



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 122 OF 2015

BETWEEN

PROF. TOM OJIENDA SC

T/A PROF. TOM OJIENDA & ASSOCIATES ADVOCATES.....PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION1ST RESPONDENT

MICHAEL KASILON.....2ND RESPONDENT

EUSTACE WAWERU.....3RD RESPONDENT

JULIUS MURAYA.....4TH RESPONDENT

CHIEF MAGISTRATE, KIBERA LAW COURTS.....5TH RESPONDENT

DIRECTORATE OF PUBLIC PROSECUTIONS.....6TH RESPONDENT

AND

LAW SOCIETY OF KENYA.....AMICUS CURIAE

JUDGMENT

Introduction

1. The Petitioner, Prof Tom Ojienda Senior Counsel (SC), is an advocate of the High Court of Kenya practising under the name and style of Prof. Ojienda and Associates Advocates. He has filed the Amended Petition dated 9th April, 2015 claiming that the Respondents violated his rights to privacy, property, fair administrative action and fair hearing as stipulated under **Articles 31, 40, 47, and 50** of the **Constitution**, respectively.
2. The Petition arises from warrants issued by the Kibera Chief Magistrate’s Court to investigate his Bank Account No. *[particulars withheld]* held at Standard Chartered Bank, Nakuru Branch, over legal fees that Mumias Sugar Company Ltd paid him for services allegedly not rendered to it. The

aforesaid warrants were obtained by the 1st, 2nd, 3rd and 4th Respondents from the 5th Respondent on 18th March, 2015 pursuant to the 1st Respondent's Notice of Motion Application dated 6th March, 2015 and filed in **Kibera CMC Misc Application No.168 of 2015**.

3. Subsequently, in its report titled **"Ethics and Anti-Corruption Commission Report on the current status of corruption matters under investigations"** to the Presidency dated 20th March, 2015, the 1st Respondent included the Petitioner as one of the persons being investigated for having been paid Kshs.280,000,000 for legal services that he did not render to Mumias Sugar Co. Ltd.
4. It is therefore the Petitioner's contention that the Respondents, without notifying him obtained warrants from the 5th Respondent to investigate his bank account and thereby violated his fundamental rights as provided for under **Articles 31, 40, 47 and 50(1) of the Constitution**.
5. He now seeks the following orders;

"(a) A declaration that the warrants to investigate an account given to Michael Kasilon and Eustace Waweru on the 18th day of March 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015; Ethics and Anti-Corruption Commission versus Standard Chartered Bank, breached the Petitioner's rights and fundamental freedoms under the provisions of Articles 27(1), 27(4), 27(5), 31, 40(1), 40(2), 47(1), 47(2) and or 50(1) of the Constitution of Kenya, hence void for all intents and purposes.

(b) Judicial Review by way of an order of certiorari to remove into the Court and quash warrants to investigate an account given to Michael Kasilon on the 18th day of March 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015; Ethics and Anti-Corruption Commission versus Standard Chartered Bank.

(c) Judicial Review by way of an order of prohibition directed to the Ethics and Anti-corruption Commission, Michael Kasilon, Eustace Waweru, Julius Muraya, either by themselves, agents and or associates from investigating or further investigating, inspecting or further inspecting and or lifting or further lifting copies of account opening documents, statements, cheques, deposit slips, telegraphic money transfers, client instructions, bankers books and or any other information in respect to Account Number [particulars withheld] held in the name of Prof. Tom Ojienda & Associates at Standard Chartered Bank Ltd and Account Number [particulars withheld] in the names of Prof. Otieno Odek, Prof Ojienda & Wanyama Advocates or any other account held by the Petitioner.

(d) Judicial Review by way of an order of Mandamus compelling the Director of Public Prosecutions to direct the Inspector General of the National Police Service under Article 157(4) of the Constitution to forthwith investigate Michael Kasilon, the 2nd Respondent herein, for possible commission of the offence of perjury in respect of the supporting Affidavit sworn by Michael Kasilon on 9th day of March 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015; Ethics and Anti-Corruption Commission versus Standard Chartered Bank and prosecution of Michael Kasilon if the investigations reveal that Michael Kasilon is culpable for the offence.

(e) A declaration that the appropriate forum to hear and determine any dispute regarding Advocate-client relationship at the first instance is the Advocates' Complaints Commission and or the Advocates Disciplinary Tribunal.

(f) Damages.

(g) Costs of and incidental to this Petition; and

(h) Any other order that this Honourable Court deems fit and just to grant in the circumstances.”

The Petitioner’s case

6. The Petitioner’s case is as contained in his Amended Petition, the affidavit in support sworn by the Petitioner on 31st March, 2015 and his Further Affidavit sworn on 9th April, 2015. Prof Ojienda who represented himself his case hereunder.
7. That Mumias Sugar Company Ltd lawfully and regularly procured his services and entered him into its panel of advocates among other twenty firms of advocates. That he, at all times, acted upon instructions given to him by the company and upon execution of the instructions, he was entitled under the law to charge legal fees for the services rendered. He thus claimed that he lawfully earned the legal fees that he had charged Mumias Sugar Company Ltd.
8. According to Prof Ojienda, the 1st Respondent had not received any complaint that Mumias Sugar Company Ltd had paid the Petitioner money for services he had not rendered and therefore the 1st Respondent did not have any basis at all to seek warrants to investigate his bank account.
9. He further submitted that the 1st to 4th Respondents, in investigating his account, violated the provisions of **Section 28(1), 28(2), 28(3) and 28(7)** of the **Anti-Corruption and Economic Crimes Act (ACECA)** which provisions enjoin the Respondents to issue notice to the Petitioner notifying him of their intended application to the 5th Respondent for an order to access and investigate his bank records and afford him an opportunity to be heard on the application before the 5th Respondent could legitimately issue the warrants to investigate accounts.
10. In any event, he claimed that even if the 1st to 4th Respondents were intent on investigating the Petitioner as an associate of a suspected person, under **Section 27** of **ACECA**, the 1st to 4th Respondents are required to give him a notice in writing requiring him to furnish the 1st to 4th Respondents with information in his possession relating to the suspected person.
11. It was also the Petitioner’s position that payment of his legal fees by Mumias Sugar Company Ltd is protected by privilege of Advocates under **Sections 134 and 137 of the Evidence Act (Cap 80) Laws of Kenya**. In that regard, he contends that **Section 28(10)** of **ACECA** divests the 1st, 2nd, 3rd and 4th Respondents of any locus to demand that the Petitioner disclose to them information protected by privilege of advocates under the said **Sections 134 and 137 of the Evidence Act**. He further claims that **Section 27(5)** of **ACECA** divests the 1st to 4th Respondent of any locus to demand that he disclose information protected by privilege of advocates under the **Evidence Act**.
12. According to the Petitioner, advocate-client privilege is statutorily underpinned under **Section 13(1)** of the **Evidence Act** and the said privilege can only be waived by the client. That it can also only be breached where the communication between the advocate and the client is in furtherance of an illegal purpose or where the advocate observes that the client used the privilege to commit crime. In that regard, he complains that at no time did Mumias Sugar Company Ltd seek that the Respondents should investigate his bank account and that the Respondents were maliciously doing so and have failed to establish any reasonable basis upon which the investigations were to be carried out. Further, that Mumias Sugar Company Ltd had never consented to the 1st to 4th Respondents conducting an investigation into the Petitioner’s bank account and there was therefore no waiver of the advocate-client privilege. On that submission, he relied on the cases of **Conlons vs Conlons (1952) 2 ALL ER 462, King Woolen Mills Ltd & Another vs Kaplan &**

Stratton Advocates (1990-1994) E. A 244 and Nelson O Kadison vs Advocates Complaints Commission & Another Petition No. 549 of 2013.

13. It was his further submission that payment of legal fees by a client to an advocate is privileged communication and in the absence of a voluntary waiver of such communication by a client, a public body cannot, without justifiable basis, breach the privilege. He relied on the case of **Peter Manyara Ndungu & Another vs Patrick Mugendi Magiri HCCA No. 897 of 2003** in support of that proposition.
14. It was Prof. Ojienda's other contention that any dispute between Mumias Sugar Company Ltd as a client and the Petitioner as an advocate regarding legal fees and legal services, if at all, is not criminal in nature but is a civil dispute that exclusively falls under the jurisdiction of the **Advocates Complaints' Commission** and the **Advocates Disciplinary Tribunal** as established under **Parts X and XI of the Advocates Act (Cap 16 Laws of Kenya)**. That therefore the Respondents lack any locus to even purport to investigate and or determine an alleged dispute over legal fees purportedly paid by a client to an advocate for which the advocate allegedly failed to render the requisite legal services.
15. It was his other position that **Section 60 A** of the **Advocates Act** empowers the Advocates' Disciplinary Tribunal to hear complaints over any professional misconduct by an advocate and it further empowers the Tribunal to *inter alia*, determine whether an advocate is entitled to retain legal fees paid over professional services rendered to a client and to order an advocate to refund to a client legal fees paid for services not rendered. In that regard, he submitted that the Respondents are neither the **Advocates Complaints Commission** nor the **Advocates Disciplinary Tribunal** and therefore they lack the mandate to investigate and or determine an alleged dispute over legal fees purportedly paid by a client to an advocate for that proposition. He relied on the case of **Albert Lukoru Loduma vs Judicial Service Commission & 2 Others Petition No.480 of 2012** and **Republic vs Disciplinary Committee ex parte Wambugu Kariuki JR No.498 of 2008** where it was held that the procedure for determining complaints against advocates was as stipulated under the **Advocates Act** and nowhere else.
16. The Petitioner submitted further that Bank Account No. [particulars withheld] which he holds at Standard Chartered Bank, Nakuru Branch is his property, which ought not to have been searched without his express consent and the search was therefore in violation of his right to privacy as provided for under **Article 31** of the **Constitution**. He also claimed that at no time was there any factual basis at all presented to the 5th Respondent that would have warranted a breach of the Petitioner's privacy rights under **Article 31** of the **Constitution**. It was his case therefore that the action of the 5th Respondent, in issuing the warrants to investigate Petitioner's account without any established legal basis, was a gross dereliction of the 5th Respondent's judicial duty and violated **Article 159(2)** of the **Constitution**. In that regard, he referred the Court to the case of **Gordon Ngatia Muriuki vs Director of Public Prosecutions & 2 Others Petition No.207 of 2014** where it was held that the issuance of an order to search without any reasonable basis being established in accordance with the law, was a violation of an individual's right to privacy as provided for under **Article 31** of the **Constitution**. He also relied on the case of **Manfred Walter Schmitt & Another vs Republic & Another Criminal Revision Nos.569 and 2336 of 2012** where it was held that when an application for a search and seizure warrant is made, the Court is required to address itself to the facts of the case and determine whether a reasonable case has been made to limit a person's rights and fundamental freedoms.
17. It was Prof. Ojienda's further position that while the decision of the 1st, 2nd, 3rd and 4th Respondents to seek warrants to investigate his accounts may be an administrative action in light of **Article 47** of the **Constitution**, the decision of the 5th Respondent in **Kibera CMC Misc Applic No.168 of 2015**, to grant the warrants must be considered in light of **Article 50(1)** of the **Constitution**. That the decision violates the Petitioner's rights under both **Articles 47(1), 47(2) and 50(1)** of the **Constitution** and that before applying for search warrants for his bank account, the 1st Respondent was required to issue him with a notice of its application to the 5th Respondent

so as to afford him an opportunity to be heard before the 5th Respondent could issue the warrants of arrest. Further, that under **Section 27** of the **ACECA**, the 1st Respondent is required to give a notice in writing to the Petitioner requesting him to furnish the Respondents with any information in his possession relating to a person suspected of a crime.

18. It was therefore his submission that the Respondents, in failing to notify him of the proceedings in **Kibera CMC Misc Applic No.168 of 2015**, and failing to afford him an opportunity to be heard in those proceedings before the impugned warrants to investigate his bank account were issued, violated his rights under **Article 50(1)** of the **Constitution**.
19. It was Prof. Ojienda's further submission that in limiting his enjoyment of his bank account in circumstances that violate the provisions of **Sections 27(3), 27(5), (28(1), 28(2), 28(3), 28(7) and 27(10)** of **ACECA**, the Respondents also violated his rights to property under **Article 40(1)** of the **Constitution**.
20. In response to the contention by the 1st to 5th Respondents that they have powers under **Article 79** of the **Constitution** and **Section 13(2) and 23 of ACECA** to investigate his bank accounts even when there was no complaint made, Prof. Ojienda submitted that under **Article 165(1)(D) (ii)** of the **Constitution**, this Court has an obligation pursuant to the provisions of **Article 159(2)(e)** of the **Constitution** to ensure that the purposes and principles of the Constitution are protected and promoted. While relying on the cases of **The Commissioner of Police & 2 Others vs Kenya Commercial Bank & 4 Others Nairobi Civil Appeal No. 56 of 2012**, **Kuria & 3 Others vs Attorney General (2002) 2 KLR 69**, **Speaker of the National Assembly & others vs De Lille MP and Another (297/98) (1999) ZASCA 50** and **Giro Commercial Banks vs Director of Public Prosecutions & 3 Others JR No. 9 of 2013**, he submitted that this Court has the jurisdiction and the duty to interrogate and pronounce itself on the exercise of discretion by the Respondents to investigate his bank account and to ensure constitutional compliance.

For the above reasons, the Petitioner seeks the prayers elsewhere sought above.

The 1st, 2nd, 3rd and 4th Respondents' case

21. The 1st, 2nd, 3rd and 4th Respondents in response to the Petition filed a Replying Affidavit sworn on 9th April, 2015 by Michael Kalison, a Forensic Investigator with the 1st Respondent, and a Further Replying Affidavit sworn on 23rd April, 2015. They also filed written submissions dated 31st July, 2015.
22. Mr. Kalison deponed that sometimes in February, 2015, the 1st Respondent received an intelligence report alleging that Mumias Sugar Company Ltd had made irregular payments on account of alleged legal fees to various advocates including the Petitioner. That he subsequently wrote a letter to the company requesting for information relating to the fees paid to their various advocates. That his investigations later revealed that there were several suspicious transactions in the bank account held by the Petitioner and as a result he applied to the 5th Respondent for warrants to investigate the said account as well as that of Mumias Sugar Company Ltd. That the 5th Respondent issued the warrants to investigate the Petitioner's bank account and that in searching the account, the 1st Respondent was merely pursuing allegations of irregularities in the payment of fees and not any dispute in regard to Mumias Sugar Company and its advocate; the Petitioner.
23. He further stated that the 1st Respondent is empowered by law to commence investigations against anyone on its own motion or on a complaint made by any person. In relation to the instant case, he claimed that the 1st Respondent was acting pursuant to a confidential report it had received alleging that Mumias Sugar Company Ltd had made fictitious payments to advocates on account of legal services not rendered. In addition, he claimed that it was alleged that Dr. Evans Kidero,

- the then Managing Director of Mumias Sugar Company had caused to be processed a sum of Kshs.300 Million out of which Kshs.280 million was paid to the Petitioner, just before he exited Mumias Sugar Company Ltd.
- 24.It was Mr. Kasilon's other statement and averment that his investigations revealed that the Petitioner was one of the advocates rendering services to Mumias Sugar Company Ltd and that several payments had been made to his account by the said Company. That he identified the documentation used in processing the payments and cases against which payments were purported to have been made and visited various Courts to verify the existence or otherwise of cases quoted in the payment documents.
- 25.It was his contention that the allegations made against the Petitioner imputed criminal conduct on his part and accordingly, it was necessary to seek and obtain warrants to investigate the payments made by Mumias Sugar Company to the Petitioner's account.
- 26.In regard to the 1st Respondent's mandate, Mr. Kalison stated that the 1st Respondent continuously receives complaints and information as a statutory duty and it is under the same statutory duty to investigate and verify the truth or otherwise of all allegations that raise reasonable suspicion of corrupt conduct or the commission of an economic crime like the one alleged against the Petitioner. It was therefore his claim that it was in the public interest that the investigations against the Petitioner ought to come to an end so that conclusive findings could be made one way or the other.
- 27.Mr. Ruto for the 1st – 4th Respondents submitted that **Section 20 of ACECA** protects members of the 1st Respondent from personal liability when undertaking the work of the Commission and claimed in that regard that in obtaining the warrants to investigate the Petitioner's bank account, the 2nd, 3rd and 4th Respondents were not acting ultra-vires their lawful mandate. He therefore contended that they should not be victimized by being sued in these proceedings in their personal names on account of actions taken in the performance of official duties. In that regard he relied on the decision of **Githu Muigai & Another vs Law Society of Kenya & Another (2015) e KLR** where it was held that the Petitioner in that case could not be held liable for actions he had undertaken in his official capacity as the Attorney General.
- 28.It was his further submission that the warrants to investigate the Petitioner's bank account were issued on reasonable suspicion that an offence had been committed and that under **Section 180(1) of the Evidence Act**, the inspection of any banker's books is necessary for the purpose of any investigation into the commission of an offence. It was thus his position that it was right and proper for the 2nd Respondent to seek and obtain and enforce the orders obtained in **Kibera Chief Magistrates Misc. Criminal Applic No.168 of 2015 EACC vs Standard Chartered Bank Ltd.**
29. In addition, he stated that the proceedings in the aforesaid criminal case were conducted *ex-parte* and the Court was satisfied that such orders were necessary without hearing Standard Chartered Bank. He further claimed that the Petitioner was not a party to those proceedings and he did not seek to be enjoined in them as such and that in any event, he had failed to follow known legal avenues to challenge the orders granted by the Court in the aforesaid criminal case. It was therefore his submission that a Constitutional Petition is the wrong means of raising those issues as the Petitioner ought to have exhausted the proper avenues for redress.
- 30.In response to the Petitioner's claim that his constitutional rights to fair administrative rights have been violated on account of failure to give notice in writing as provided for under **Section 27 of ACECA**, he submitted that **Section 27** was not invoked in the **Criminal Applic No. 168 of 2015** and in any case, he claimed that **Section 27** was not couched in mandatory terms and the 1st Respondent was not obliged to obtain information through that section of the law solely.
- 31.In respect to protection from discrimination, it was Mr. Ruto's submission that the genesis of

investigations of the Petitioner's bank account was a report made to the 1st Respondent on 16th February, 2015 and that in the alleged report, there was no allegation levelled against any other law firm. He thus defended the 1st Respondent's actions and claimed that in the natural course of events, steps had to be taken to investigate the Petitioner's accounts. For that proposition, he relied on the decision of **Republic vs Director of Public Prosecutions & 3 Others ex parte Meridian Medical Center Ltd & 7 others (2015) e KLR** where it was held that for an act to amount to discrimination, it must fall within the prohibited acts under **Article 27** of the **Constitution**. In any case, it was his case that investigations are not an administrative action and that the decision to institute a prosecution cannot be administrative or fall afoul of **Article 47** of the **Constitution**.

32.As regards alleged violation of the Petitioner's right to privacy, Mr. Ruto submitted that the law envisages that there are instances where the right to privacy may be abridged and in that regard, he relied on the decision of **JLN & 2 Others vs Director of Children Services and 4 Others (2014) e KLR** where it was held that private information may be revealed in certain instances. It was his further submission that as the 1st Respondent was investigating embezzlement of public funds at Mumias Sugar Company Ltd, the right to privacy may properly be abridged in those circumstances.

33.In relation to the right to property as provided for under **Article 40** of the **Constitution**, it was Mr. Ruto's submission that at no time was the Petitioner deprived of his property for him to seek protection under **Article 40** of the **Constitution**. In any event, he claimed that public monies were embezzled from Mumias Sugar Company Ltd to the Petitioner in the form of fictitious legal fees and therefore the protection provided by **Article 40** of the **Constitution** does not extend to any property that has been found to have been unlawfully acquired.

34.In response to the allegation of violation of the right to fair hearing under **Article 50** of the **Constitution**, he submitted that the rights enshrined under **Article 50** of the **Constitution** are trial related and an allegation of their violation cannot be made before a trial has started. On that submission, he relied on the case of **Eng. Michael Kamau vs EACC & Others Petition No.230 of 2015**.

35.On the issue of advocate/client confidentiality, he submitted that privilege belongs to the client and the right of waiving the privilege lies with the client and not the advocate as provided for under **Section 136** of the **Evidence Act**. He contended further that the warrants, subject of these proceedings, were obtained to inspect the Petitioner's accounts on allegations of corruption and consequently, there was good reason to seek disclosure from the bank of any material in its custody that may have furthered an illegal activity.

36.Finally, Mr. Ruto urged the Court to consider the matter in public interest especially through the prism of granting independence in investigations of corruption cases and urged that the Petition ought to be dismissed.

The 5th Respondent's case

37. The 5th Respondent, Chief Magistrate, Kibera Law Courts did not file any response to the Petition. However, the Attorney General filed written submissions on points of law in opposing the Petition.

38.Mr. Njoroge who appeared for the 5th Respondent submitted that the 1st Respondent has the mandate to deal with all economic crimes relating to the Nation or even a private enterprise and urged the Court in determining the dispute herein to consider the definitions of economic crimes and corruption as provided for under **ACECA**. It was his further contention that the Court is empowered to take note of the investigations of an allegation that an irregular payment for fictitious services made by Mumias Sugar Company Ltd was the sole subject of the present proceedings and there was nothing unlawful about such an investigation.

39. In regard to the Petitioner's claim that the warrants to investigate his accounts were issued in violation of **Article 27** of the **Constitution**, Mr. Njoroge submitted that he had not demonstrated any discrimination on the part of any of the Respondents and that discrimination can only be demonstrated by evidence that there were other persons who were in the same circumstances as the Petitioner yet the Petitioner was afforded a different treatment from them.
40. He stated that the 5th Respondent had jurisdiction to issue the warrants under the provisions of **Section 118** of the **Criminal Procedure Code** and that such a decision cannot be challenged in the manner that the Petitioner had done.
41. It was his further position that the Petitioner had not demonstrated a violation of his right to property because he still holds the bank account which had not been frozen and no money had been appropriated from it at all.
42. Relying on the case of **James Humphrey Oswago vs The Ethics and Anti-Corruption Commission, (2014) e KLR**, Mr. Njoroge submitted that it was unreasonable to expect that investigators would notify the Petitioner before carrying out any investigations as he would have then be alerted to conceal any incriminating evidence. It was his submission that in any event, the Respondents were not carrying out an administrative action and therefore **Article 47** of the **Constitution** cannot apply to the instant case. He also claimed that the right to fair hearing under **Article 50** of the **Constitution** cannot be properly invoked since it only safeguards a accused person's rights during a criminal trial.
43. It was therefore Mr. Njoroge's position that the Petitioner had not demonstrated that any of his rights under **Articles 27, 40, 47** and **50** of the **Constitution** had been violated and he urged the Court to dismiss the Petition with costs to the 5th Respondent.

The 6th Respondent case

44. In opposing the Petition, the 6th Respondent, the Director of Public Prosecutions, filed Grounds of Opposition dated 10th April, 2015 which read as follows;

“(1) The warrants to investigate the account of the Petitioner were lawfully issued pursuant to Section 118 of the Criminal Procedure Code Cap.75, as read with Section 180 of the Evidence Act Cap 80 and Section 23 of the Anti-Corruption and Economic Crimes Act, 2003.

(2) The Petitioner's rights are subject to constitutional limits enshrined in Article 24 of the Constitution so as to protect public interest in detection, prevention and prosecution of corruption and economic crimes.

(3) That a clear reading of Section 134 and 137 of the Evidence Act demonstrates that the client-advocate privilege is not protected in case of commission or omission that amounts to illegality, fraud, or when crime is committed or suspected to have been committed.

(4) That the Petitioner's right to property by dint of Article 40 of the Constitution does not extend to any property that has been found to be unlawfully acquired.

(5) That the 1st Respondent is lawfully conducting investigations as empowered under Section 13(2)(c) of the EACC Act and its officers are protected by Section 20 of the EACC Act from any commission or omission done in good faith for purposes of executing their powers under the same Act.

(6) That no complaint is filed with the Director of Public Prosecutions regarding commission of any offence of perjury by Michael Kasilon or any other officer of the first Respondent that will warrant the DPP in exercise of powers conferred under Article 157(4) of the Constitution to direct the Inspector General of National Police Service to investigate the commission of the said offence.

(7) That the pendency of a dispute before the Advocates Complaints Commission and or Disciplinary Tribunal is not a bar to prosecution of any offence resulting from simultaneous professional misconduct.”

45. In addition to the above grounds, Mr. Ashimosi submitted that this Court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of the Constitution. That the 6th Respondent and the police have a constitutional duty and obligation to maintain law and order and also investigate crimes and apprehend offenders. Relying on the decision of **Director of Public Prosecutions vs Crosley Holdings Ltd and 2 Others Civil Appeal No.152 of 2009** he submitted that the decision to investigate, recommend and prosecute should not be amenable to judicial review except if undertaken in bad faith.

46. On the issue of advocate/client privilege, Mr. Ashimosi submitted that **Sections 134 and 137** of the **Evidence Act** do not apply if such a defence is in furtherance of any illegal purpose.

47. It was also his contention that warrants to investigate the accounts of the Petitioner were lawfully issued pursuant to the provisions of **Section 118** of the **Criminal Procedure Code**, **Section 180** of the **Evidence Act** and **Section 23** of **ACECA**. That the said action was also reasonable and justifiable in a democratic society in consonance with **Article 24** of the **Constitution**.

48. It was his other submission that the 1st Respondent is lawfully conducting investigations as empowered under **Section 13(2) (c)** of **ACECA** and its officers are protected by **Section 20** of **ACECA** from any commission or omission done in good faith for purposes of executing their powers under the Act.

49. He further contended that no complaint had been filed with the police or the 6th Respondent in relation to an alleged offence of perjury by Mr. Michael Kalison or any other officer of the 1st Respondent that would warrant the DPP to exercise his powers as conferred under **Article 157 (4)** of the **Constitution** so as to direct the Inspector General of National Police Service to investigate the commission of the said offence.

50. Mr. Ashimosi further stated that the pendency of a dispute before the **Advocates Complaints Commission** and or **Disciplinary Tribunal** is not a bar to prosecution of any offence resulting from simultaneous professional misconduct. That this Court cannot also usurp the powers of the 6th Respondent and determine such an issue.

51. Mr. Ashimosi concluded by urging that since the Petitioner had failed to prove violation of his fundamental rights and freedoms, the Court ought to dismiss the Petition with costs.

The Amicus Curiae Brief

52. The Law Society of Kenya was admitted as Amicus Curiae in these proceedings on 7th July, 2015. It filed written submissions dated 29th July, 2015 on points of law and was represented by Mr. Kitonga SC.

53. It was Mr. Kitonga's submission that even before applying for a search warrant, the Respondents needed to summon the Petitioner and request him to provide the requisite details of the bank

account in question, or to voluntarily accede to a search being conducted thereon. That the Respondents would only have been compelled to file an application for warrants to investigate if the Petitioner had refused to comply, and even before the warrants were issued, the 5th Respondent ought to have heard both parties before making a determination thereof. That the aforesaid procedure would have ensured that the principles of natural justice have been adhered to.

54. It was also his submission that in undertaking the investigations, the Respondents were under a duty to abide by all relevant constitutional and statutory provisions and respect the Petitioner's right to privacy and human dignity. He added that advocate/client privilege binds an advocate not to be compellable to disclose a client's affairs without express authority or consent of his client. That an advocate cannot therefore be compelled to breach the said requirement and in the same way the Respondents cannot use underhand or criminal methods to obtain information.

55. It was therefore the Amicus brief that the principle of advocate-client privilege is the backbone of court litigation, legal practice and the rule of law and that the principle should not be varied as it would pose a grave danger to the system of administration of justice and conduct of legal affairs.

Determination

56. Having set out the Parties' respective cases and submissions, I am of the view that there are two major issues for determination in this Petition; (i) Whether the warrants to investigate the Petitioner's Bank Account No. {*particulars withheld*} held at Standard Chartered Bank, Nakuru Branch were issued in violation of the Petitioner's fundamental rights and freedoms as provided for under **Articles 27, 40, 47 and 50 of the Constitution**. (ii) Whether the advocate/client privilege is applicable in these proceedings and consequently, whether the prayers set out elsewhere above can be granted.

57. Before I determine the above issues, I heard Mr. Ruto for the 1st to 4th Respondents to claim that this was the wrong forum for the Petitioner to vindicate himself as he was supposed to challenge the warrants via known legal avenues such as through an appeal which he had failed to do.

58. In that regard, and as was correctly submitted by Prof. Ojienda, this Court has the jurisdiction, under the provisions of **Article 165 (1)(d)(ii) of the Constitution**, to determine the "***question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.***" The 1st to 4th Respondents have in that context claimed that under **Article 79 of the Constitution** and **Sections 13(2) and 23 of ACECA**, they have power to investigate suspected corrupt and unlawful conduct. If that be so, their actions are therefore subject to the authority of this Court as stipulated under **Article 165(1) (d) (ii) of the Constitution**.

59. In addition to the above, **Section 362 of the Criminal Procedure Code** and **Article 165(6) of the Constitution** grant the High Court supervisory powers over the Subordinate Courts. In furtherance of that mandate, under **Section 362 of the CPC** the High Court has power to;

"Call for and examine the record of any criminal proceedings before any subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate Court."

For clarity, **Article 165 (6) and (7) of the Constitution** provides as follows;

"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of

any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”

I am therefore satisfied that this Court has powers to examine the legality of the proceedings in **Kibera CMC Misc Applic No.168 of 2015** and in any event, the Petitioner has the right under **Article 22(1)** of the **Constitution** to institute Court proceedings claiming that a fundamental right or freedom under the Bill of Rights has been violated and that is what the Petitioner has done.

60. I should also quickly dispose of one issue that cannot be contested; that the 2nd – 4th Respondents are officers of the 1st Respondent and cannot be sued for conduct in that capacity. **Section 7** of the **2nd Schedule** to **ACECA** provides as follows in that regard;

“(1) No action or proceeding for compensation or damages shall be brought against a member of the advisory Board or any other person authorized by the Advisory Board, in respect of anything done or omitted in good faith under this Act

(2) This paragraph shall not relieve the Advisory Board of any liability.”

There are no facts placed before me to indicate that any of the officers named have acted, personally, in any way that should attract personal sanctions against them. That includes the 2nd Respondent and the allegations of perjury made against him. If such an offence may have been committed, this Court is not the right forum to initiate such a complaint.

61. In the event, the names of the 2nd – 4th Respondents are struck off the Petition with no orders as to costs.

62. Having said so, the Petitioner’s complaint is straight forward; He claims that the warrants to investigate his bank account issued by the 5th Respondent on 18th March, 2015 upon application by the 1st to 4th Respondent were issued in breach of **Sections 27, 28(1), 28(2), 28(3) and 28(7)** of **ACECA** in that no notice was given to him before the warrants were issued. He also claims that the Respondents violated his fundamental rights and freedoms as provided in **Articles 27, 40, 47 and 50** of the **Constitution**. He also claims that he is protected by advocate/client privilege and that there exist other mechanisms in which issues of legal fees paid for services not rendered are dealt with.

63. On their part, the Respondents contend that they did not act *ultra-vires* their lawful mandate and that the warrants were obtained pursuant to the provisions of **Section 180** of the **Evidence Act** and that they did not, in doing so, violate any of the Petitioner’s constitutional rights. I will therefore start by examining whether the Respondents violated the Petitioner’s fundamental rights and freedoms as claimed.

Equality and freedom from discrimination under Article 27 of the Constitution

64. The Petitioner submitted that in seeking the warrants to investigate him, the Respondents discriminated against him as compared to all other twenty law firms that are currently in Mumias Sugar Company’s panel of Advocates therefore violating his right not to be discriminated against.

65. In that context, **Article 27** of the **Constitution** enshrines the right to equality and freedom from discrimination in the following terms;

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) *Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

(3) ...

(4) *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

(5) *A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*

(6) ...

(7) ...

(8)” (*Emphasis added*)

66. The term “**discrimination**” has been defined as;

“...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society”. (See Andrews vs Law Society of British Columbia [1989] I SCR 143, as per McIntyre J.)

67. The Court in **Peter K. Waweru vs Republic [2006] e KLR** also defined discrimination as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their respective descriptions.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex....A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”.

68. Further, in **Willis vs The United Kingdom, No. 36042/97, ECHR 2002 – IV and Okpiz vs Germany, No. 59140/00, 25th October 2005**, the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations. ?

69. I agree with the above definitions and in that regard, the Petitioner asserts that the Respondents’ actions of investigating him out of the pool of advocates on Mumias Sugar Company’s panel of advocates amounts to discrimination.

70. With respect to the Petitioner, I am unable to make any finding on the discrimination allegation made because no material has been placed before this Court to support the said allegation. I do not for instance have the names of the other advocates who are in the panel of Mumias Sugar Company Ltd who were paid legal fees like the Petitioner and have not been investigated. What evidence of differential treatment then do I have to make an affirmative finding? None and the claim must therefore fail.

Right to privacy under Article 31 of the Constitution

71. It is the Petitioner's contention that **Article 31** of the **Constitution** protects his right to privacy

which includes the right not to have his bank account investigated without any factual basis. That at no time did the Respondents present such a factual basis to the 5th Respondent as to warrant issuing of warrants to investigate the said bank account.

72. In that context, the right to privacy is provided for under **Article 31** in the following terms;

“Every person has the right to privacy, which includes the right not to have –

- a. ***Their person, house or property searched.***
- b. ***Their possessions seized.***
- c. ***Information relating to their family or private affairs unnecessarily required or revealed; or***
- d. ***The privacy of their communications infringed.”** (Emphasis added)*

73. The question before me is whether the warrants to investigate the Petitioner’s bank account violated his right to privacy. I will determine that question in the context of the defence raised by the Respondents that **Section 180** of the **Evidence Act** mandated the 1st to 4th Respondents to obtain warrants to investigate the said bank account and so their conduct was sanctioned by law. In order to determine that issue, I must first address the nature of the right to privacy and what it seeks to protect and consequently juxtapose that with the claim before me.

74. The interests underlying the entrenchment of a right to privacy in the Bill of Rights have long been recognized by common law as important reasons for protecting such a right. The common law therefore recognizes the right to privacy as an independent personality right and a breach of a person’s privacy is said to occur when there is unlawful intrusion into that privacy. Further, the breach of a person’s privacy also occurs when there is unlawful disclosure of private facts about that person. Some examples of breaches of privacy recognized by the common law were mentioned by Ackermann J in his judgment in **Berstein vs Bester NO (1996) (2) SA 751** and include entry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion and the disclosure of private facts in breach of a relationship of confidentiality. The Courts have also held that the common law right to privacy is invaded by publishing a person’s photograph as part of an advertisement without the consent of the person. See **O’ Keeffe vs Argus Printing and publishing Co Ltd 1954 (3) SA 244 (C), 247F-249D**.

75. The above notwithstanding, in the **Berstein vs Bester NO (supra)** case the South Africa Constitutional Court cautioned against a straightforward use of common law principles to interpret fundamental rights and freedoms. In determining therefore whether an invasion of the common law right to privacy has been violated, the Court stated as follows regarding the applicable test;

“It essentially involves an assessment as to whether the invasion is unlawful. And, as with other forms of anuria, the presence of a ground of justification (such as statutory authority) means that an invasion of privacy is not wrongful. Under the Constitution, by contrast, a two-stage analysis must be employed in deciding whether there is a violation of the right to privacy. First the scope of the right must be assessed to determine whether law or conduct has infringed the right. If there has been an infringement it must be determined whether it is justifiable under the limitation clause”.

The same reasoning was applied by the High Court in **CORD and Others vs Republic of Kenya and Others, Petition No.628 of 2014**.

76. Further, in determining the scope of the right to privacy, the Consultative Assembly of the Council of Europe defined **Article 8(2)** of the **European Convention on Human Rights**, which provides for the right to privacy of an individual’s private and family life, his home and correspondence as follows;

“The right to privacy consists essentially in the right to live one’s own life with a

minimum interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially”.

In addition to the above, in the final conclusions of the **Nordiac Conference on the Right to Respect for Privacy of 1967**, the following other elements of the right to privacy are listed; the prohibition to use a person’s name, identity or photograph without his or her consent, the prohibition to spy on a person, respect for correspondence and the prohibition to disclose official information.

77.I also note that a legitimate expectation of privacy has two components; the protection of the individual and the reasonable expectation of privacy. The reasonable expectation of privacy test itself has two compartments. Firstly, there must be at least a subjective expectation of privacy and secondly, the expectation must be recognized as reasonable by the society. On that aspect, in **Berstein vs Bester NO (supra)** Ackermann J writing for the majority stated as follows;

“The subjective expectation component does more than say that privacy is what feels private. It provides an explanation for the permissibility waivers of privacy. One can have no expectation of privacy if has consented explicitly or implicitly to have one’s privacy invaded. It is, however, the second part of the definition- the objective component-that does more work. One’s subjective privacy intuitions must be reasonable to qualify for the protection of the right. What is reasonable, of course, depends on the set of values to which one links the (empty) standard of reasonableness.”

I am in agreement with the learned judge and as I understand it, privacy therefore is what can reasonably be considered to be private and again in **Berstein vs Bester NO (supra)** Ackermann J introduced a more helpful way of getting a handle on privacy and introduced the continuum of privacy interests as follows;

“The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy, this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of a civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”

78.Ackermann J’s reasoning can therefore be summarized as follows; (a) privacy is a subjective expectation of privacy that is reasonable, (b) it is reasonable to expect privacy in the inner sanctum, in the truly personal realm, (c) a protected inner sanctum helps achieve a valuable good-one’s own autonomous identity. It emerges to my mind that, and from the decision in **Berstein vs Bester NO (supra)**, that privacy is not a value in itself but is valued for instrumental reasons, for the contribution it makes to the project of ‘autonomous identity’. This protection in return seeks to protect the human dignity of an individual.

79.The need to protect privacy has also well been enumerated by **B. Rossler** in his book, **The Value of Privacy (Polity, 2005) p. 73** where he explained it as follows;

“Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships,

formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part”.

80. I am persuaded by the reasoning above and it is in that light that I will determine the claim for violation of right to privacy as alleged in the Petition before me. In that context, **Section 180(1)** of the **Evidence Act** provides;

“Where it is proved on oath to a Judge or Magistrate that in fact, or according to reasonable suspicion, the inspection of any banker’s book is necessary or desirable for the purpose of any investigation into the commission of an offence, the Judge or Magistrate may by warrant authorise a police officer or other person named therein to investigate the account of any specified person in any banker’s book, and such warrant shall be sufficient authority for the production of any such banker’s book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker’s book.”
(Emphasis added)

In addition, **Section 23** of **ACECA** provides thus;

“(1) The Secretary or a person authorized by the Secretary may conduct an investigation on behalf of the Commission.

(2) Except as otherwise provided by this Part, the powers conferred on the Commission by this Part may be exercised, for the purposes of an investigation, by the Secretary or an investigator.

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

(4) The provisions of the Criminal Procedure Code (Cap. 75), the Evidence Act (Cap. 80), the Police Act (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provision of this Act or any other law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator.”

81. Looking at the law above therefore, it is therefore clear that the Court, upon application, has power to authorize access by police officers and investigators to bank accounts of suspected accounts used for the commission of an offence. It therefore means that although a bank account is otherwise private to any person, the bone of contention is how and to what extent the Court’s power can be utilized so as to justify the limitation of the right to privacy.

82. The Petitioner in that regard has maintained that there has never been any factual basis at all presented to the 5th Respondent to warrant breach of his right to privacy under **Article 31** of the **Constitution** and that there must be a reasonable basis upon which warrants to investigate his bank account can be issued.

83. In answer to that contention, Mr. Kasilon in his affidavit stated at paragraphs 4 to 6 as follows;

“(4) That sometime in February, 2015 the Commission received an intelligence report alleging that Mumias Sugar Company had made irregular payments on account of legal fees to various advocates including the Petitioner.

(5) That we commenced investigations by writing a letter to the Company Secretary, Mumias Sugar Company to furnish us with information relating to the fees paid to their various advocates. Mumias Sugar company was not coerced to avail the documents requested.

(6) That our investigations revealed that there were several transactions occurring in the bank account held by the Petitioner herein and subsequently, we applied to the Chief Magistrate’s Court for warrants to investigate that particular account as well as that of Mumias Sugar Company.”

84. In the case of **Gordon Ngatia Muriuki vs Director of Public Prosecutions & 2 Others Petition No. 207 of 2014** the Court stated as follows regarding the purpose of a warrant;

“The purpose of warrants is to protect the right of a person from unreasonable searches and seizures and unnecessary arrests in light of the protections conferred by Articles 29 and 31 of the Constitution. Article 29 protects the right to freedom and security of the person and includes the right not to be deprived of that freedom arbitrarily or without just cause. Article 31 protects the right to privacy which includes the right to a person not to have their person, home or property searched and possessions seized. By issuing an order without a reasonable basis being established in accordance with the law, the Court violated the rights of the individual.”

Similarly, in the case of **Manfred Walter Schmitt & Another vs Republic & Another Criminal Revision No. 569 OF 2012** the Court held as follows;

“I would be remiss if I did not comment on the nature of the proceedings before the Subordinate Court. The duty imposed on the Judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual. The Court is not a conveyor belt for issuing warrants when an application is made nor must the Court issue warrants of search and seizure as a matter of course. When an application is made, the Court is required to address itself to the facts of the case and determine, in accordance with the statutory provisions, whether a reasonable case has been made to limit a person’s rights and fundamental freedoms. On the other hand, the duty of the State and its agencies, in investigating and prosecuting crime, is to furnish the Court with facts upon which the Court can conclude that there is a reasonable evidence of commission of a crime by the person it seeks to implicate by the application for search and seizure.”

And in **Vitu Limited vs The Chief Magistrate’s Criminal Applic No. 475 of 2004** the Court stated that;

“A police officer is not legally empowered to apply for or to obtain a warrant to investigate a person’s bank account just because he imagines that person may commit or has committed an offence. There must be substantial acts and circumstances already available to the police officer to enable him to create or to have reasonable suspicion in mind that, the account holder has committed an offence ... there must have been a complaint and investigations.”

85. I am in agreement with the exposition of the law as above and the principle emerging from the above cases is that there must be some degree of reasonable basis upon which an investigator would seek to investigate a bank account. In that regard therefore, the Courts have been categorical that mere suspicion of commission of a crime, is not a sufficient basis to seek a search

warrant and the test applicable to determine reasonable basis was set out by the Court in the case of *Emmanuel Suipanu Siyanga vs Republic Criminal Appeal No.124 of 2009* where it stated that;

“... it follows that the factual basis which would make any suspicion which is actually formed a reasonable one must also exist at the material time; a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not ground which then made suspicion reasonable, it was not a reasonable suspicion. Whether grounds actually existed at the time is to be tested objectively. Consequently a suspicion may be reasonable even though subjectively it was based on unreasonable grounds, to prove reasonable suspicion, it must of necessity be recognized that a reasonable suspicion never involves certainly as to the truth. Where it does, it ceases to be suspicion and becomes fact ... there must be satisfactory account ...”

86. I am in agreement and applying the above principle and the test required in the instant case, I have seen the Notice of Motion Application made in **Kibera CMC Misc Applic No.1681 of 2015** and annexed to the affidavit of Mr. Kasilon as annexure MK2 (I). The Notice of Motion Application is said to have been made on the following grounds;

“(a) That the commission is investigating an allegation of corruption by dint of Part IV of the Anti-Corruption and Economic Crimes Act, 2003, involving an allegation that there was an irregular payment whereby some money was paid to the account for fictitious legal services rendered to Mumias Sugar Company Limited.

(b) That it is suspected that this transaction was irregular and that some of the money herein was paid to Prof. Tom Ojienda & Associates.

(c) That the said public money was paid to the account in question hence the need to investigate the same.

(e) That for purposes of ongoing investigations, it is necessary for the said bank to avail certified copies of the account opening documents, statement, cheques, deposit slips, telegraphic money transfers, client instruction, bankers' books or any other relevant information in respect of the account in question.

f. That the documents referred to herein above are necessary for the conclusion of ongoing investigations.”

87. Are the above grounds reasonable and can they be a basis for limiting the right to privacy under **Article 31** by the issuance of warrants ex-parte? While I will address the latter issue in due course, limitations to the right to privacy must be taken into account. **Article 24** of the **Constitution** and thus the test also set out in **Berstein vs Bernstein (Supra)** by Ackermann J.

88. In that regard, in **CORD (Supra)**, the High Court stated thus;

“As O’Higgins C.J commented in Norris vs Attorney General (1984) I.R 587, a right to privacy can never be absolute. It has to be balanced against the State’s duty to protect and vindicate life. What needs to be done, as was recognised in Campbell vs MGN Ltd (2004) 2 AC 457, is to subject the limitation and the purpose it is intended to serve to a balancing test, whose aim is to determine whether the intrusion into an individual’s privacy is proportionate to the public interest to be served by the intrusion.”

Article 24 of the **Constitution** also provides as follows;

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom

a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

3. The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.”

89. **Article 24(3)(a) (i)** is clear therefore that property, such as a personal bank account can be properly searched and such a search, if properly founded, cannot be a basis for breach of the right to privacy.

90. In the above context, it has been claimed that since the 1st Respondent had received information that there may have been unlawful payments of purported legal fees paid to the Petitioner, there was a basis for conducting the search and I am convinced that the public interest in doing so far outweighs the Petitioner’s right to privacy and that right can properly be limited in the circumstances.

91. I am making a firm finding therefore that the search of the Petitioner’s bank account having been done by following Statute and on reasonable grounds, did not amount to a violation of his right to privacy under **Article 31** of the **Constitution**.

Right to property

92. It is the Petitioner’s contention that the Respondents violated his right to property as is stipulated under **Article 40** of the **Constitution**. He particularly contends that bank account No. {*particulars withheld*} held at Standard Chartered Bank, Nakuru Branch is his property and the warrants to investigate the said account violated his rights under **Article 40(1)** and **(2)** of the **Constitution**

that militate against arbitrary deprivation of property.

93. In response to that contention, the Respondents claimed that his right to property has not been violated as he has not been deprived of his said property and also that property rights do not extend to illegally acquired property.

94. In that regard, the protection of the right to property is provided for under **Article 40** of the **Constitution** in the following manner;

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

a. of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

i. requires prompt payment in full, of just compensation to the person; and

ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

2. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

3. The State shall support, promote and protect the intellectual property rights of the people of Kenya.

4. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

95. Looking at the law above, it is clear that **Article 40** protects property of any nature and **Article 260** of the **Constitution** has defined property as follows;

“Property includes any vested or contingent right to or interest in or arising from-

a. Land, or permanent fixtures on, or improvements to, land,

b. Goods or personal property,

c. Intellectual property or,

d. Money, choses in action or negotiable instruments.”

96. Given the above definition and taken as a whole, it therefore means that **Article 40(1)** of the **Constitution** protects generally any property that is capable of being owned by a person including the Petitioner's bank account and proceeds therein. The question in that context is whether the Petitioner's right to property has been violated.
97. I have alluded to the matter elsewhere above and my answer is that I do not think so. I say so because as correctly submitted by the Respondents, I did not hear the Petitioner to claim that his bank account had been frozen or that he was not able to access the same or that money had been appropriated from it. How then can it be said that the right has been violated also noting that the intrusion into it was lawful? Having said so, it is therefore obvious that I do not find a violation of his right to property as alleged.

Fair administrative action under Article 47 of the Constitution

98. It was the Petitioner's case that in seeking the warrants to investigate his bank account, the 1st to 4th Respondents violated his rights to fair administrative action as they failed to issue him with a notice in writing of their application to the 5th Respondent as is provided for under **Sections 27 and 28 of ACECA**.
99. In response, the Respondents contended that their actions were not administrative but rather were law enforcement in nature and as such cannot give rise to the claims of violation of the right to fair administrative action.
100. **Article 47** of the **Constitution** protects the right to fair administrative action in the following terms;

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

101. It has been held that **Article 47** above was intended to subject administrative processes to constitutional discipline hence relief for administrative grievances was no longer left to the realm of common law - See **Dry Associates Limited vs Capital Markets Authority & Another Petition No.328 of 2011**.
102. If I understood the Petitioner's contention against the above background, it was that the Respondents violated **Sections 27 and 28 of ACECA** by failing to notify him in writing before seeking the warrants to investigate his bank account.
103. In that regard, **Section 27** provides that;

1. The Commission may apply ex parte to the Court for an order requiring an associate of a suspected person to provide, within a reasonable time specified a written statement in relation to any property specified by the Secretary, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

2. In subsection (1), “associate of a suspected person” means a person, whether or not suspected of corruption or economic crime, who the investigator reasonably believes may have had dealings with a person suspected of corruption or economic crime.

3. The Commission may by notice in writing require 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 crime.

4. A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

5. No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act (Cap. 80).”

104. While Section 28 provides,

“(1) The Commission may apply, with notice to affected parties, to the Court for an order to -

- a. require a person, whether or not suspected of corruption or economic crime, to produce specified records in his possession that may be required for an investigation; and*
- b. require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not.*

(2) A requirement under subsection (1)(b) may include a requirement to attend personally to provide explanations and information.

(3) A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.

(4) The six month limitation in subsection (3) does not prevent the Commission from making further requirements for further periods of time as long as the period of time in respect of which each requirement is made does not exceed six months.

(5) Without affecting the operation of section 30, the Commission may make copies of or take extracts from any record produced pursuant to a requirement under this section.

6. A requirement under this section to produce a record stored in electronic form is a requirement —

a. to reduce the record to hard copy and produce it; and

b. if specifically required, to produce a copy of the record in electronic form.

7. In this section, “records” includes books, returns, bank accounts or other accounts, reports, legal or business documents and correspondence other than correspondence of a strictly personal nature.

8. The Commission may by notice in writing require a person to produce for inspection, within a reasonable time specified in the notice, any property in the person’s possession, being property of a person reasonably suspected of corruption or economic crime.

9. A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(10) No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act (Cap. 80).” (Emphasis added)

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.
107. It is indeed true therefore that an investigation is an administrative function of the 1st Respondent notwithstanding that it sought and obtained, by a judicial process, warrants to search the Petitioner's accounts. Either way, the right to have due notice under **Section 28** of **ACECA** as read with **Article 47** of the **Constitution** was clearly violated and I so find.
108. But that is not the end of the matter because under **Section 28** of the **ACECA**, some of the Respondents have argued that the warrants to search were properly and lawfully issued under **Section 118** of the **Criminal Procedure Code**. That Section for avoidance of doubt provides as follows;

“118.

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 of a Magistrate may by written warrant (called a search warrant) authorise 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 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.”

109. Assuming that the above provision applies to the present proceedings, then the 1st Respondent was obligated to “**prove**” that its intended action was necessary and reasonable. In **Wharton's Concise Law Dictionary, 2014 Edition**, “**proof**” is defined as “... *such evidence as would induce a reasonable man to come to a particular conclusion, Hawkins vs Powells Tiller Steam Co. Ltd (1911)1 KB 88.*”
110. The above Section must also be read against **Sections 27(1)** and **28** of **ACECA**. **Section 27(1)** refers to ex-parte proceedings but neither **Sections 118** above nor **Section 28** aforesaid refer to ex-parte judicial proceedings to “**prove**” that the Search Warrants are necessary.
111. My only deduction therefore is that such proceedings, being judicial in nature, must also be governed by **Article 50(1)** of the **Constitution** which demands that there ought to be “**a fair and public hearing**” before the search warrants are issued by the Magistrate's Court. I see no other plain reading of the law than that. **Article 50(1)** for avoidance of doubt provides as follows;

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

2. *Every accused person has the right to a fair trial, which includes the right—*
 - a. **to be presumed innocent until the contrary is proved;**

- b. *to be informed of the charge, with sufficient detail to answer it;*
- c. *to have adequate time and facilities to prepare a defence;*
- d. *to a public trial before a court established under this Constitution;*
- e. *to have the trial begin and conclude without unreasonable delay;*
- f. *to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

- i. *to remain silent, and not to testify during the proceedings;*

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

- j. *to adduce and challenge evidence;*

- k. *to refuse to give self-incriminating evidence;*

- *to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;*

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.” (Emphasis added)

112. I heard the 1st Respondent to argue that if a suspect is given notice of investigations, he may move evidence that would otherwise be necessary to create a case against him. That threat is real but there are more than one ways, under the law, in which exhibits may be secured during an investigation but the right to a fair hearing cannot be negated by such fears and threats.

113. In the event, I am satisfied that **Article 47(1)** and **2** as well as **50(1)** of the **Constitution** were breached as alleged by the Petitioner.

The breach of Advocate-Client privilege

114. It is the Petitioner's contention that the 1st to 5th Respondents violated the advocate-client privilege as set out under **Section 134(1)** of the **Evidence Act**.

115. **Section 134(1)** of the **Evidence Act** provides that;

“(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

a. *any communication made in furtherance of any illegal purpose;*

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

(2) ...” (Emphasis added)

116. In that context, in the case of **Mohammed Salim Balala & Anor vs Tor Allan Safaris Ltd (2015) e KLR** the Court of Appeal held that advocate-client privilege can only be breached where the communication between an advocate and the client furthers an illegal purpose or where the advocate observes that the client used the privilege to commit a crime.

117. Further, the legal principle that advocate-client privilege can only be waived by a client was upheld in the case of **Conlons vs Conlons (1952) 2 ALL ER 462** in the following terms;

“What is the rule [as to privilege] and what is the meaning of the rule? ...The object and meaning of the rule is this; that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentlemen whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to his should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.”

118. In the case of **King Woolen Mills Ltd & Another vs Kaplan & Stratton Advocates (supra)** it was held that;

“... the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client's consent. The fiduciary relationship exists even after conclusion of the matter for which the retainer was created.”

119. Lastly, **Section 28(10)** of **ACECA** protects disclosure of information relating to advocate-client privilege as provided for under **Section 134** of the **Evidence Act**. For avoidance of doubt, this Section provides thus;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

(10) *No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act.*”

120. The principle emerging from the above decisions and provisions of the law is that communications passing between an advocate and client are privileged as they are necessary for the purposes of obtaining legal advice by a client and last throughout a particular transaction and even thereafter.

121. Applying the above principle to the present Petition, therefore, Prof. Ojienda strenuously argued that payment of legal fees was covered by the advocate-client privilege and the Respondents were not entitled to seek a warrant to investigate his advocate-client bank account held at Standard Chartered Bank. In response, the Respondents claimed that the purpose of the warrants to investigate was the gathering of information relating to the alleged commission of corruption-related offences by the Petitioner and they were therefore necessary. With the totality of facts and evidence before me, can the principle be properly applied in this case?

122. It is uncontested that the information that was sought by the 1st Respondent related to payments from Mumias Sugar Co. Ltd as legal fees to the Petitioner. That information was then related to the investigation whether the legal fees were properly earned or not. Who was the client? Mumias Sugar Co. Ltd was the client and from the paragraph 5 of the Affidavit of Mr. Kasilon, Mumias Sugar Co. Ltd, upon being requested to avail its set of documents relating to the legal fees, co-operated and **“was not coerced to avail the documents requested.”**

123. In the nature of things therefore, the investigation had to follow a paper trail starting from the client who voluntarily availed its documents to the investigators and necessarily the next point of call was the Petitioner’s bank account. If the client then voluntarily waives any privilege of communication, how can the advocate benefit from that privilege? Under **Section 134(1)** of the **Evidence Act**, the privilege flows from the express consent of the client and not the advocate.

124. In addition to the above, the proviso to **Section 134(1)** is such that privilege in every circumstance cannot protect either a client or an advocate from **“any communication made in furtherance of any illegal purpose”**. If therefore it was alleged corruption that was the subject of the investigation, where is privilege in such a situation?

125. One other thing comes to mind; it is not the Petitioner's advocate-client account that is the subject of these proceedings but a private account to which legal fees are paid into that is in question. That account, I would imagine, is run solely for purposes other than for the benefit of any of the Petitioner's clients and I do not see how advocate-client privilege can be invoked to protect the search of such an account.

126. In the circumstances, I am unable to uphold the argument that the privileged advocate-client relationship between the Petitioner and Mumias Sugar Co. Ltd has been affected by the investigations commenced by the 1st Respondent.

Whether there is any other forum for determining the issue in dispute

127. It is the Petitioner's contention that the dispute, if any, in the instant Petition, would be between him as an advocate and Mumias Sugar Company Ltd as his client regarding legal fees and legal services rendered and which dispute ought to fall exclusively within the mandate of the **Advocates Complaints Commission** and the **Advocates Disciplinary Tribunal** as established under Parts X and XI of the **Advocates Act**.

128. In that regard **Section 53(4), (6) and 6 (B)** of the **Advocates Act** provides thus,

“(1) ...

(2) ...

(3) ...

(3A) ...

(4) It shall be the duty of the Commission to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof; and—

a. if it appears to the Commission that there is no substance in the complaint it shall reject the same forthwith; or

b. if it appears to the Commission whether before or after investigation that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it under Part XI; or

c. if it appears to the Commission that there is substance in the complaint but that it does not constitute a disciplinary offence it shall forthwith notify the person or firm against whom the complaint has been made of the particulars of the complaint and call upon such person or firm to answer the complaint within such reasonable period as shall be specified by the Commission in such notification; or

d. upon the expiration of the period specified under paragraph (c), the Commission shall proceed to investigate the matter for which purpose it shall have power to summon witnesses, to require the production of such documents as it may deem necessary, to examine witnesses on oath and generally take all such steps as it may consider proper and necessary for the purpose of its inquiry and shall, after hearing any submissions made to it by or on behalf of the complainant and the person or firm against whom the complaint has been made, make such an order or award in accordance with this section as it shall in the circumstances of the case consider just and proper; or

(e) if it appears to the Commission that there is substance in a complaint but that the

circumstances of the case do not disclose a disciplinary offence with which the Disciplinary Committee can properly deal and that the Commission itself should not deal with the matter but that the proper remedy for the complainant is to refer the matter to the courts for appropriate redress the Commission shall forthwith so advise the complainant.

(5) ...

(6) ***If the Commission considers that the complainant has suffered loss or damage by reason of the advocate's conduct, the Commission may, by order, award such complainant compensation or reimbursement not exceeding one hundred thousand shillings.***

(6A) ...

(6B) ***Where the matter before the Commission relates to surrender of funds or property by an advocate to a client, the Commission may order the surrender of all refunds or property which the advocate does not dispute: Provided that this subsection shall not apply where the complainant has filed a civil suit against the advocate in respect of the same funds or property.***

(6C) ...

(6D) ...

(6E) ...

(7)

(8) ...

(9) ...” (Emphasis mine)

The above provisions therefore empower the **Advocates Complaints Commission** to receive and hear complaints over the professional conduct of any advocate or firm of advocates, and if satisfied that the complaint is merited, it may make such orders as are explicitly set out above.

129. Further, **Section 60** of the **Advocates Act** entitles a client to lodge a complaint to the **Advocates Disciplinary Tribunal** over any professional misconduct by an advocate, and also empowers the Tribunal *inter alia* to determine whether an advocate is entitled to retain legal fees paid to him over alleged professional service. **Section 60A (1), 60A (2) and 60A (3)** of the **Advocates Act** therefore empower the Advocates Disciplinary Tribunal to hear complaints by clients on an advocate's failure to render legal services or to render deficient legal services upon being paid by the client. The said provisions further mandate the Tribunal to order the Advocate to refund the client legal fees paid for services not rendered or part of legal fees paid for services deficiently rendered. For clarity I hereby reproduce **Section 60, 60 A(1), 60A(2) and 60A(3)** which provides thus;

60. Complaints against Advocates

(1) ***A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.***

(2) ***Where a person makes a complaint under subsection (1), the complaint shall be by affidavit by himself setting out the allegations of professional misconduct which appear to arise on the complaint to the Tribunal, accompanied by such fee as may be prescribed by rules made under section***

58(6); and every such fee shall be paid to the Society and may be applied by the Society to all or any of the objects of the Society.

(3) Where a complaint is referred to the Tribunal under Part X or subsection (1) the Tribunal shall give the advocate against whom the complaint is made an opportunity to appear before it, and shall furnish him with a copy of the complaint, and of any evidence in support thereof, and shall give him an opportunity of inspecting any relevant document not less than seven days before the date fixed for the hearing: Provided that, where in the opinion of the Tribunal the complaint does not disclose any prima facie case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint.

4. After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order—
 - a. that such advocate be admonished; or
 - b. that such advocate be suspended from practice for a specified period not exceeding five years; or
 - c. that the name of such advocate be struck off the Roll; or
 - d. that such advocate do pay a fine not exceeding one million shillings; or
 - (e) that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or such combination of the above orders as the Tribunal thinks fit.
5. The Tribunal may make any such order as to payment by any party of any costs or witness expenses and of the expenses of the Tribunal or the members thereof in connection with the hearing of any complaint as it may think fit, and any such order may be registered with the Court and shall thereupon be enforceable in the same manner as an order of the Court to the like effect.
6. Where an advocate against whom the Tribunal is hearing a complaint relating to fees and costs has not filed a bill of costs in Court, the Tribunal may upon the request of the complainant, order such an advocate to produce before it a detailed fee note: Provided that where the advocate fails to comply with an order of the Tribunal under this subsection, the Tribunal may determine the fee payable to the advocate in such sums as it deems fit.
7. If a bill of costs has been filed in Court by the advocate against whom a complaint is being heard but has not been taxed, the Tribunal may adjourn the complaint for such period as it considers reasonable to allow such taxation: Provided that if at the expiry of such adjournment, the bill is still not taxed, the Tribunal may make its own estimate of the costs due to the advocate and make orders accordingly.
8. A determination of the Tribunal under subsections (7) and (8) shall be deemed, for all purposes, to be a determination of the Court.
9. In any case where the complainant has not filed a civil suit against the advocate in respect of the sum in dispute, the Tribunal may order the advocate to pay to the complainant such sum as it finds to be due from the advocate.

10. *An order made by the Tribunal under this section—*

a. shall be in the name of the advocate or firm of advocates in respect of whom or which the order is made;

(b) may be filed in the civil registry of the Court by any party thereto who shall, within twenty-one days of the filing, give a notice to all other parties in writing of the filing of the order, which shall bear the date, the cause number and the registry in which it has been filed and a return of service of the order.

(11) If no memorandum of appeal is filed in accordance with subsection (1) of section 62 the party in favour of whom the order is made may apply ex parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the Court to the like effect and, if it is an order for the recovery of money, may be enforced on the immovable and movable property of the advocate in accordance with the Civil Procedure Rules

(12) The Tribunal may issue a warrant for the levy of the amount of any sum ordered to be paid by virtue of this section on the immovable and movable property of the advocate by distress and sale under warrant, and such warrant shall be enforced as if it were a warrant issued by the Court.

60A (1). Hearing of Complaints

1. *The powers conferred on the Committee by this section may be exercised on the hearing of—*

a. any application or complaint made to the Committee under this Act by or on behalf of the Council;

b. any application made to the Committee by the Complaints Commission under this Act; or

c any application or complaint made to the Committee under this Act, by or on behalf of any person.

60A (2).

2. *Where, on the hearing of any application or complaint with respect to an advocate or firm of advocates, it appears to the Committee that the professional services provided by such advocate or firm in connection with any matter in which such advocate or firm of advocates had been instructed by a client were, in any respect, not of the quality that could reasonably have been expected of an advocate, then, subject to subsection (4), the Committee may, if it thinks fit, do one or more of the following things, namely—*

a. determine that the costs to which the advocate or firm of advocates shall be entitled, in respect of those services shall be limited to such amount as may be specified in its determination and by order, direct the advocate to comply, or to secure compliance, with such one or more requirements falling within subsection (3) as appear to it to be necessary in order to give effect to its determination; or

b. by order direct the advocate or firm of advocates to secure the rectification at their own expense of any error, omission or other deficiency arising in connection with the matter as it may specify; or

c. by order direct the advocate or firm of advocates to take at their own expense, such other action in the interests of the client as it may specify.

60A (3).

3. *The requirements referred to in paragraph (a) of subsection (2) are—*

a. a requirement to refund the whole or part of any amount already paid by or on behalf of the client in respect of the advocate's costs in respect of services rendered in connection with the matter;

b. a requirement to remit the whole or part of the costs; and

(c) a requirement to waive, whether wholly or to any specified extent, the right to recover those costs.

(4) ...

(5) ...

(6) ...” *(Emphasis added)*

130. I have deliberately reproduced all the above provisions to show that there exists a legal framework under the **Advocates Act** to deal with issues of unprofessional conduct by an advocate including the issue of payment of fees for services rendered. In the instant Petition, and looking at the totality of the 1st Respondent's pleadings, its main complaint against the Petitioner is that he was paid legal fees for legal services he did not render to Mumias Sugar Company Ltd. and that this was in furtherance of a corrupt intended.

131. In that context, it is indeed true that where the Constitution or Statute has created a mechanism for settling a dispute, that mechanism ought to be invoked. That is why in **Narok County Council vs Trans Mara County Council and Another, Civil Appeal No.25 of 2000**, it was held that;

“Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute.”

132. The question that now arises is whether the issues in contest before me should first have been placed before the **Advocates Complaint Commission** and/or the **Advocates Disciplinary Tribunal**. To my mind the answer is simple; criminal offences including questions of corruption committed by advocates are not any different from those committed by laymen in law. The regime of the Commission and Tribunal aforesaid is limited to professional misconduct and not criminal conduct. To say otherwise would give advocates a special place in the criminal justice system and however attractive such a proposition may be to advocates, it is fallacious and against the public interest and the need to apprehend criminals, whatever their profession. In any event, an advocate may suffer both a professional sanctions as can be seen above and simultaneously suffer a criminal sanction and in the circumstances, I see no value in the Petitioner's arguments on that point. That is all there is to say on that matter.

Whether the Prayers sought can be granted

133. I have addressed all the issues arising to be determined in the Petition before me and revisiting the Prayers therein;

i. Prayer (a) thereof is granted only to the extent that the warrants issued were so issued in violation of **Articles 47(1), (2) and 50(1)** of the **Constitution** and are void to that extent.

ii. Prayer (b) is a consequence of Prayer (a) and noting the provision of **Article 23(3)(f)** of the

Constitution it is warranted. That Article provides as follows;

“(3) In any proceedings brought under Article 22, a Court may grant appropriate relief, including—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) an order of judicial review.”

A judicial review order to quash the warrants is therefore valid in this case.

- iii. Prayer (c) cannot be granted as framed. It seeks generic and amorphous orders beyond what is before this Court. Other bank accounts held by the Petitioner, alone or with Prof. Otieno Odek (Now a Judge of appeal) and one Wanyama, Advocate are not the subject of the present Petition and no favourable orders can be granted in such circumstances.
- iv. Prayer (d) is misplaced and misguided as it is not the place of this Court to originate criminal proceedings including against Michael Kasilon, the 2nd Respondent for alleged perjury.
- v. Prayer (e) cannot be granted as I have said that what is before me is not a question of professional misconduct *per se* but investigations into alleged corruption, a matter outside the mandate of the **Advocates Complaints Commission** and the **Advocates Disciplinary Tribunal**.
- vi. As for costs, none were sought by the Petitioner and although he has only partially succeeded, the best order would be that each party ought to bear its own costs.

Conclusion

134. Before I finally dispose of this matter, it is imperative that I should state that this judgment brings to the fore the need for investigators to re-read the operative law in the conduct of their investigations within the new constitutional reality of Kenya.
135. Regarding search warrants particularly, both investigators and Magistrates must apply their minds to that reality before issuing Search and other Warrants as a matter of course and I can do no better than return to the finding in **Manfred Walter Schmitt (supra)** that the Magistrate's Courts are not mere judicial conveyor belts and that investigators ought not to be granted a *carte blanche* whenever they apply for warrants. If not, otherwise necessary investigations may be derailed by that casual attitude alone.
136. To the Petitioner, a Senior Counsel and Professor of Law and a member of the Judicial Service Commission, I have said that investigations of the nature that he is facing are not akin to an inquiry of professional misconduct but a serious inquiry into alleged corrupt conduct. It would be in his best interests to quickly clear his name the best way he can and at the earliest. My final orders below cannot stop fresh investigations into the issues in dispute before me if the 1st Respondent follows the law and due process. The quashing of prior warrants cannot stop issuance of fresh ones.

Disposition

137.I have come to the end of this judgment and it is clear by now that the Petition succeeds partly. Looking at the prayers the Petitioner sought and reproduced elsewhere above, I will therefore dispose the Petition in the following terms only;

- a. A declaration is hereby issued that the warrants to investigate an account given to Michael Kasilon and Eustace Waweru on the 18th day of March 2015 in **Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015; Ethics and Anti-Corruption Commission versus Standard Chartered Bank**, breached the Petitioner's rights and fundamental freedoms under the provisions of **Articles 47(1), 47(2) and 50(1)** of the **Constitution** of Kenya, hence void for all intents and purposes.
- b. A Judicial Review order by way of an order of Certiorari is hereby issued to remove into the Court and quash warrants to investigate an account given to Michael Kasilon on the 18th day of March 2015 in **Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015; Ethics and Anti-Corruption Commission versus Standard Chartered Bank**.
- c. The 2nd – 4th Respondents are struck off these Proceedings.

138.Each Party shall bear its own costs.

139.Orders Accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence:

Muriuki – Court clerk

Prof Ojienda – Petitioner

Mr. Kagucia for 1st – 4th Respondents

Mr. Ashimosi for 6th Respondent

Mr. Kuria for 5th Respondent

No appearance for Amicus Curiae

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

5/2/2016