REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

PETITION NO. 25 OF 2018

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO 79 OF 2016 & PETITION NO 137 OF 2016

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

AND

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

AND

IN THE MATTER OF: THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT (CAP 65A) LAWS OF KENYA

AND

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

AND

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

AND

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

BETWEEN

DR. EVANS ODHIAMBO KIDERO.....1ST PETITIONER

DR. SUSAN AKELLO MBOYA.....2ND PETITIONER

DR EVANS ODHIAMBO KIDERO (*Suing on behalf of the Estate of*

***the Late* ABIGAEL ATIENO KIDERO)….....3RD PETITIONER**

DR EVANS ODHIAMBO KIDERO

(*Suing on behalf of the Estate of*

***the Late* PHILIP AYOT KIDERO).....4TH PETITIONER**

GEM INVESTMENTS.....5TH PETITIONER

GEM APARTMENTS.....6TH PETITIONER

GEM SUITES.....7TH PETITIONER

ORRO LIMITED.....8TH PETITIONER

ARGENTI LIMITED….....9TH PETITIONER

PAUL AOL.....10TH PETITIONER

VERSUS

THE CHIEF MAGISTRATE OF MILIMANI LAW COURTS.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....4TH RESPONDENT

HON ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1 The Petitioners filed a Notice of Motion dated 25th September 2018 under ***Articles 19, 20, 21, 22, 27, 28, 49(1), 159, 165(3) and 258 of the Constitution, Section 1A, 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rule*** for **ORDERS THAT:**

(i) The Petition herein be heard and determined on priority.

(ii) A Conservatory order do issue staying any further execution of the search warrant dated **19th September 2018** by the EACC, the 2nd Respondent herein, through any of its agents or investigators pending the hearing and determination of this Application.

(iii) A mandatory order compelling the immediate surrender of ALL of the 2nd-10th Petitioners' properties which were searched and seized without any warrant on the 20th day of September 2018 pending the hearing and determination of this Application and Petition as per SCHEDULE A.

(iv) A Conservatory Order do issue restraining the 2nd Respondent through any of its agents or investigators from purporting to search, seize and continue to seize the 1st Petitioner's properties pending the hearing and determination of this Application and Petition.

(v) A Conservatory Order do issue restraining the 2nd Respondent through any of its agents or investigators from purporting to search, seize and continue to seize the 2nd-10th Petitioners' properties pending the hearing and determination of this Application and Petition.

(vi) A Conservatory Order do issue restraining the 2nd Respondent through any of its agents or investigators from purporting to search, seize and continue to hold the 2nd-10th Petitioners' properties pending the hearing and determination of this Petition.

(vii) A mandatory order compelling the immediate surrender of ALL of the 1st Petitioner's properties which were searched and seized without any warrant on the 20th day of September 2018 pending the hearing and determination of this Application and Petition.

2 The Notice of Motion was supported by the affidavit of the 1st Petitioner/Applicant sworn on 25th September 2018 and a further affidavit sworn on 11th October 2018. The 2nd Respondent opposed the application and filed a replying affidavit by Mulki Abdi Umar sworn on 8th October 2018.

All the Counsel appearing filed written submissions which they highlighted.

The Petitioners'/applicants case

3 The 1st Applicant in his supporting affidavit gave a background of his academic achievements and his work history. He averred that his earnings between 1985-2012 amounted to Kshs 578,000,000/-. He said he further earned other money from rents and stocks amounting to 3,200,000£ during the same period.

4 He explained how he performed so well as Managing Director at Mumias Sugar Company (MSC) leading to his earning of so many awards. That the company made so much profit but everything went down upon his exit.

5 He listed the properties he acquired over the years from as early as 1995. This is evidenced by title deeds (EK21-30). He also made mention of companies in which he has shares. He annexed EK31 and EK 32 to show his earnings and wealth declarations.

6 He went on to explain his achievements as the Governor of Nairobi City County Government. He stated that he failed to recapture his seat as Governor and since then he has been subjected to alot of threats, attacks, harassment, witch hunt and intimidation by the 2 nd respondent. He was arrested on 8th August 2018 and on 20th September 2018 4am his Muthaiga home was raided by about 40 men who were the 2nd Respondent's officers.

7 The said officers were wielding guns and held the 1st Applicant and family hostage until 12 pm. There were similar raids at his home in Kisumu and his office at Westlands. During the raid the officers seized different properties belonging to him, his wife, all Petitioners, their children, his late wife and son.

8 He averred that the search warrants though vague, were for him and not the other parties. He deponed that the search warrants were defective as the 2nd Respondent has no jurisdiction to investigate affairs of MCS which is a private company (EK 37). Further that the warrants were abused by the 2nd Respondent who confiscated properties he acquired as early as 1993.

9 He also averred that the 2nd Respondent failed to issue him with a Notice in writing before the seizure as is required under section 26 (1) (a) and (b) 28 and 29 of ACECA. He was further not given an opportunity to avail particulars of his properties. He deponed that the search was meant to obtain evidence to sustain the criminal case against him in **ACC No 32 of 2018 Republic vs DR. Evans Kidero & 10 Others.**

10 He insisted that the warrant was against him alone yet the properties of the 2nd-10th Petitioners were seized without any warrant.

In his further affidavit he listed twelve(12) properties and eight(8) vehicles said to belong to him but were in actual fact registered in the names of other legal entities.

11 He admitted having received several contributions from friends, supporters and well wishers through deposits into his bank accounts to the tune of Kshs 423 Million. This he said was the subject of an arbitration before the Kenya Revenue Authority (KRA). He explained that the Kshs 200 Million mentioned by the 2nd Respondent in the replying affidavit was a loan he took from Family Bank and deposited the money in his fixed deposit account.

12 Prof Ojienda for the Applicant submitted that the orders by the Magistrate were not directed at 3rd parties and the 2nd Respondent had not addressed the issue of seizure of 3rd parties' properties, when the said parties were not mentioned in the search warrants.

13 He further submitted that search warrants should not involve private properties such as MSC which is run by a board of directors. He added that the 2nd Respondent did not issue any notice to the Petitioners to explain those properties in issue. That the 1st Respondent ignored the fact that the 2nd Petitioner is the wife of the 1st Petitioner and she had her own property.

14 Mr Orengo for the Applicants referred the court to the replying affidavit. He submitted that the 1st Applicant's late wife's death certificate was seized and he wondered why. He also pointed out that a document in respect of the late Tom Mboya's property was annexed as the Applicant's property. Counsel argued that most of the properties were acquired before 2003 when the Applicant was not an employee of MSC or even a Governor.

15 Mr Oduor who appeared for the 2nd Petitioner referred to Article 19 of the Constitution, and submitted that the said Article articulates rights which must be respected as individual rights. It was his argument that the search warrant should not have been extended to others who had not been mentioned.

16 Mr Havi for the Petitioners asked the court to order for the return of all items belonging to the 2nd-10th Petitioners. According to him it is only the 1st Petitioner who is under investigation and it was the Respondent's duty to justify their action. He cited the cases of: **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR & (ii) Wilson Kaberia Nkunja v The Magistrates & Judges Vetting Board & Others Petition No 154 of 2016[2016] eKLR**.

17 In the latter case Justice Lenaola J (as he then was) stated.

"There is a real danger in the Respondent's action. If the order is not granted the Petition will be rendered nugatory."

The 2nd Respondent's Case

18 The 2nd Respondent opposed the application and filed a replying affidavit by Mulki Abid Umar sworn on 8th October 2018. He is involved in the investigations in respect of this matter. He averred that the grant of the conservatory and stay orders sought will amount to interference with the 2nd Respondent's Constitutional and statutory mandate. Secondly that the Petitioners had not met the threshold for the grant of interlocutory mandatory orders sought. That there were no special circumstances presented to warrant the issuance of the said orders.

19 He averred that the search warrants were lawfully sought pursuant to section 118 CPC was read with section 23 and 29 of ACECA The application was presented exparte as provided for under section 118A CPC and the Court granted the orders.

20 The deponent referred to search warrants obtained on 19th January 2016 and the results of the searches carried out in respect to the 1st Petitioner's several bank accounts which he listed. Following this exercise the 1st Petitioner filed Petition no. 78 of 2016 where he was on 1st March 2016 granted conservatory orders (MAU4) restraining the 2nd Respondent and others from doing anything in respect to those accounts.

21 He further stated that the 2nd Petitioner who is his wife filed a similar Petition No 79 of 2016 (MAU5) and Petition No 137 of 2016 seeking conservatory orders which were never granted. The two petitions namely Nos. 79 and 137 of 2016 were consolidated.

22 He explained that Petition No 78/16 was later transferred to the Anti Corruption division and registered as ACEC No 8 of 2017. It was consolidated with Petition No. 109 of 2016 and heard by a three (3) Judge bench, which delivered its judgment on the issues raised. The petition was dismissed and that paved way for the 2nd Respondent to continue the investigations, which are the subject of the present Petition.

23 He deponed that there was no statutory or Constitutional requirement for issuance of a Notice prior to carrying out such investigations. He admitted that using the warrants obtained on 19th September 2018, the 2nd Respondent conducted searches at the 1st Petitioner's homes in Muthiga and Kisumu on 20th September 2018 at 6.am. He said the searches were lawfully conducted. That any documents retrieved were pursuant to the search warrants obtained by the 2nd Respondent.

24 He denied that the investigations was in furtherance of the pending **Acc No 32 of 2018 –Republic v Dr. Evans Kidero & 10 Others**. He added that the current petition raises similar issues that were determined vide Petition No 109 of 2016 consolidated with ACEC No 8 of 2017.

25 He outlined 75 immoveable properties valued at Kshs 9,005,000,000/- plus eleven (11) cars as belonging to the 1st Petitioner/Applicant. He denied that the 2nd Respondent had infringed on the 1st Petitioner's rights to property nor right to a fair hearing. In a further response the 2nd Respondent stated that the Petition is an abuse of the court process to block or prevent any objective investigation into allegations of corruption and/or economic crimes for which there is reasonable cause to suspect.

26 He said the 1st Petitioner had not denied ownership of the titles/documents of the outlined properties. He reiterated that the 2nd Respondent is investigating allegations to the effect that large amounts of money were deposited into the 1st Petitioner/Applicant's accounts when he was the Managing Director MSC and Governor Nairobi City County.

27 Mr Ruto for the 2nd Respondent submitted that the search warrants being complained about were lawfully issued, and executed. Further that the 1st Petitioner is associated with all the other Petitioners and it was him who led the EACC officers to them.

28 Referring to the case of **Christopher Ndarathi Murungaru v Kenya Anti Corruption Commission and Another [2006] eKLR,** Counsel submitted that they were yet to verify some of the listed properties. That once that is done a Notice under section 26 ACECA will be issued. He added that they had adhered to all the conditions set out in Petition No. 109 of 2016.

29 It was Counsel's submissions that issuance of conservatory orders at this point will be determining the Petition itself. He referred to the case of : (i) **DNM VS JK Petition No 133 of 2015 (2016) eKLR** & (ii) **Kenya Breweries Ltd & Anor v Washington O. Okeyo[2002] eklr**. He submitted that this matter was complex and the mandatory injunction sought should not be granted.

30 Counsel argued that it was not uncommon to have those charged disguise property in their children's names and accounts. He wondered why the 1st Petitioner had possession of the title documents if he was not the owner of the properties. Lastly he submitted that the matter is still under investigation including the valuation. He added that it is only after the investigation that some of the properties can be released.

The 3rd Respondent's Case

31 The 3rd Respondent filed grounds of opposition and a replying affidavit by Akule Alex. The gist of its response is that the DPP had been wrongly enjoined in these proceedings as there is no claim against it and neither has the matter been referred to that office. The deponent added that the 2nd Respondent acts independently and does not receive any instructions from anyone let alone the 3rd Respondent.

32 Mr Muteti submitting on behalf of the 3rd Respondent contended that no single action had been attributed to the DPP. He asked the court to consider a future action since the case was not ripe for prosecution. He relied on the case of **Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 Others [2016] eKLR** to support the said argument.

33 Counsel argued that the Applicant had not shown that the orders for search were illegal or unlawful. He referred to the case of **Okiya Omtatah Okoiti & 2 others vs Attorney General & 4 Others [2018] eKLR**

34 He submitted that the jurisdiction of this court was improperly invoked since he should have gone to the issuing court to set aside the orders. On this he referred to the case of **Patrick Ouma Onyango & 12 Others v Attorney General & 2 Others Misc. Application No 677 of 2005 [2016] eKLR.** On what is to be considered when issuing conservatory orders counsel cited the case of **Ezekiel Waruinge v DPP & 2 Others 2017 eKLR.**

35 Mr Oboso for the 1st, 4th & 5th Respondents submitted that since the present application does not touch on any wrong doing by the 1st, 4th & 5th Respondent, he would not make any submissions, but he would wait for the petition.

36 All counsel for the Petitioners separately submitted by way of a rejoinder saying the process of search and seizure is about investigations into offences and for that reason the DPP had to be a party to these proceedings. That after investigations the matter lands at the DPP's doorstep.

Determination

37 I have carefully considered the Notice of Motion, supporting affidavits, replying affidavits and the submissions. The main issue I find falling for determination is whether the Applicants have satisfied this court of the need to issue the several orders sought. Both parties have stated so much in their affidavits to the extent that an analysis of what has been deponed to and submitted on, would result in the determination of the entire petition through this /Ruling. This must be avoided at all costs.

38 At the centre of this Petition is the issuance of the search warrants dated 19th September 2018. The kind of questions which this court will have to deal with are:

- whether the search warrant was lawfully obtained.
- whether the said warrants terms are vague, overboard, open ended and not reasonably intelligible to the searcher.
- whether the terms of the said warrant violate articles 28, 29, 31 & 40 of the Constitution.

39 All these are important and relevant issues because it is on the basis of this search warrant dated 19th September 2018 that the 2nd Respondent's officers conducted the searches complained of. If this court were to delve into these sub issues at this point, it will have determined prayers No. B, C, D, F, H & J of the Petition dated 25th September 2018.

40 Secondly vide this application the Petitioners are seeking a mandatory order to compel the immediate surrender of all the Petitioners' properties searched and seized without warrants on 20th September 2018. This is an issue that requires evidence to be led to determine which these properties are and whether a search warrant should itemise all properties that are to be searched and seized through it. This sub issue still touches on the big question of the search warrant.

41 Thirdly the Applicants have raised an issue as to whether the 2nd Respondent has jurisdiction to investigate the affairs of MSC which is a private company. This is the same issue that has been raised at prayer no. G of the Petition. The above being my observation, I do find that it is in the interest of both parties that the thorny issue of the search warrants, searches, seizures be exhaustively dealt with in the main petition.

42 The matter at hand is still at its investigative stage. The 3rd Respondent (DPP) comes in at the tail end of the whole exercise. As at this point the DPP has not played any role and he has not been cited in respect of any violation. It would not serve any purpose keeping the 3rd Respondent as a party in these proceedings.

43 What then happens in the meantime? To enable this court deal with the petition exhaustively without unnecessary distractions and a myriad of applications I hereby issue the following orders:

(i) A conservatory order staying any further execution of the search warrant dated 19th September 2018 or any other search warrant in respect to the Petitioners/Applicants by the EACC, the 2nd Respondent herein, through any of its agents or investigators to issue pending the hearing and determination of this petition.

(ii) Any searched and seized properties which the 2nd Respondent has already found to be unrelated to the matter at hand must be released forthwith within the next **72** hours. A formally prepared inventory shall be signed by all affected parties with a copy to each of them and the court.

(iii) The 3rd Respondent (DPP) is hereby expunged from these proceedings.

(iv) For purposes of fast tracking the petition, I hereby direct that all necessary responses to the petition to be filed and served by the respondents within the next **14** days.

(v) The Petitioners to have leave to file further affidavits (if any) within **7** days upon service of the responses.

(vi) Directions on the hearing of the Petition to be taken on 4th December 2018. All parties are asked to adhere to the timelines.

Orders accordingly.

Dated, signed and delivered this 6th day of November 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE