made *per in curiam* by failing to appreciate clear provisions of the Constitution. Further, they argued that the above decision is distinguishable as it concerned the recovery of corruptly acquired assets, and does not expressly challenge the capacity of the 3rd respondent to conduct criminal investigations.

62. They also invited the court to distinguish *Petition No. 230 of 2015 consolidated with Petition No. 305 of 2015, Eng. Michael Sistu Mwaura Kamau and 12 Others v Ethics & Anti-Corruption Commission and 4 Others* and *Nairobi Anti-Corruption Case No. 13 of 2015, Republic vs Charity Kaluki Ngilu & 9 others* wherein EACC was basically a State witness.

63. **Mr. Ogosso** for the A.G. submitted that there is a general presumption of constitutional validity of legislation until the contrary is proved and the burden rests on the person asserting to rebut this presumption.^[34] He cited *Mark Ngaywa vs Minister of State for Internal Security and Provincial Administration and Another*,^[35] where the court followed *Bishop Joseph Kimani and Others -vs- Attorney General, Committee of Experts and Another* ^[36] where the court stated:- "...legislation should only be impugned ... only where it has been proven to be unconstitutional, null and void." He also cited *Susan Wambui Kaguru & Others v Attorney General Another*^[37] where the court stated that "...every statute passed by the legislature enjoys a presumption of legality... The question for the court is to consider whether these laws are within the four corners of the Constitution..."

64. He urged the Court in determining unconstitutionality of the provisions, to consider the objects and purpose of the legislation.^[38] He

argued that the impugned sections majorly fall within the broader **Part IV** of the **ACEC Act** titled “**Investigations.**” He submitted that the import of the foregoing is that the investigative powers and functions of EACC have a constitutional and statutory underpinning, hence the exercise of those powers do not in any way usurp the constitutional powers of the National Police Service. He also argued that declaring the said provisions as unconstitutional is tantamount to declaring a constitutional provision, to wit Article **252** as unconstitutional.^[39] He submitted that without the impugned sections, the manner in which EACC would carry out its investigative powers and functions would be vague nor would it be capable of conducting its constitutional mandate.

65. **Mr. Ogosso** argued that the investigative powers and functions of EACC have a constitutional and statutory underpinning and that seeking to have them declared unconstitutional is tantamount to seeking to declare a constitutional provision, to wit Article 252, unconstitutional.^[40]

66. He cited the words of the US Supreme Court in *U.S vs Butler*^[41] in which the Court expressed itself as follows thus “*When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.*”

67. Counsel for the DPP submitted that the investigative powers and functions of the EACC have a constitutional and statutory underpinnings derived from Articles **79** and **252 (a) & (d)** of the EACC Act as read with Section **35 (1)** of the ACEC Act. He argued that a purposive interpretation of Article **244 (b)** of the Constitution leads to the conclusion that the Constitution did not purpose to confer mandate of prevention of corruption, transparency and accountability to the National Police Service but it envisaged a complementary nature of implementing and enforcing the values and principles of leadership and integrity with those of preventing and combating corruption by all law enforcement agencies including the National Police Service. Further, he argued that Section **24** of the National Police Service Act does not confer the National Police Service exclusive powers and functions of investigating corruption.

68. Counsel for EACC urged the court to consider the object, reasons and history of the statutes. He submitted that whereas Chapter Six deals with leadership and Integrity, the Constitution mandated Parliament to establish an independent EACC, hence EACC is also mandated to be an Anti-Corruption Commission. To buttress his argument, counsel cited *Boniface Katana Kalaveri vs Ethics & Anti-Corruption Commission & Another*^[42] in which the High Court held that apart from enforcement of Chapter Six, EACC would not only deal with matters of ethics but would also be an anti-corruption commission. Counsel also cited international conventions to which Kenya is a party which mandate state parties to fight corruption.

69. On the constitutionality of the provisions, he submitted that Article **252** of the Constitution grants EACC power to conduct investigations either on its own initiative or on a complaint made by a member of the public and referred to above cited case of *Boniface Katana Kalaveri vs Ethics & Anti-Corruption Commission & Another*^[43] whereby the court stated that the enactment of the act was in fulfillment of the dictates of Article **79**. Further, counsel argued that the Constitution did not purpose to confer the mandate of preventing corruption to the National Police Service exclusively. He relied on *Christopher Ndarathi Murungaru vs Kenya Anti-Corruption Commission & Another*^[44] in which the court stated that investigations and particularly those involving economic crimes and corruption are complex and require investigative skills and knowledge of a specialized nature.

70. Article **79** of the Constitution provides that Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of the Chapter. Pursuant to the said provision, Parliament enacted the EACC Act.^[45]

71. The EACC Act^[46] establishes the EACC pursuant to Article **79** of the Constitution. It further provides for the functions and powers of the Commission, the qualifications and procedures for the appointment of the Chairperson and members of the Commission, and for other connected purposes. The Act enumerates certain functions, in addition to the roles that the Constitution has already accorded the commission. A notable function under the Constitution is the power to oversee the implementation process and compliance with the provisions of Chapter six of the Constitution on leadership and integrity.

72. Additional functions of the commission under the Act are:-^[47] **(a) In relation to State officers:- (i) Develop and promote standards and best practices in integrity and anti-corruption; (ii) Develop a code of ethics; (b) Work with other state and public offices in the development and promotion of standards and best practices in integrity and anticorruption; (c) Receive complaints on a breach of the code of ethics by public officers; (d) Investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under the Act or any other law enacted pursuant to chapter six of the Constitution; (e) Recommend appropriate action against state officers or public officers alleged to have engaged in unethical conduct; (f) Oversee the enforcement of codes of ethics prescribed for public officers; (g) Advise, on its own initiative, any person on any matter within its functions; (h) Raise public awareness on ethical issues and educate the public on the dangers of corruption, and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes Act, 2003 on confidentiality; (i) Subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and secure the revision of methods of work or procedures that may be conducive to corrupt practices; and (j) Institute and conduct proceedings in court for purposes of recovering or protecting public property, or freezing or confiscating proceeds of corruption or those related to corruption, or the payment of compensation, or other punitive and disciplinary measures.**

73. The EACC is the only constitutional Commission that is not specifically located in Chapter Fifteen of the Constitution.^[48] Its composition and aspects of its mandate are specifically statutory.^[49] Subject to the provisions of Article **79** of the Constitution, the EACC was established by the EACC Act. It replaced the Kenya Anti-Corruption Commission (KACC) after the adoption of the Constitution.^[50]

74. As we construe the additional mandate provided under Section **11** of the Act, it is imperative that we determine whether the said mandate can be read in manner consistent with the mandate contemplated under Article **79** of the Constitution. A clear reading of Article **79** of the

Constitution leaves no doubt that the constitutional mandate of the Commission contemplated under the said provision is to "ensure compliance with, and enforcement of, the provisions of Chapter Six of the Constitution.

75. *The preamble to the EACC Act reads "An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution, to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes."*

76. The Constitution provides, under Chapter 6, for leadership and integrity of all public officers. The Chapter is predicated upon the assumption that State officers^[51] are the nerve Centre of the Republic and carry the highest level of responsibility in the management of state affairs and, therefore, their conduct should be beyond reproach. This means that under the Constitution Kenyans decreed that those whose conduct does not bring honor, public confidence and integrity have no place in the management of public affairs. This is to ensure that those entrusted with the management of public affairs and resources are persons of good character, probity and uprightness. The chapter lays down the principles upon which the State Officers should conduct themselves. According to Black's Law Dictionary,^[52] the term Integrity means "soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with "probity," "honesty," and "uprightness."

77. The architecture of Constitution of Kenya, in our view, was intended to deal with a long legacy of impunity, institutional frailties and embedded corruption. The Centre-piece of anti-corruption and public integrity reform is Chapter Six of the Constitution, the Anti-Corruption and Economic Crimes Act and the Leadership and Integrity Act.

78. The EACC is mandated under **Section 11(1)(d)** of the **ACECA** to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to **Chapter Six** of the **Constitution**. Further, under the provisions of **Section 35** of **ACECA** as read with the provisions of **Section 11(1) (d) of EACC Act**, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not.

79. The EACC lacks prosecutorial powers and has to forward all cases it has investigated to the Director of Public Prosecutions (DPP) for prosecution. There is no doubt that the State's prosecutorial powers are vested in the DPP under **Article 157** of the **Constitution**. The relevant part provides at clause (6) thereof as follows:-

The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with

the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

80. The decision to institute criminal proceedings by the DPP while discretionary is also not subject to the direction or control of any authority. (**Article 157 (1)**). These provisions are also replicated in **Section 6** of the **Office of the Director of Public Prosecutions Act**.^[53]

81. The contest in this case is whether EACC, by investigating criminal corruption cases relating to corruption, is acting within its Constitutional Mandate. The Petitioners argue that EACC has unconstitutionally encroached on the mandate of the National Police Service under Article 244 of the Constitution and Section 4 of the National Police Service Act^[54] whose core functions include the maintenance of law and order, the investigation of crimes, the prevention and detection of crime, the collection of criminal intelligence, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.

82. The Respondents seek refuge in Article 252 (1) of the Constitution which provides that Each commission, and each holder of an independent office—

(a) may conduct investigations on its own initiative or on a complaint made by a member of the public;

(b) has the powers necessary for conciliation, mediation and negotiation;

(c) shall recruit its own staff; and

(d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

83. Whereas the Petitioners premised their attack on the impugned provisions on the proposition that Article 252 (1) (a) of the Constitution should be construed to mean that the investigations contemplated under the said provision should only be confined to matters falling within Chapter Six of the Constitution, no reference was made to Article 252 (1) (d) above which reads "may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution."

84. As stated earlier, section **11** of the EACC Act in addition to the functions conferred by the Constitution, prescribes additional functions enumerated earlier among them investigations. The impugned provisions of the ACEC Act fall under Part **IV** on investigations covering sections **33** to **37** of the Act, Part **V** covering offences provided under Sections **38** to **50** of the Act, Part **V1** covering compensation and recovery of improper benefit and relevant to this case is sections **56 B** which deals with out of court settlement and **56C** relating to recovery of funds and other Assets. It is these sections that this court has been invited to find *ultra vires* the constitutional mandate of EACC provided under Article **79** of the Constitution.

85. It is common ground that EACC has a constitutional status vested in commissions established under Chapter 15 of the Constitution. Flowing from that is Article **252 (1) (d)** above which reads "may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution."

86. It is also common ground that Article **244 (b)** of the Constitution provides that the National Police Service shall— **(b)** prevent corruption and promote and practice transparency and accountability. Article **245 (4)** provides that the Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

87. Clearly Article **245 (1) (d)** grants EACC powers to perform functions prescribed by an act of Parliament. The provisions in question have been prescribed by acts of Parliament. Article **244 (b)** and **245 (4)** grants the National Police Service powers to prevent corruption and promote transparency and power to investigate any particular offence or offences.

88. This court cannot deviate from its own duty of determining the constitutionality of an impugned statute. In our view, every law has to pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. The foundation of this power^[55] is the theory that the Constitution which is the fundamental law of the land, is the 'will' of the 'people', while a statute is only the creation of the elected representatives of the people; when, therefore, the "will" of the legislature as declared in the statute, stands in opposition to that of the people as declared in the Constitution—the "will" of the people must prevail.

89. A law which violates the Constitution is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the Constitution, what the court has to consider is the "direct and inevitable effect" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

90. Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution.^[56]

91. On the constitutionality or otherwise of the impugned provisions, Articles **252 (1) (d)** and **244 (b)** and **245 (4)** of the Constitution cited above must be read and construed together. It is settled law that a constitution cannot be unconstitutional for lack of another constitution against which alleged unconstitutionality must be construed. The Constitution grants powers to commissions to perform functions prescribed by an act of Parliament. The same Constitution creates the National Police Service and equally vests it with mandate to prevent corruption and to undertake investigations. The Constitution affirms its place as the supreme law of the land^[57] and in Article 2(3) it states: "The validity or legality of this Constitution is not subject to challenge by or before any court or other state organ".

92. Therefore, even if one felt that a clause in the Constitution is somewhat unconstitutional or illegal, there would be no forum before which to challenge it, and nobody to make that declaration of unconstitutionality. This position is very well illustrated by the case of *Rwanyarare and Haj Badru Wegulo vs. Attorney General*.^[58] The petitioners had moved to court alleging that certain articles of the Constitution of Uganda were inconsistent with other articles of the same Constitution, and constituted threats and infringements to the inherent rights and freedoms therein. The petitioners sought to have the offending clauses declared unconstitutional. The petition was dismissed as incompetent, with the court holding that it did not have jurisdiction to construe parts of the Constitution as against the rest of the Constitution. Justice Kato said: "This court has no power to declare one article of the Constitution inconsistent with another, but could deal with the question as to whether or not correct procedure was followed when the (amendment) Act was passed."

93. In *Paul Ssemogerere and Others vs. The Attorney General*^[59] for instance, it was held that "it is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The Constitution must be read as an integrated and cohesive whole."

94. Likewise in the case of *South Dakota vs. North Carolina*^[60] the Supreme Court of the United States pronounced itself thus: "It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument."

95. From the foregoing, no constitutional clause is superior or inferior to another. Constitutional clauses are complementary. Thus, the Constitution mandates constitutional commissions to perform functions prescribed by an act of Parliament. EACC functions are premised on its constitutional and statutory mandate. The same Constitution mandates the National Police Service to undertake investigations and prevent

corruption.

96. Professor Githu Muigai, former Attorney-General of Kenya, highlighting the challenges of interpreting the Constitution, observed that the Constitution being a political charter and a legal document, makes its interpretation a matter of great political significance, and sometimes controversy. He writes:-[\[61\]](#)

“The constitution contains conflicting or inconsistent provisions that the courts are called upon to reconcile, and at other times the Constitution implicitly creates a hierarchy of institutions or values and the courts are called upon to establish the order of importance. At times, the Constitution is vague or imprecise or has glaring lacuna and the courts are called upon to provide the unwritten part...”

97. It is acknowledged that, while a Constitution may have (and always has) its imperfections, there will be clauses that do not seem in tandem with the “norms” or principles underpinning the Constitution, and no one is really saying otherwise. However, to construe those imperfections as amounting to unconstitutionality is jurisprudentially unsound and only creates needless confusion. The above being the clear provisions of the Constitution leaves us with one possible and viable legal option, that is, to agree with Mr. Ogosso and counsel for EACC that the impugned provisions have a constitutional underpinning and challenging them amounts to challenging Article 252 (1) (d) of the Constitution which is affront to Article 2 (3) of the Constitution.

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

Whether or not EACC was enjoined to give notice to the third Petitioner prior to applying for the search warrants, and/or whether EACC violated his rights under Articles 31, 40, 47, 48 and 50 (1) of the Constitution.

99. **Mr. Ochieng Oduol** for the second Petitioner submitted that a reading of Sections 23 and 29 of ACEC Act reveals that that there is no mention on the issuance of a notice to any person prior to the making of an application for warrants. However, he submitted that every action or exercise by a State or public Officer must of necessity comply with the Constitution[\[62\]](#) and that every person is required to uphold and defend the Constitution.[\[63\]](#) Counsel also submitted that public institutions are required to observe the principles of governance among them the Rule of Law.[\[64\]](#)

100. He submitted that Article 244(c) of the Constitution read together with the provisions of Section 23(4) of the ACEC Act enjoin the Respondents to respect the Petitioner’s rights and fundamental freedoms when exercising police power of investigations against the Petitioner and /or taking any steps against the Petitioner. He argued that EACC is enjoined to secure the observance of the democratic values and principles and promote constitutionalism in Kenya.[\[65\]](#) He further argued that Section 26 of ACECA empowers the Commission to obtain statements from a suspect in respect of his assets and the manner in which that asset has been acquired, but this power is reserved for the Director only and can only be exercised on notice to the suspect. He also argued that Section 27(3) enjoins the Commission to give notice in writing to any person to provide, within a reasonable time specified in the notice, any information or documents in the person’s possession that relate to a person suspected of corruption or economic crimes. He submitted that this power can only be exercised on notice to the associate to a suspected person or the person having information about the suspect.

101. He argued that Sections 28(1) of the Act enjoins the 1st Respondent to issue a notice to any person including a suspect to produce specified records in his possession that may be required for an investigation and provide any explanations required by the Commission in that respect. Section 28(5), he argued, empowers the Commission to make copies of such records while Section 28(6) enables the Commission to obtain electronic copies of records. He submitted that Section 28(8) also empowers the Commission to inspect property held by a person. He argues that Section 28(7) defines records to include books, returns, bank accounts or other accounts, reports, legal or business documents and correspondence other than correspondence of a strictly personal nature.

102. **Mr. Oduol** reiterated that Section 23 of the Act empowers the Commission to conduct investigations but Sections 26 through 28 provides for the manner in which those investigations are to be undertaken and from whom those investigations may be done and information obtained. He argued that the underlying requirement from Sections 26 through 28 in respect of information held by a suspect, or any other person is the requirement of notice to the said person. The notice, he argued, has to give the person sufficient time within which to avail the requisite information, that failure to provide information within the time prescribed by the notice attracts a criminal sanction in the commission of an offence for which a penalty is prescribed under Sections 26 through 28. Hence, he argued, that prior to undertaking any investigations including obtaining information and records in respect of bank accounts, it is incumbent upon the Commission to give adequate notice to a suspect or any person having the relevant information sought. He fortified his argument by the provisions of Article 47 of the Constitution and the provisions of the Fair Administrative Action Act. To buttress his argument, counsel cited *Judicial Service Commission vs Mbalu Mutava & another*[\[66\]](#) and argued that EACC was under a duty to give the third Petitioner notice of its investigations.

103. He cited *Sanjay Shah Arunjain vs Republic*,[\[67\]](#) where dealing with an *ex parte* application for warrants to investigate accounts under Section 180 (1) of the Evidence Act[\[68\]](#) thus:-

“The administration of justice in this country is adversarial. That being the case, unless the law provides that a party may move the court ex-parte for any orders, the other party, should have notice of such a proceeding and accorded an opportunity to be heard. That is the cornerstone of the law of natural justice. There is no law that provides that a warrant such as the one herein can be issued ex-parte. If the Legislature so intended, that would have been expressly provided for. I am fortified in that argument by the fact that the bank – customer relationship is based on a fiduciary understanding with its own attendant obligations. Further, if any authority is given an order that may be used on a fishing expedition, the same may be misused and/or abused. In the instant case,

now that the court has the benefit of an affidavit by one of the applicants Sanjay Shah, it now transpires that the bank did not have in its possession the records sought to be investigated. Had there been any application, duly filed and served, all these matters would have been canvassed before the learned trial magistrate. There has been in my view a miscarriage of justice.

... The issuance of the warrant was un-procedural, misplaced and misconceived. That being the case, it must be vacated. It is so ordered. (Emphasis added).

104. **Mr. Oduol** also cited is the case of *Erastus Kibiti Stephen vs Euro Bank Limited & another*^[69] where the Court opined that:-

"In my view, as the Law now stands, an officer wishing to inspect Bankers Books must satisfy the Court on the reasons for such course. Although I accept the view that the Affidavit presented to the court should be accompanied by an application. I do not subscribe to the view that the order may not be obtained ex-parte at the first instance where the circumstances so dictate, for example where prior notice to the customer would lead to the closure of the Account, thus defeating the very purpose of the exercise. But the application ought to be served soon after on the customer and the Bank for their response." (Emphasis added).

105. He also cited *Tom Ojienda, SC t/a Tom Ojienda & Associates Advocates vs Ethics and Anti-Corruption Commission & 6 others*^[70] in which EACC was a party and the court quashing warrants obtained under similar circumstances stated:-

105. Looking at the provisions of the law above, it is clear that **Section 27(1)** requires the 1st Respondent to apply ex-parte to Court requiring an associate of a suspected person to provide information in relation to any property under investigation. The Respondents, in agreement with the Petitioner, contended that this provision had not been invoked in the instant case as the Petitioner was not an associate of any person suspected of a crime. That being so, why then was Section 28 of ACECA which mandates the Commission to apply to Court with notice to an affected person for an order to produce specified records required for an investigation, not complied with?

106. This Section must also be read with **Section 180(1)** of the **Evidence Act** which requires proof that there is suspicion that an offence may have been committed. (Emphasis added).

106. He relied on the words of **Lenaola J** in the above case stating that an investigation is an administrative process and the EACC must comply with the dictates of Articles **47** and **50(1)** of the Constitution and give due notice to the affected parties before any warrants are sought before the Courts. Counsel sought to distinguish the finding of this Honourable Court in the case of *Mape Building & General Engineering vs Attorney General*^[71] where the court held that applications for warrants or seizure could be made *ex parte* because there was a risk of destruction of evidence including monies in accounts beyond the reach of the Courts if the said Application is heard *inter partes*. He argued that in the said case there was money in the accounts which was the target of the seizure warrants unlike in this case which deals with documentation in respect of the Petitioner's accounts with his banks. In the instant case, counsel argued, the documents sought were in possession of the third Petitioner and EACC could have obtained them under **Section 28**, hence there was no possibility of the Petitioner or the bank destroying the said information as they are records which the Petitioner's banks are legally bound to keep and preserve under the Banking Act^[72] and regulations issued by the Central Bank of Kenya, hence, there was no risk of dissipation of the money or the documents sought, hence, the third Petitioner was entitled to a notice. He also argued that the third Petitioner's right to a fair administrative action, access to justice, fair hearing, privacy and property had been violated.

107. **Mr. Ogosso**, for the first, fourth and Fifth Respondents submitted that the warrants were lawfully issued pursuant to the provisions of **Section 118** of the Criminal Procedure Code,^[73] **Section 180** of the Evidence Act^[74] and **Section 23** of ACECA.^[75] Such applications, he argued are made *ex parte* under **Section 118A** of the Criminal Procedure Code.^[76] Citing authorities, he argued that all that is required is some degree of reasonable basis upon which an investigator would seek to investigate a bank account.^[77]

108. We must point out that provided there is no abuse of process, the issuing of search warrants and the seizure of articles consequent thereupon is a vital, indeed a necessary element in the effective combating of crime. On the other hand, all citizens have constitutionally enshrined rights to dignity, privacy, freedom, security, trade and property.^[78] Thus, courts must strike a wholesome balance between, on the one hand, the dignity and privacy of every citizen and, on the other, support for the State in combating crime.^[79]

109. **Section 118** of the Criminal Procedure Code^[80] provides that:-

"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 or a magistrate may by written warrant (called a search warrant) authorize 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 thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law."

110. A brief outline of the basic principles relevant to search warrants is accordingly apposite. In *Minister of Justice & others vs Desai*^[81] the South African court made it clear that it has long been recognised in law that a search warrant constitutes a serious encroachment on the rights of the individual? and that careful scrutiny by the courts is required.^[82]

111. In yet another leading South African decision on the subject, that is, *Minister of Safety and Security vs Van der Merwe & others*^[83] Mogoeng J, delivering the unanimous judgment of the court, in paras **55** and **56** stated:- "What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligible manner:-

(a) states the statutory provision in terms of which it is issued;

- (b) identifies the searcher;
- (c) clearly mentions the authority it confers upon the searcher;
- (d) identifies the person, container or premises to be searched;
- (e) describes the article to be searched for and seized, with sufficient particularity; and
- (f) specifies the offence which triggered the criminal investigation and names the suspected offender.

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

- (a) the person issuing the warrant must have authority and jurisdiction;
- (b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;
- (c) the terms of the warrant must be neither vague nor overbroad;
- (d) a warrant must be reasonably intelligible to both the searcher and the searched person;
- (e) the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and
- (f) the terms of the warrant must be construed with reasonable strictness."

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

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

"A search warrant is not some kind of mere, interdepartmental correspondence "or note." It is, as its very name suggests, a substantive weapon in the armoury of the State. It embodies awesome powers as well as formidable consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere, checklist approach." ^[85](Emphasis added)

114. In the absence of evidence of abuse of power or a gross violation of the rights of a person to be searched, a court would be slow to find that a search warrant is unlawful on purely technical grounds.^[86]

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

116. What is clear from the position of the law is **first**, that Police officers or other state agents therefore cannot without a search warrant, lawfully enter upon and search any premises, nor can they carry away any property without the authority of the Court. **Second** that from the provisions of the Criminal Procedure Code^[87] set out above, the onus is on the person seeking the search warrant to prove the necessity for such warrant. To us, the above requirements have not been proved to be absent in the proceedings leading to the issuance of the warrant. In **Vitu Limited vs The Chief Magistrate Nairobi & two others**^[88] the court stated that:-

"It is therefore expected that when a police officer or any other investigator approaches the Court for a warrant, there must be reasonable suspicion of an offence being about to be committed or having been committed..."

117. On whether the third petitioner ought to have been given notice prior to the issuance of the warrant, we are persuaded that the Criminal Procedure Code^[89] provides a simple yet effective mode of obtaining authority through the court. The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of the investigations. Section **118A** of the Criminal Procedure Code^[90] provides that "An application for search warrant shall be made *ex-parte* before a Magistrate."

118. The order or warrant is never to be granted as a matter of course. To us, to give the notice to the person to be investigated can easily jeopardize the incriminating evidence. On this ground, we entirely agree with Onguto J. in the earlier cited decision in *Mape Building & General Engineering vs A.G & 3 Others*.^[91] Clearly, it is understandable why warrants or seizure orders are obtained *ex parte* when any matter is still at the investigation stage. The justification seems to fall within the provisions of Article **24 (1)** of the Constitution, hence, we find that the allegation for breach of Article **50** fails.

119. Onguto J. put it bluntly in *Mape Building & General Engineering vs Attorney General & 3 others*[92] when he stated that:-

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

120. Counsel for the third Petitioner placed heavy reliance on *Tom Ojienda, SC t/a Tom Ojienda & Associates Advocates vs Ethics and Anti-Corruption Commission & 6 others*[93] and *Sanjay Shah Arunjain vs Republic*. [94] It is settled law that a case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[95]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ..., that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)

121. The ratio of any decision must be understood in the background of the facts of the particular case.[96] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [97] Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. [98] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. [99] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. [100]

122. In *Erastus Kibiti Stephen vs Euro Bank Limited & another*[101] the learned Judge was very clear that *the order may be obtained ex parte at the first instance where the circumstances so dictate, for example where prior notice to the customer would lead to the closure of the Account, thus defeating the very purpose of the exercise.* In *Tom Ojienda, SC t/a Tom Ojienda & Associates Advocates vs Ethics and Anti-Corruption Commission & 6 others* the court was clear that that **Section 27(1)** requires the 1st Respondent to apply ex parte to Court requiring an associate of a suspected person to provide information in relation to any property under investigation. The Respondents, in agreement with the Petitioner, contended that this provision had not been invoked in the instant case *as the Petitioner was not an associate of any person suspected of a crime. That being so, why then was Section 28 of ACECA which mandates the Commission to apply to Court with notice to an affected person for an order to produce specified records required for an investigation, not complied with?* The Respondent in the above case was not an associate of any person suspected of crime. Clearly, the above two cases are distinguishable from the facts before us.

123. In any event the said decisions were rendered by a court of coordinate jurisdiction. A decision of a court of co-ordinate jurisdiction is not binding though it is entitled to its due respect.[102] While decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity which is the respect one court holds for the decisions of another. As a concept it is closely related to *stare decisis*. In the case of *R. vs. Nor. Elec. Co.*, [103] McRuer C.J.H.C. stated:-

"...The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary..." (Emphasis added).

124. In our opinion, we think that *"strong reason to the contrary"* does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was *"given without consideration of a statute or some authority that ought to have been followed."* We do not think *"strong reason to the contrary"* is to be construed according to the flexibility of the mind of the particular judge. Talking about consideration of a statute and authority or authorities that ought to have been followed, perhaps at this juncture it is important to recall the provisions of section **118A** of the Evidence Act [104] reproduced earlier and our earlier conclusion that warrants or seizure orders are obtained *ex parte* when any matter is still at the investigation stage and that the justification falls within the provisions of Article **24 (1)** of the Constitution.

125. On the alleged violation of Article **47** Rights, we find comfort in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava*[105] which succinctly elucidated the law in cases of this nature. It held that *the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50 (1) of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.* [106] Fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies.

126. Further, from the facts and circumstances of this case, we find that the third Petitioner has not proved the alleged breach of his right to property under Article **40** of the Constitution. Accordingly, we find no basis to hold that there has been a violation of the third Petitioner's rights to be heard or violation of rights under article **47** of the Constitution or rights to property.

127. We must further point out that this Court's jurisdiction sitting as a constitutional Court ought not to be invoked in matters which can properly be dealt with in the ordinary course of litigation. In our view, our current Constitution pervades all aspects of life so much so that any action taken by a party may easily be transformed into a constitutional issue by simply citing some provision of the Constitution however remote. Parties who intend to commence legal proceedings by way of a Constitutional Petition therefore ought to take note of the sentiments of the Court in *Ngoge vs. Kaparo & 4 Others*, [107] a decision affirmed by the Supreme Court in *Peter Oduor Ngoge vs. Francis Ole*

Kaparo & 5 Others[108] where the Court of Appeal expressed itself as follows:-

“Any...inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry...It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters...My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one...The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

128. Whereas every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a 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, it is our view that those provisions ought not to be abused. As was held in *Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others*:-[109]

“Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process...A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action... The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”

129. Therefore, it is our view and we so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution are to exercise their jurisdiction is an abuse of the Court process. To entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

130. It is in that light that we understand the Court’s position in *John Harun Mwau vs. Peter Gastrow & 3 Others*[110] that the Constitution ought only to be invoked when there is no other recourse for disposing of the matter. In that case the Court expressed itself in the following terms:-

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

131. Similarly, in *Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited*,[111] **Lenaola, J.** (as he then was) held that:-

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industries* (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal)*, such sanctions should be reserved for appropriate and really serious occasions.”

132. The rationale for this was given in *Rapinder Kaur Atwal vs. Manjit Singh Amrit*[112] where it was held that:

“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true...I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof”.

133. In this case we do not see any difficulty, and none has been given to us, in the 3rd petitioner moving the Court which issued the search

warrants *ex parte* to have the same set aside if the same were improperly obtained instead of transforming such grievance into a constitutional issue.

Disposition.

134. In view of our analysis of the facts, the submissions by the parties, the law and authorities, the conclusion becomes irresistible that these consolidated Petitions must fail. Accordingly, we dismiss the consolidated Petitions with no orders as to costs.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 8th day of June 2018

G.V. ODUNGA

JUDGE

E.C. MWITA

JUDGE

JOHN MATIVO

JUDGE

[1] Article 157 (6) of the Constitution.

[2] Act No 11A of 2011.

[3] Act No. 3 of 2003.

[4] Act No. 22 of 2011.

[5] Act No. 3 of 2003.

[6] Act No 22 of 2011.

[7] Act No. 3 of 2003.

[8] Act No. 4 of 2015.

[9] Cap 65,Laws of Kenya.

[10] Supra.

[11] Ibid.

[12] Ibid.

[13] As set out in Pet No.122 of 2015, *Tom Ojienda, SC t/a Tom Ojienda & Associates Advocates vs Ethics and Anti-Corruption Commission & 6 Others* {2016}eKLR, Lenaola J.

[14] In Misc. App No.443 of 2016.

[15] Cap 80,Laws of Kenya.

[16] Act No 3 of 2003.

[17] Cap 80, Laws of Kenya.

[18] See Wallis JA dealt with the matter as follows in *Natal Joint Municipal Pension Fund vs Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

[19] Investigating Directorate: *Serious Economic Offences and Others vs Hyundai Motor Distributors (Pty) Ltd and Others*; *In re Hyundai Motor Distributors (Pty) Ltd and Others vs Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

[20] *Johannesburg Municipality vs Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted *Jaga vs Dönges, N.O. and Another*; *Bhana vs Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 664G-H.

[21] Act No. 22 of 2011.

[22] {1985} KLR 104; {1976-1985} EA 67,

[23] Advisory Opinion No. 1 of 2012; [2014] eKLR

[24] *Smith Dakota vs. North Carolina*, 192 US 268(1940)

[25] This rule is restated by Joubert JA in *Adampol (Pty) Ltd vs Administrator, Transvaal 1989 (3) SA 800(A)* at 804BC.

[26] {1987} 1 SCC 424.

[27] Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes" <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf>.

[28] Christopher G. Wren and Jill Robinson Wren, *The Legal Research Manual: A game Plan for Legal Research and Analysis*(2d. ed. 1986).

[29] Plain meaning should not be confused with the "literal meaning" of a statute or the "strict construction" of a statute both of which imply a "narrow" understanding of the words used as opposed to their common, everyday meaning. *Supra* note 1.

[30] Civil Appeal No. 273 of 2003 {2005} 2 KLR 317; {2008} 3 KLR (EP) 72

[31] *Infra*.

[32] Act No. 11A of 2011.

[33] {2015} eKLR

[34] Counsel cited *Ndyanabo -vs- Attorney General* [2001] EA 495

[35] Petition No.4 of 2011

[36] Petition No 699 of 2009

[37] {2012}eKLR

[38] Counsel cited *Murang'a Bar Operators and Another -vs- Minister of State for Provincial Administration and Internal Security and Others* Nairobi Petition No. 3 of 2011 [2011] eKLR and *Samuel G. Momanyi -vs- Attorney General and Another* High Court Petition No. 341 of 2011.

[39] Counsel cited *Commission for the Implementation of the Constitution -vs- The Speaker of National Assembly*, Nairobi High Court Petition No.403 of 2015 where Onguto, J at paragraph 115, Onguto J citing *Judges & Magistrates Vetting Board & 2 Others -vs- Centre for Human Rights & Democracy & 11 Others* [2014] eKLR.

[40] Counsel cited *Commission for the Implementation of the Constitution -vs- The Speaker of National Assembly*, Nairobi High Court Petition No.403 of 2015 where Onguto, J at paragraph 115, Onguto J citing *Judges & Magistrates Vetting Board & 2 Others -vs- Centre for Human Rights & Democracy & 11 Others* [2014] eKLR.

[41] 297 U.S. 1 {1936}.

[42] {2015}eKLR.

[43] *Ibid*.

[44] Misc Civ App No. 54 of 2006.

[45] *Supra*.

[46] Ibid.

[47] Section 11 of the Act.

[48] Prof Ben Sihanya, *Constitutional Commissions in Kenya Experiences, Challenges and Lessons*, Presented at Conference on State Implementation of the Constitution since 2010 Laico Regency, November 20, 2013.

[49] Ibid.

[50] Ibid.

[51] The Constitution defines State Officers as : State office” means any of the following offices— (a) President; (b) Deputy President; (c) Cabinet Secretary; (d) Member of Parliament; (e) Judges and Magistrates; (f) member of a commission to which Chapter Fifteen applies; (g) holder of an independent office to which Chapter Fifteen applies; (h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government; (i) Attorney-General; (j) Director of Public Prosecutions; (k) Secretary to the Cabinet; (l) Principal Secretary; (m) Chief of the Kenya Defence Forces; (n) commander of a service of the Kenya Defence Forces; (o) Director-General of the National Intelligence Service; (p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or (q) an office established and designated as a State office by national legislation; “State officer” means a person holding a State office.

[52] 8th ed. (2004).

[53] Act No. 2 of 2013.

[54] Act No. 11A of 2011.

[55] As explained by Indian nine-judge bench of the Supreme Court in the case of *Advocates on Record Association & Others vs Union of India* {1993} 3SCC 441.

[56] See Article 1 of the Constitution of Kenya 2010.

[57] See Article 2 (1).

[58] Constitutional Petition No. 5 of 1999[unreported]).

[59] Constitutional Appeal no. 1 of 2002) [2004] UGSC10).

[60] 192 US 268(1940).

[61] <https://abacus.co.ke/newsfeed/a-constitution-cannot-be-unconstitutional/>

[62] Counsel cited Articles 2(1) and 2(2) of the Constitution.

[63] Counsel cited Article 3(1) of the Constitution.

[64] Counsel cited Articles 10, 73(1) and 73(2) (b) of the Constitution.

[65] Counsel cited Article 249(1)(b) &(c).

[66] {2015}eKLR.

[67] {2002} eKLR.

[68] Cap 80,Laws of Kenya.

[69] {2003} eKLR, Waki J (as he then was).

[70] High Court Petition No. 122 of 2015 {2016} eKLR.

[71] {2016}eKLR.

[72] Cap 488, Laws of Kenya.

[73] Cap 75, Laws of Kenya.

[74] Cap 80, Laws of Kenya.

[75] Act No. 3 of 2003.

[76] Cap 75, Laws of Kenya.

[77] Counsel cited *Emmanuel Suipanu Siyanga –vs- Republic* Criminal Appeal No.124 of 2009

[78] See Articles 28, 31, 29, 43, 40, and 24 of the Constitution of the Republic of South Africa, 1996. See also, in general terms, *Mistry vs Interim Medical and Dental Council of South Africa & others* 1998 (4) SA 1127 (CC); *Investigating Directorate: Serious Economic Offences & others vs Hyundai Motor Distributors(Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others & others vs Smit NO & others* 2001 (1) SA 545 (CC); Thint (fn 5 above) and Van der Merwe (fn 4 above).

[79] *Iridescent in Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others & others vs Smit NO & others*, 7 Thint and Van der Merwe is the requirement that the courts must strike a wholesome balance between, on the one hand, the dignity and privacy of every citizen and, on the other, support for the State in combating crime.⁸

[80] Cap 75, Laws of Kenya.

[81] Supra Note 24.

[82] Ibid at page 403.

[83] *Minister of Safety and Security v Van der Merwe & others* 2011 (5) 61 (CC).

[84] *Ex parte Hull* (1891-1892) 4 SAR TS 134

[85] *Goqwana vs Minister of Safety NO & others* (20668/14) [2015] ZASCA 186 (30 November 2015)

[86] Ibid.

[87] Cap 75, Laws of Kenya.

[88] **H.C. Misc. Criminal Application No. 475 of 2004 (Osiero J.).**

[89] Supra.

[90] Supra.

[91] Supra Note 11.

[92] Ibid.

[93] Supra.

[94] Supra.

[95] MANU/SC/0047/1967.

[96] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986.

[97] *Bhavnagar University vs. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59).

[98] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr.* (Citing Lord Denning).

[99] Ibid.

[100] Ibid.

[101] {2003} eKLR, Waki J (as he then was).

[102] *R. vs. Nor. Elec. Co.*, [1955] O.R. 431; *R. v. Groves* (1977), 17 O.R. (2d) 65.

[103] *Ibid.*

[104] Cap 80, Laws of Kenya.

[105] {2015} eKLR

[106] *Ibid.*

[107] {2007} 2 KLR 193

[108] Petition No. 2 of 2012 {2012} eKLR

[109] {2007} 2 EA 235

[110] {2014} e KLR

[111] {2013} eKLR

[112] Petition No. 236 of 2011