REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

PETITION NO. 230 OF 2015

CONSOLIDATED WITH PETITION NOS. 305, 324 AND 203 OF 2015

ENG. MICHAEL SISTU MWAURA KAMAU…….....….1ST PETITIONER

CHARITY KALUKI NGILU……...….....……2ND PETITIONER

SARAH NJUHI MWENDA……....…….....….3RD PETITIONER

POLLY WANJIKU GITIMU ALIAS PAULINE.....…4TH PETITIONER

MARK MUIGAI WANDERI……..…….....……5TH PETITIONER

MACMILLAN MUTINDA MUTISO……....…….....…….6TH PETITIONER

JAMES MBALUKA…….……7TH PETITIONER

ENG. GILBERT MONGARE ARASA……....…….8TH PETITIONER

CHEGE KAMAU DANIEL…….....….....…….9TH PETITIONER

JIBRIL NOOR…….……..….10TH PETITIONER

KIPKEMOI NG'ENO…….....…….11TH PETITIONER

JOSPHERT MILIMU KONZOLO……....……12TH PETITIONER

TELESOURCE.COM LIMITED…….....13TH PETITIONER

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS….....2ND RESPONDENT

THE HON. ATTORNEY GENERAL……..…….....…3RD RESPONDENT

THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE.....….4TH RESPONDENT

CHIEF MAGISTRATE MILIMANI LAW COURTS..... 5TH RESPONDENT

JUDGEMENT

Introduction

1. The Petitions consolidated in this matter and in respect of which this judgment relates arise out of the intended prosecution of ten of the thirteen petitioners with respect to various corruption offences. These petitioners are aggrieved by the decision of the Respondents to prosecute them, and raise several constitutional questions against their prosecution. They argue, *inter alia*, that the 1st Respondent was not properly constituted when it recommended their prosecution and further that it acted on the instructions of the Executive. They therefore contend that their prosecution is unconstitutional and should accordingly be quashed.
2. The 1st Petitioner herein, **Eng. Michael Sisto Mwaura**, is a Kenyan citizen and the former Cabinet Secretary in the Ministry of Transport.
3. The 2nd Petitioner, **Charity Kaluki Ngilu**, is a Kenyan citizen and the former Cabinet Secretary in the Ministry of Land, Housing and Urban Development.
4. The 3rd Petitioner, **Sarah Njuhi Mwenda,** is a Kenyan citizen and until recently the Chief Land Registrar in the Ministry of Lands, Housing and Urban Development.
5. The 4th Petitioner, **Polly Wanjiku Gitimu** *alias* **Pauline**, is a Kenyan citizen and a Senior Deputy Director of Survey with the Ministry of Land, Housing and Urban Development,
6. The 5th Petitioner, **Mark Muigai Wanderi**, is a Kenyan citizen and a Senior Deputy Director of Survey with the Ministry of Land, Housing and Urban Development.
7. The 6th Petitioner, **Macmillan Mutinda Mutiso**, is a Kenyan citizen and an Advocate of this Hon. Court having been admitted to practice in the year 1996.
8. The 7th Petitioner, **James Mbaluka**, is a male Kenyan citizen and a businessman.
9. The 8th to 12th Petitioners are all male adult Kenyans while the 13th Petitioner is a limited liability company incorporated under the Companies Act.
10. The 1st Respondent is the **Ethics and Anti-Corruption Commission** ("the Commission") established under Article 79 of the Constitution of Kenya, 2010 ("the Constitution") read together with the ***Ethics and Anti-Corruption Commission Act*** ("***EACC Act***"). The EACC is cited in these proceedings as Respondent being the body responsible for investigating the alleged commission of various offences by the Petitioners under the ***Anti-Corruption and Economic Crimes Act***, 2003 ("***ACECA***").
11. The 2nd Respondent is the **Director of Public Prosecutions** ("**the DPP**") who exercises the State power of prosecution by dint of Article 157 of the Constitution. The DPP is cited in these proceedings as the person responsible for instituting the prosecution of the Petitioners.
12. The 3rd Respondent is the Attorney General. It is an office established as such under Article 156 of the Constitution of Kenya. It is joined in this Petition as the principal legal adviser to the Government of Kenya and as the office with the responsibility to represent the National Government in Court or any other legal proceedings to which the National Government is a party
13. The 4th Respondent is the Inspector General of the National Police Service established under Article 245 of the Constitution of Kenya. It is joined in this Petition as the office with the responsibility to arrest and/or detain suspects in accordance with directions issued by the Director of Public Prosecution.
14. The 5th Respondent is the Chief Magistrate's Court sitting at Milimani in Nairobi before whom the Petitioners' prosecution was instituted.

The 1st Petitioner's Case

15. According to the 1st Petitioner, on 26th day of March, 2015, the Executive arm of Government headed by His Excellency the President during his State of the Nation address to Parliament (hereinafter referred to as "the speech" or "the address") presented a list authored by the Commission christened "***The current status of corruption matters under investigation to the Presidency***" dated 20th March, 2015. In the said list, several personalities totalling one hundred and seventy five were named, the 1st Petitioner being one of them, and various allegations of corruption were levelled -against them. The said list, according to the 1st Petitioner, was presented to the legislative arms of the government, the Senate and National Assembly on 31st March, 2015 and the President directed the Commission to complete investigation of the allegations within 60 days. He further directed those mentioned in the said list to step aside from their respective offices awaiting investigations, a direction which the 1st Petitioner complied with and stepped aside from his position as a Cabinet Secretary.
16. Subsequently, the 1st Petitioner was summoned to appear for interrogation before the Commission and did appear there on 9th April 2015 and 21st May 2015 when he was interrogated on several allegations and recorded a statement with the Commission.
17. It was contended by the 1st Petitioner that between the time of the Presidential directive and when the investigation were completed, the Commission underwent a series of storms and metamorphosis as at the time it purported to forward its files to the DPP, its Chairman, Vice chairman and the other Commissioner had ceased to hold office. The Commission was therefore without commissioners when it forwarded the 1st Petitioner's file to the DPP. The 1st Petitioner averred that on various dates when he was under investigations, the Commission kept on leaking its findings to the media with a special bias against him, hence his fate was sealed long before the Commission made an official communication on Sunday 24th May 2015 in a media briefing.
18. The 1st petitioner contended that the resignation of the Commission's Chairman and the other commissioners came about when they were required to appear before a Tribunal to answer a myriad of accusations touching on their integrity and ability to effectively run the Commission, and further, that the Commissioners' resignation was the culmination of a chequered path which began with the presentation of a petition to Parliament and subsequent public outcry. According to the 1st Petitioner, notwithstanding the resignation of the Commissioners, the Commission on 24th May 2015 and in full glare of the media announced that it had completed the 1st Petitioner's investigations and recommended to the DPP that the 1st Petitioner should be charged with the offence, among others, of abuse of office, which announcement received very wide coverage in the electronic, social, and prints media on 24th and 25th May 2015. Subsequently, on 28th May 2015, the DPP announced that it concurred with the Commission's decision and made an order that the 1st Petitioner be arrested and charged with the offences already stated herein above.
19. The 1st Petitioner contended that the actions of the Commission and the DPP violated his right to fair administrative action under Article 47 of the Constitution. He contends further that the Commission, by taking directions and/or directives from the Executive and seeking to meet the ultimatum set by the President to prosecute him, violated Article 79 as read together with Article 249(2) on its impartiality, and it therefore violated the Constitution. In addition, the 1st petitioner contended that on 24th. May 2015, when the Commission purported to forward the 1st Petitioner's file for prosecution to the DPP, the Commission was not properly constituted in accordance with the mandatory provisions of Article 250(1) and the purported investigations and findings were in effect null and void in law.
20. It was his case therefore that the purported act of the Commission violated his rights under Articles 27 and 39 of the Constitution on equality and freedom from discrimination and movement, as well as his right to a fair hearing. In addition, since the body that undertook the investigations was not properly constituted, the ensuing trial could not be fair.

1st Petitioner's Submissions

21. In the 1st Petitioner's view, the following issues fall for determination in these petitions:

i. **Whether or not there was a request by the H.E President of Kenya to the 1st Respondent Commission to provide a status report on matters related to corruption in Kenya in accordance with Article 254(2), and if so, was the request presented to the President in accordance with Article 254(2) read together with rule 9 of the second Schedule.**

ii. **Whether or not the President's directive and ultimatum issued to the 1st Respondent Commission to conduct and conclude investigations within 60 days infringed the provisions of Articles 79 and 249(2) of the Constitution and Section 28 of the Ethics and Anti-Corruption Commission Act, 2012**

iii. **Whether or not the 1st Respondent Commission was properly constituted in accordance with Article 79 as read together with Article 250(1) of the Constitution and section 4 of the Ethics and Anti-Corruption Commission Act, 2012 at the time it prepared and forwarded its investigations to the Director of the 2nd Respondent; or in other words was the 1st Respondent Commission constituted as envisaged under Article 79 as read together with Article 250(1) of the Constitution and section 4 of the Ethics and Anti-Corruption Commission Act, 2012.**

iv. **If the answer to (iii) above is in the negative, were the said investigations and subsequent recommendations made to the 2nd Respondent as against the Petitioner, valid, constitutional or were they a nullity in law.**

v. **Whether or not the decision by the 1st Respondent Commission and the 2nd Respondent to charge the Petitioner in the 5th Respondent Court which charge emanated from directions and an ultimatum issued by the Executive violated the petitioner's constitutional right to freedom of movement as enshrined under Article 39 of the Constitution.**

vi. **Whether or not the charges preferred against the Petitioner arising from a fatally flawed process conducted in violation of both the Constitution and other laws can be allowed to stand.**

vii. **Whether or not the Petitioner's rights were violated in the entire process and if so, is the Petitioner entitled to the orders sought or reliefs sought in the Amended Petition.**

22. In support of his submissions the 1st petitioner relied on Articles 27, 29, 39, 47, 50, 79, 249 and 250 of the Constitution and sections 4 and 28 of the Ethics and Anti-corruption Commission Act.

23. It was his case that Article 254 of the Constitution imposes a duty on commissions to submit reports to the President and Parliament at the end of each financial year and clause (2) thereof deals with a situation where the President or senate may request for a report on a certain issue. In this case, however, there is nothing on record to show that the President made such a request to the 1st Respondent. Notwithstanding this the 1st Respondent Commission submitted a purported status report to the President in March, 2015 which report was not signed and sealed by the Commission as required under paragraph 9 of the Second Schedule enacted pursuant to section 15 of the ***EACC Act*** which un-signed, unsealed status report was the genesis of the Petitioner's present tribulations. That such a report ought to be under the hand of both the chair and the secretary of the Commission, it was submitted is confirmed by a letter dated 23rd August, 2013 addressed to the Secretary/Chief Executive Officer of the Commission by the Director of Public Prosecutions. It was therefore submitted that there was no valid report capable of being acted upon or forming the basis of an investigation as the purported report was a nullity in law and anything flowing from it must also be considered void.

24. It was submitted that the Executive acted *ultra vires* in the directive and ultimatum issued to the Commission by the President as it contravened the oath of Office which imposes a duty on the President to obey the provisions of the Constitution and any other law. To the 1st petitioner, The directive and ultimatum were illegal, null and void as they violated the provisions of Article 79, 249(2) of the Constitution and Section 28 of the ***EACC Act*** which clearly outlines that the 1st Respondent should be independent and not under the control or direction of any authority or person during the discharge of its duties and/or functions. In obeying the said directives and ultimatum, the Commission was accused of breaching clear provisions of the Constitution hence its acts against the 1st Petitioner were void and a nullity in law.

25. According to the 1st Petitioner, Articles 79 & 250(1) of the Constitution and section 4 of the

EACC Act outline the Composition of the Commission to include a chairman, vice-chairman and another commissioner. During the investigations carried against the Petitioner and the presentation of the recommendations to the DPP, the Commission's Chairman, vice chairman and the other commissioner had vacated office. It was therefore submitted that the actions of the Commission were contrary to the aforesaid provisions thus the investigations and the recommendations it made were irregular, unlawful, null and void.

26. It the 1st Petitioner's view, since the wording of Article 250(1) of the Constitution and section 4 of the ***EACC Act*** are mandatory, in the absence of a fully composed commission there was absolutely no basis for any report or recommendation.

27. In the 1st petitioner's view, it would follow that the investigations conducted and the subsequent recommendations made to the DPP against him having emanated from a nullity in law were illegal, irregular, null and void, no charge can be formulated on an illegality in law as there is a presumption that a charge must be formulated from a lawful and legal process. In support of this position, the 1st petitioner relied on **Omega Enterprises(Kenya) Limited vs. Kenya Tourist Development Corporation Limited & 2 others (1998) eKLR** and **Paramount Bank Limited vs. Mohammed Ghias Qureishi, Civil Appeal No. 239 of 2001.**

28. It was submitted on behalf of the 1st petitioner that to subject the Petitioner to rigorous criminal proceedings in the 5th Respondent Court emanating from a nullity in law is a gross violation of the Petitioner's fundamental right and freedom as enshrined under Article 39 of the Constitution and further that the decision by the Commission and the 2nd Respondent to charge the Petitioner in the 5th Respondent Court which charge emanated from directives and an ultimatum issued by the Executive violated the Petitioner's constitutional right to freedom and movement.

29. To the 1st petitioner, since an action emanating from a nullity in law is itself a nullity in law, the charges preferred against him having emanated from a series of processes that are irregular, unlawful, null and void are subsequently invalid, null and void hence the charges preferred against him should not be allowed to stand. In support of this submission, the 1st petitioner relied on **Hon. Sam Kuteesa & Others vs. The Attorney General, Constitutional Petition No. 46 and Reference No. 54 of 2011.**

30. The 1st petitioner's case was that the Commission's actions of continuously leaking information to the press during the course of the investigations against him were a clear and uncontroverted violation of the Petitioner's right to a fair trial as enshrined under Article 50 of the Constitution and a gross violation of the principles of natural justice. To him, the actions of the Commission of investigating the Petitioner despite the fact that it was not properly constituted and based on an unlawful and irregular directive and ultimatum issued by the President was a gross violation of the Petitioner's right to fair administrative action as enshrined under Article 47 of the Constitution.

31. It was further asserted that the move by the Commission of singling out the Petitioner out of the team of the tendering committee for investigations on allegations of corruption and abuse of office were biased and discriminatory and therefore infringed on the Petitioner's right to equality and non-discrimination as enshrined under Article 27 of the Constitution of Kenya.

32. This Court was therefore urged to grant the orders sought as the entire process leading to his prosecution and the criminal proceedings at the 5th Respondent Court was flawed, irregular, null and void as it violated mandatory provisions of the Constitution and the ***Ethics and Anti-Corruption Commission Act, 2012***. In support of this position, the 1st petitioner relied on **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi (2007)e KLR**, **Stanley Munga Githunguri vs Republic (1985) KLR 91** and **Metropolitan Bank Ltd vs. Pooley (1885) 10 App Cases 210 at 220, 221.**

33. It was submitted that the 1st Petitioner's rights were compromised by a fatally flawed process in that he was arrested and arraigned in court thereby curtailing his freedom without a just cause contrary to Articles 29(1) and 39. In his view, a just cause presupposes a legal cause as opposed to a flawed process like demonstrated hereinabove. It was contended that since the investigations conducted by the 1st Respondent and forwarded to the 2nd Respondent were administrative actions in nature which did not accord with Article 47 of the Constitution, the 1st Petitioner's right was violated. To the 1st petitioner, since he was singled out of a group of tender committee for charge and arraignment in court without any reason(s) if any, why the others were left out his rights to

equality and non-discrimination under Article 27 were violated.

34. It was contended that the said process violated Article 157(11) in that despite having acknowledged in writing the deficiency of the composition of the Commission, the DPP went ahead and preferred charges against the 1st Petitioner. This, it was submitted was a clear case of abuse of legal process which in turn infringed Article 47 read together with Article 157(11) of the Constitution. In support of his case, the petitioner relied on **Grain Bulk Handlers Ltd vs. J.B Maina & Co. Ltd & 2 Others (2006) eKLR**, **Kenya National Examinations Council vs Republic exparte Geoffrey Gathenyi Njoroge, Civil Appeal No. 266 of 1996** and **Republic vs. Public Procurement Administrative Review Board & 2 others Exparte Sanitam Services (E.A) Limited (2013) eKLR**.

The 2nd Petitioner's Case

35. The 2nd petitioner, **Charity Kaluki Ngilu**, avers that on or about 7th April, 2015, she appeared before the Commission to respond to allegations appearing in the report dated 20th March, 2015 presented to the President of the Republic of Kenya, **Hon. Uhuru Kenyatta** by the Commission and which the President submitted to Parliament on 26th March, 2015 with instructions to the Commission to fully investigate the allegations levelled against the persons mentioned in the report. Various allegations were levelled against her with respect to an alleged conspiracy to inflate the value of plot no. Mombasa/MN/1/397 with a view to a personal benefit and an attempt to deprive **Myta Limited** of land parcel LR No. 209/19473 located along Statehouse Crescent Road, Nairobi.

36. According to the 2nd Petitioner, the allegations revolving around the Karen land, LR No. 3586/3 ("Karen land") in respect of which she now faces charges in the criminal case, were not part of the Commission's report presented to the President and that the 2nd Petitioner was never notified at any stage that she was under investigation for the offence of obstructing the Commission's investigators without justification or lawful cause.

37. The 2nd Petitioner avers that she was subsequently, on or about 14th June, 2015, informed that the Commission had recommended her prosecution to the DPP for obstructing officers of the Commission under section 66 of the Anti-corruption and Economic Crimes Act (***ACECA)***, a recommendation which the 2nd Petitioner protested giving a detailed account of the events that took place that led to the erroneous conclusion and inference of obstruction by officers of the Commission. However, the DPP in a press statement declared that he had accepted the Commission's recommendation to charge the 2nd Petitioner with the offence of obstruction.

38. It was the 2nd Petitioner's case that this recommendation was ridiculous in light of the statements of the Commission's top investigator, **Mr. Abdi Mohamud Mohamed,** Investigating Officer, **Mr. Emmanuel Arunga** as well as that of the star witness **Ndungu Kiarie**. In any event, it was contended by the 2nd Petitioner that the reason given for not releasing the original documents to the investigators was reasonable, justifiable and lawful. To her the decision to seek permission before releasing the same was in compliance with the provisions section 81 of the ***Evidence Act*** which in her view, regulates admission of certified copies of public documents into evidence so as to among other things, eliminate the inconvenience to the general public of taking original public documents from their proper custody during investigations and eventual trial.

39. To the 2nd Petitioner, the DPP was under a constitutional obligation to examine all the evidence before accepting the recommendation of the Commission.

40. It was further contended by the 2nd Petitioner that since the DPP in the said press statement concluded that the Karen land was private land and not public land, the institution of prosecution was an abuse of the legal process. This, according to her, was due to the fact that there was a civil dispute pending in the High Court seeking determination of questions of fraud, illegality and who the ultimate and legitimate owner of the Karen land is.

41. The 2nd petitioner further averred that since the Directorate of Criminal Investigations under the National Police Service conducted investigations into the Karen land saga and submitted a report to the DPP, the parallel investigation by the Commission into the same parcel of land is an abuse of process, particularly when the two processes lead into different outcomes and when the issue of

the acquisition of the Karen land is at the heart of a civil dispute with rival claims pending before the Environment and Land Court namely ELC Case No. 1180 of 2014. In this regard, it was the 2nd Petitioners' case that the DPP had reneged on his constitutional mandate while exercising the State powers of prosecution to prevent and avoid abuse of the legal process under Article 157(11) of the Constitution.

42. It was further contended by the 2nd Petitioner that the DPP's decision to prosecute the Petitioners was not taken independently as envisaged by the Constitution but was coloured by the directives issued by the President during his speech to Parliament.
43. According to the 2nd Petitioner, by his letter dated 23rd August, 2013, the Director of Public Prosecutions appreciated and acknowledged the legal challenges that exist in the Commission taking any steps including any investigations or recommendations which are not under the hand of the Chair and the Secretary. However, the recommendation made to the DPP to prosecute her were made under the hand of the Secretary alone since, at the time that recommendations to prosecute her were made, there was no Chairperson or members of the Commission, the Chairperson, **Mr. Mumo Matemu**, having been the last Commissioner to resign on or about May 12, 2015.
44. In the 2nd Petitioner's view, the position taken by the DPP in these proceedings is in stark contrast to the position he earlier took in the letter dated 23rd August, 2013 authored under his hand, yet it is impermissible for the DPP to approbate and reprobate from and resile from the position he took in 2013.

3rd – 6th Petitioners' Case

45. According to the 3rd – 6th Petitioners, the Commission as currently constituted lacked the constitutional mandate to conduct investigations. This contention was based on the provisions of Articles 79 and 250 (1) as read with section 4 of the ***EACC Act***. Like the 1st and 2nd Petitioners, they contended that as at the time the investigations and recommendations of the Commission were made to the DPP in relation to the Karen land, the Commission did not have a chairperson or members and accordingly, did not exist in law. To these Petitioners, a trial conducted based on investigations undertaken by a body that does not have the legal or constitutional mandate requisite for its existence is a nullity *ab initio* and ripe for termination.
46. It was further contended that the Commission which is constitutionally supposed to be an independent commission was, contrary to its mandate, acting at the whims and directions of the executive as evidenced by the fact that in a report submitted to the President of the Republic of Kenya on 20th March, 2015, the Commission selectively listed the persons who were under investigations and in the State of the Nation address by the President on 26th March, 2015 to Parliament, the Commission was directed to conduct investigations and conclude the same within a period of sixty (60) days.
47. It was these Petitioners' case that the President has no authority or power to direct the Commission to conduct investigations and therefore any investigations conducted as a result of the said directive are a blemish on the Commission's independence to carry out its mandate free of the shackles and pressures from politicians and the executive.
48. The 3rd – 6th Petitioners' further case was that the Directorate of Criminal Investigations ("DCI") which has the constitutional mandate to conduct investigations into the acquisition of the Karen land, conducted its investigations and found no fault with them hence the conduct of parallel investigations by the DCI and the Commission to arrive at different conclusions is a clear abuse of the legal process which the DPP is constitutionally mandated to prevent and avoid in line with Article 157(11) of the Constitution.
49. These Petitioners disclosed that there were pending proceedings before the Environment and Land Court being ELC Case No. 1180 of 2014 wherein the 12th and 13th Petitioners were claiming ownership of the Karen land. In that case, the Hon. Attorney General who is representing the Ministry of Land, Housing and Urban Development put forward the government's position as to who owns the land in accordance with the records available in the Ministry. The Deputy Chief Land Registrar in the Ministry of Land, Housing and Urban Development (now deceased) also put forward the government's position by tendering evidence based on the records available at the

Ministry of Land, Housing and Urban Development.

50. It was the said Petitioners' case that to charge them and the 12th and 13th Petitioners with corruption related offences despite the existence of the civil suit where the ownership of the Karen land was at the heart of the dispute was a clear manifestation of abuse of the legal process as it was meant to pre-empt, influence and embarrass any decision that the ELC Court might reach in determining the ownership of the Karen land.
51. To the said Petitioners, in light of the existence of the civil proceedings in relation to the Karen land and the parallel and conflicting investigations by the DCI and the Commission, it is not only an abuse of the legal process for the DPP to charge them, but amounts to contempt of court as it was calculated to embarrass, influence and pre-empt the civil trial court in its decision on the disputed ownership of the Karen land.

2nd to 6th Petitioners' Submissions

52. It was submitted on behalf of the 2nd to 6th Petitioners that at the heart of these proceedings is the question whether the Commission, as presently constituted, both during the time when the investigations were conducted and also at the time the recommendations to charge them were made, has the constitutional and legal mandate to conduct investigations and make recommendations to the DPP to charge them. In their view, in light of Articles 79, 249 and 250(1), the Commission lacked the constitutional mandate and authority to conduct investigations. .
53. It was submitted on behalf of the petitioners that in accordance with Article 79 of the Constitution, Parliament enacted the ***EACC Act*** to establish the Commission and to provide for its composition, which is provided for under sections 3 and 4 of the ***EACC Act.*** To the Petitioners, the core component for the constitutional and legal existence of the Commission is the appointment of a chairperson and two (2) members of the Commission. However, the Commission does not in law include the Secretary or the Secretariat of the Commission whose legal architecture is to provide necessary service to the Commission as configured by the Constitution and the governing statute. It was submitted that as at 12th May, 2015, the Commission as a constitutional Commission was neither functional nor operational. This was so because its legal existence was wholly dependent on there being a Chairperson and two members, yet its Chairman, the last Commissioner in the office after the other two Commissioners resigned on 31st March, 2015 and 30th April, 2015 respectively, was reported to have resigned in the evening of 12th May, 2015. To the Petitioners, with effect from 30th April, 2015, the Commission lacked the requisite statutory quorum to transact or conduct any business of the Commission as it became non-functional and non-operative. To support this view the Petitioners relied on paragraph 5 of the Second Schedule to the ***EACC Act***.
54. The Court was urged to take judicial notice that as at the time the investigations and recommendations of the Commission were made in a report dated 10th June, 2015 to the DPP in relation to the Karen land, the Commission did not have a chairperson or members hence the condition precedent for the constitutional and legal existence of the Commission was lacking and the Commission did not exist in fact or in law.
55. It was the Petitioners' case that the power to conduct investigations is a right donated by the Constitution and the governing statute and a trial conducted based on investigations undertaken by a body that does not have the legal or constitutional mandate requisite for its existence is a nullity *ab initio.* The petitioners therefore argued, basing their contention on section 11(1)(d) of the ***EACC Act***, that the criminal cases facing them were ripe for termination in their entirety. .
56. The Commission's power, according to the petitioners, is vested in the Commission and not the Secretariat nor the Secretary to the Commission since the Secretary to the Commission is an office created under Article 250(12) of the Constitution and, as read together with section 16(1) of the ***EACC Act***, he is appointed by the Commission with the approval of the National Assembly. Section 16(6) of the ***EACC Act*** makes the Secretary responsible to the Commission in the performance of his functions and duties of his office. It was therefore submitted that in the absence of the Commissioners, the law does not permit the secretary to carry out those functions since the Secretary and the Secretariat he heads have not been clothed with any investigative or recommendatory functions by the governing law. His functions, according to the petitioners are,

pursuant to section 16(7) of the ***EACC Act,*** specified as being:

a. ***The chief executive officer of the Commission;***
b. ***The accounting officer of the Commission; and***
c. ***Responsible for-***

(i) carrying out of decisions of the Commission;

(ii) day-to-day administration and management of the affairs of the Commission;

(iii) supervision of other employees of the Commission;

(iv) the performance of such other duties as may be assigned by the Commission."

57. According to the Petitioners, under paragraph 9 of the Second Schedule enacted pursuant to section 15 of the ***EACC Act***, it is expressly provided that all instruments made by and decisions of the Commission shall be signified under the hand of the Chairperson and the Secretary. It was submitted that the Report submitted to the DPP recommending the prosecution of the Petitioners was not the decision of the Commission since it did not bear the signature of the chairperson of the Commission. This was the position adopted by the DPP vide a letter dated 23rd August, 2013 in which he took the view that recommendations made to the DPP ought to be under the hand of the Secretary and the Chairperson of the Commission.
58. It was submitted that the DPP was well aware of the legal position as early as 2013 and alive to the fact that any Report that was not signified under the joint hands of the Chairperson of the Commission and the Secretary was ripe for challenge for being invalid and stillborn from its very inception. Accordingly, the Petitioners submitted that the Report of the Commission dated 20th March , 2015 is unconstitutional, illegal, invalid and a nullity *ab initio*. Further, the decision of the Secretary of the Commission to recommend the prosecution of the Petitioners to the DPP lacked legal validity and the prosecution stemming from investigations carried out by a body lacking legal existence is still born and a nullity in law from its very inception.
59. On the independence of the EACC, it was submitted that the DPP and the Commission are constitutionally supposed to be an independent office and a constitutional commission respectively. The Petitioners cited ***Black's Law Dictionary***, 8th Edition, page 785 which defines "independent", Article 249 of the Constitution and section 28 of the ***EACC Act.***
60. The Petitioners' case was that contrary to its mandate, the Commission, acting at the whims and directions of the executive, submitted a report to the President of the Republic of Kenya dated 20th March, 2015 in which its Secretariat selectively listed persons who were under investigations. Thereafter, in the State of the Nation address by the President on 26th March, 2015 to Parliament, the Commission was directed to conduct investigations and conclude the same within a period of sixty (60) days.
61. In the Petitioners' view, the law in section 27 of the ***EACC Act*** sets out the occasions on which H.E. the President is entitled to receive reports from the Commission in the following terms:

(1) The Commission shall, at the end of each financial year cause an annual report to be prepared.

(2) The Commission shall submit the annual report to the President and the National Assembly three months after the end of the year to which it relates.

(3) The annual report shall contain, in respect of the year to which it relates—

a. ***the financial statements of the Commission;***
b. ***a description of the activities of the Commission;***
c. ***such other statistical information as the Commission may consider appropriate relating to the Commission's functions;***

d. ***any recommendations made by the Commission to State departments or any person and the action taken;***
e. ***the impact of the exercise of any of its mandate or function;***
f. ***any impediments to the achievements of the objects and functions under the Constitution, this Act or any written law; and***
g. ***any other information relating to its functions that the Commission considers necessary.***

(4) The Commission shall cause the annual report to be published and the report shall be publicized in such manner as the Commission may determine.

62. In this case it was submitted that since the report given to the President by the Secretary to the Commission neither emanated from the Commission nor was within the time frame stipulated in law, it did not meet the criteria laid down by the law. Further, it was submitted that the President directing the Commission to conduct investigations within a set timeline was a clear manifestation of interference by the executive in the functions of an independent institution which is not supposed to be under the direction or control of any person or authority. Further, that this was contrary to the Code of Conduct for Members and Employees of the Commission as provided under the Third Schedule to the ***EACC Act***. Therefore as the President had no authority or power to direct the Commission to conduct investigations, any investigations conducted as a result of the said directive are a blotch and blemish on the Commission's independence to carry out its constitutional mandate as an independent commission free from the chains, coercions and pressures from politicians and the executive. It was the Petitioners' case that by directing all the files under investigations to be sent by the Commission to the DPP within sixty (60) days from the date of delivery of the State of the Nation Address, it was clear that the President interfered with the functions of the Commission and the DPP.
63. On the independence of the DPP, it was submitted that the same is secured by Article 157 (10) of the Constitution as read with section 6 of the ***Office of the Director of Public Prosecutions Act, 2013*** ("***ODPP Act***"). It was however contended that the DPP, in gross violation of the constitutional independence bestowed upon him, allowed the executive to interfere with his constitutional mandate. To the Petitioners, this was manifested in his press statement dated 17th June, 2015, in which he made reference to the said address. It was therefore the Petitioners' submissions that the DPP in deference to the Head of State is unlikely to bring to bear his independent professional judgment and competence in evaluating evidence and determining whether or not to prosecute in cases where the Head of State has given express direction on how he wishes the thorny issue of corruption to be addressed.
64. It was further submitted that it is constitutionally impermissible for the DPP to receive reports and commence criminal proceedings against individuals based on directives and instructions received from any person or authority. To the petitioners, the decision to prosecute them was not founded on independent, professional and competent prosecutorial decision. Rather, it was in compliance with executive directives. Consequently, such prosecutions are an abuse of the legal process and must be halted.
65. On parallel investigations and proceedings, it was submitted that since the Directorate of Criminal Investigations ("DCI") conducted investigations into the acquisition of the Karen land and found no fault with the 2nd Petitioner, there was no basis upon which the Commission could conduct parallel or subsequent investigations into the Karen land with different outcomes. To them, the conduct of parallel investigations by the DCI and the Commission to arrive at different conclusions was a clear abuse of the legal process which the DPP is constitutionally mandated to prevent and avoid in terms of Article 157 (11) of the Constitution. It was argued that immediately the EACC made its recommendations which were contradictory with the recommendations made by the DCI, the DPP was constitutionally mandated to treat with circumspection the investigations by the Commission and scrutinise, with scrupulous fairness, the contradictory reports given by the two investigative agencies.
66. The Petitioners noted that there were pending civil proceedings before the Environment and Land Court being ELC Case No. 1180 of 2014 where the 12th and 13th Petitioners were claiming ownership of the Karen land. **Muchanga Investments Limited**, the Plaintiff in the ELC Case and the **Estate of Carmelina Mburu** had raised rival claims to the same parcel of land. In those

proceedings, it was contended, the Hon. Attorney General, a constitutional office holder and the principal legal adviser to the government, representing the Ministry of Land, Housing and Urban Development and the government officials, being the 3rd, 4th and 5th Petitioners, in the civil proceedings had taken the position that according to the public records held by the Ministry, the Karen land is legally owned by the 13th Petitioner. It was therefore submitted that the DPP was obligated to take into consideration the existence of the civil proceedings in relation to the dispute over the ownership of the Karen land before making the decision to prosecute. To the Petitioners, it is not only an abuse of the legal process by the DPP to charge the 2nd, 3rd, 4th, 5th, 12th and 13th Petitioners with criminal offences relating to the documentation of the ownership of the Karen land, but also a blatant contempt of court calculated to embarrass, influence and pre-empt the fair determination of the ownership dispute by the Environment and Land Court. The said criminal proceedings, it was their view, was designed to aid one of the disputants. In support of this submission, the Petitioners relied on the decision in **David Mathenge Ndirangu vs. Director of Public Prosecutions & 3 Others [2014] eKLR** at paras 37 & 39.

67. With respect to concurrent civil and criminal proceedings, it was the Petitioners' case that section 193A of the ***Criminal Procedure Code*** relied on by the Respondents cannot override the constitutional provisions repeated in the ***Office of the Director of Public Prosecutions Act***, that the prosecuting authorities will avoid abusing the legal process in exercise of the prosecutorial power of the State. Furthermore, it would be ludicrous and an embarrassment to the entire justice system if section 193A of the ***Criminal Procedure Code*** could be invoked notwithstanding the real likelihood and possibility that two different courts are likely to be embarrassed by arriving at different verdicts over the same issue. In support of this position, the Petitioners relied on the decision in **R –vs- DPP & Others Ex parte Qian Guo Jun & Anor [2013] eKLR** at para 25, **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR** at page 5, **Rosemary Wanja Mwagiru & 2 Others –vs- A.G. & 3 Others [2013] eKLR** at paragraph 42, **R vs. Attorney General & Another ex parte Hussein Mudobe H.C Misc Civil Application No. 898 of 2003** and **Floriculture International Limited and others vs. Trust Bank Ltd & Others High Court Misc. Civil Application No. 114 of 1997** at page 46 – 47.

68. The Petitioners therefore argued that those opposed to the termination of the criminal case cannot successfully seek refuge under the provisions of section 193A of the ***Criminal Procedure Code***.

69. On the allegation that there was abuse of the legal process, it was submitted that in instituting the criminal case and charging the 2nd Petitioner in the said proceedings with the offence of obstructing officers of the EACC from conducting their investigations, the DPP was perpetrating a gross abuse of the legal process and was in gross violation of the express constitutional obligation that behoves him to avoid and prevent abuse of the legal process. In the Petitioners' view, there is no reasonable cause for instituting criminal proceedings against the 2nd Petitioner which yields no other inference, save that the prosecutor is abusing the legal process in violation of Article 157(11) of the Constitution.

70. In the Petitioners' view, the entirety of the evidence that the DPP intends to rely on in support of the criminal case reveals no scintilla of evidence to support a charge of obstruction of officers of the EACC. The Petitioner's prosecution is accordingly *mala fides* and taken for extraneous and ulterior motives other than the pursuit of legitimate criminal justice.

71. To the said Petitioners, an outline of the factual background and concise analysis of the prosecution evidence collated for the purposes of prosecuting the 2nd Petitioner was important to demonstrate beyond peradventure that there was no reasonable cause to justify the prosecution of the 2nd Petitioner. In support of this position the Petitioners relied on the provisions of the Code for Prosecutors of the Crown Prosecution Service of the United Kingdom ("CPS Code") and our own prosecution policy, as coded in ***The National Prosecution Policy***, revised in 2015 at page 5.

72. In the Petitioners' view, in the criminal case facing the 2nd Petitioner, there is not only absent any realistic prospects of a conviction but the evidence collated and looked at fairly and impartially cannot found the basis of a prosecutable case of obstruction of investigators against the 2nd Petitioner.

73. According to the petitioners, the first inkling of obstruction appears in the investigations diary, in an entry made on 4th February, 2015. It is recorded that **Ndungu Kiarie** ("D – 20") indicates to

the investigators that:-

"before they record statement and release the documents he must first seek authority from the Cabinet Secretary. Upon coming back he states that he has instruction from the Cabinet Secretary not to release any document or record statement unless with her express authority."

74. This information comes from only one witness, **Mr. Ndungu Kiarie**, who recorded three (3) statements with the Commission's investigators. The first statement was recorded on 5th February, 2015, a day after the entry in the investigations diary. The second statement was recorded on 12th February, 2015. In these two statements he does not mention receiving any instructions from the 2nd Petitioner.
75. According to the Petitioners, it was clear from the evidence of **Mr. Ndungu Kiarie**, that he never met the 2nd Petitioner on 4th February, 2015 and the 2nd Petitioner in an affidavit**[1]**sworn on 21st July, 2015 deposed that she was not in her office on 4th February, 2015, when she was alleged to have issued instructions to **Mr. Kiarie** from her office. Accordingly, there was no evidence that the 2nd Petitioner issued any instructions to **Mr. Kiarie** either not to record statement or not to release documents. To them, there was no other direct and admissible evidence on the issue of the obstruction. It was contended that the instructions from the 2nd Petitioner to **Cesare Mbaria** were limited to the non-release of original documents since certified true copies had always been available to the Commission's investigators. This position, it was contended, was supported by the evidence of **Mr. Abdi Mohamud Mohammed**, the Commission's Director of Investigations, which confirmed that the 2nd Petitioner had justification and lawful excuse to insist on having the original documents for purposes of her appearance before the Parliamentary Committee. Despite this, the investigators disregarded the 2nd Petitioner's wishes and retained the original documents. In those circumstances, it was submitted that it is not only irrational and unreasonable but ill-motivated and malicious to allege that the 2nd Petitioner obstructed investigators.
76. According to the Petitioners, from the contents of the investigations diary and the recorded statements, the investigators were able to record statements from each and every witness they desired to interview. They collected all the documentary exhibits they considered crucial for the prosecution. From the totality of evidence collated by the Commission investigators, it was impossible to establish the crime of obstruction. It was noteworthy, according to the Petitioners, that the 2nd Petitioner is not charged with attempted obstruction and indeed such an offence does not exist under the ***ACECA***. In any event, according to the 2nd Petitioner, a successful obstruction of investigations would have stalled the investigations.
77. The 2nd Petitioner submitted that obstruction *per se* is not a crime under section 66(1)(a) of the ***ACECA*** but that the prosecutor must show absence of justification or lawful excuse. In this case however, the Commission's investigators appeared to have been obsessed with the retention of original documents. However, the 2nd Petitioner and other officers of the Ministry were fully justified to retain original documents and to only release certified true copies, which was the confirmed practice when investigations are being carried out by various investigative agencies. It was further contended that the ***Evidence Act*** has elaborate provisions on public documents under section 79 - 82 to ensure that original documents do not leave their usual custody and to permit the usage of certified true copies during trials.
78. The fact that the 2nd Petitioner was responsible for initiating the investigations by inviting investigators from the Commission and the Criminal Investigations Department ("CID") to undertake the investigations was, in the Petitioners' view, indicative of the state of mind incompatible with the necessary *mens rea* required to obstruct the same investigations she initiated. In support of this line of argument, the Petitioners relied on the decision of **Madan, J** (as he then was) in the case of **Stanley Munga Githunguri vs. Republic [1986] eKLR** page 10 while citing with approval **Lord Blackburn** in the case of **Metropolitan Bank vs. Pooley (1885) 10 App Cases, 210,** at page 220, 221 where the learned Judge stated:-

"But from early times…the Court had inherently [in] its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious

and harassing – the Court had the right to protect itself against such an abuse."

79. The Petitioners also relied on **Williams vs. Spautz [1992] 66 NSWLR 585**, at 600 for the same proposition.
80. The same view, it was submitted was expressed in **R vs. DPP & Others Exparte Qian Guo Jun & Anor** (supra), **R vs. A.G & Anor. Ex-parte Kipng'eno Arap Ng'eny** and **Floriculture International Limited and Others vs Trust Bank Ltd & Others** (supra).
81. It was therefore submitted that the prosecution initiated by the DPP is not only frivolous, vexatious and malicious but it is a prosecution which the DPP ought not to have authorized *ab initio* as it is tantamount to a perpetration of abuse of the legal process: a clear violation of Article 157(11) of the Constitution, which the DPP swore to uphold, defend and protect. While appreciating that the power to prosecute is constitutionally vested in the DPP, it was submitted that such power must be exercised in a professional, competent, reasonable and fair manner and for the sincere pursuit of criminal justice not to aid litigants in civil claims. It is not a power to be deployed for extraneous purposes such as influencing the determination of disputed ownership of land. To this end the Petitioners relied on **Ronald Leposo Musengi vs. DPP & Others [2015] eKLR**, Paras 55 & 60.
82. It was therefore submitted that in instituting the criminal case, the DPP acted capriciously and on a whim to charge the 2nd Petitioner despite the clear absence of evidence and or nexus linking the 2nd Petitioner to the offence of obstructing officers of the EACC in the investigation of the Karen land and that absence of reasonable cause to institute criminal proceedings is *prima facie* indicative of abuse of the legal process.
83. With respect to the right to be heard, it was submitted that prior to the institution of the criminal proceedings, the EACC and the DPP was under a constitutional and legal mandate to hear the Petitioners' side of the story. However this was not done as they were not asked to give an explanation to the allegations against them. This, it was contended, was contrary to section 12(c) of the ***EACC Act*** which imposes upon the EACC the obligation to adhere to the rules of natural justice while fulfilling its mandate.
84. Similarly, it was submitted that the DPP is mandated to take into account the rules of natural justice in the exercise of his mandate to institute criminal proceedings under section 4 of the ***ODPP Act*** which provides the guiding principles for the Office of the DPP in fulfilling its mandate. That provision, to the Petitioners, specifically lists the rules of natural justice as one of the fundamental principles to be adhered to. In this respect the Petitioners relied on **Ronald Leposo Musengi v Director of Public Prosecutions & others** (supra).
85. In the Petitioners' contention, the right to be heard is at the heart of our justice system and is the foundation upon which the rule of law in our nation rests. The Commission and the DPP cannot be allowed to erode away the core rubric of justice and therefore decisions taken in violation of this constitutional safeguard must be quashed.
86. According to the Petitioners, they have demonstrated that they had a meritorious case warranting interference with their unconstitutional, unlawful and illegal prosecution which has been instituted for purely political and extraneous purposes other than the pursuit of legitimate criminal grievances. Not only have they laid serious grounds for impugning the decision of the Secretary of the Commission recommending their prosecution, they have also questioned the legal validity and constitutional existence of the Commission as contemplated by the Constitution and the governing statutory framework. They have also demonstrated that there was no reasonable cause to charge them. To them, a dispassionate and objective analysis of the material placed before this Hon. Court will lead to the inevitable and inescapable conclusion that no competent, reasonable, sensible and objective prosecutor would ever proceed with the charges of obstruction against the Petitioners on the available evidence.
87. This Court was therefore prevailed upon not to stand by and countenance such travesty of justice and gross abuse of the legal process but to step in to halt in its tracks the unconstitutional prosecution of the Petitioners by the DPP.

The 9th to 11th Petitioners' Case

88. The 9th to 11th Petitioners, who are not personally affected by the investigations or prosecutions

undertaken by the respondents but who challenge the constitutionality of the acts of the 1st Respondent, reproduced the factual circumstances that gave rise to the Petitions. They argue that Article 259(1) & (3) provides for the principles to be adopted while the provisions of the constitution are being construed and contended that in interpreting the Constitution and developing jurisprudence, the Court will always take a purposive interpretation of the Constitution as guided by the Constitution itself. They cited in support of this position **R vs. Big M Drug Mart Ltd [1985] 1 SCR 295** for the principles of interpreting the Constitution.

89. The 9th -11th Petitioners contended that their petition being a public interest Petition brought pursuant to Article 22(2)(c) of the Constitution, they need not demonstrate some personal infringement or loss so as to bring this petition. In support of this position they cited **Njoya & 6 Others vs. AG Misc Application 82 of 2004 (OS)** where the court stated that if the role of challenging the constitutionality of law and actions was left to the Attorney General, then one might as well hope to reach a mirage as it would be unrealistic to expect the Attorney General to challenge the validity of certain state actions given that he is often the adviser, the author and pilot of the government laws and actions. Thus, **Ringera, J,** as he was then, adopting the decisions of this court in **Ruturi & Another Vs Minister of Finance & Another (2001) 1 EA 253** stated *inter alia*:

> **"… we are persuaded by the second school of thought for reasons that in our view the court's first role should be to uphold constitutionalism and the and the sanctity of the constitution. We think such a role cannot be well performed by shutting the door of the court on the face of persons who seek to uphold the constitution on the ground that such persons have no peculiarly personal stake in a matter which belongs to all. Furthermore if the matter were to be left to the intervention of the Attorney General, we think that one might as well hope to reach a mirage…he could not naturally be expected to challenge the constitutionality of his own creations…"**

90. The Petitioners therefore submitted that they had rightly brought this petition and therefore had locus standi.
91. On the issue whether the presentation of the Commission's report by the President was unconstitutional and whether the President's directive of a 60 days ultimatum to the Commission was unconstitutional, these Petitioners relied on Article 249(2)(a) & (b) and averred that the Commission is an independent constitutional commission established under article 79 of the constitution and actualized by the ***EACC Act.*** **A**s such it enjoys the protection of commissions under Chapter Fifteen of the Constitution as an independent constitutional commission. In their view, the Commission ought to be independent and free from direction and control from any person.
92. They argue, however, that when the President addressed the National assembly on 26th March 2015, he may have good intentions but his speech violated the Constitution in that his 60 days' ultimatum to the Commission amounted to express or direct control of a constitutional commission which is independent and ought to be free from any interference, positive or negative. In their view, the implication of this directive was to interfere with the liberty of the Commission in execution of its mandate, resulting in undue pressure and as a result, affecting the efficiency of the Commission. In their view, the Commission must have abandoned procedures and rules to beat the deadline and as a result was unable to give concrete reports.
93. It was their contention further that when a Commission like the EACC is under pressure and interference, the implication will be that the Commission will hastily present names and files to public prosecutor for prosecution without concrete evidence and eventually people's rights will be violated and most importantly, the war on graft will have been lost as there will be no sustainable prosecutions in court. They asserted that for people's rights to be preserved and the war on graft to be won, the Commission must be independent and free from directives and control from the President as was the case on 26th March 2015. They therefore stated that the 60 days ultimatum by the President to the Commission was unconstitutional and therefore null and void.
94. Citing Article 254 (1) of the Constitution, the 9th -11th petitioners contended that the requirement for the submission of the report to the President and Parliament was mandatory. In their view therefore, when the President presented the Commission's report to Parliament, he usurped the

Commission's mandate. While not challenging the Commission's mandate to present the report to the President, they challenged the presentation of the report to the National Assembly by the President as being inconsistent with the Constitution.

95. To the Petitioners, the intention of the drafters of the Constitution was to allow the Commission to table its report to Parliament when it is sure that it has already finalized the investigations, so that presentation to Parliament does not prejudice its investigation. However, when the President tabled the report, the work of the Commission was jeopardized as the persons who were being investigated became known even before investigations were complete, thus blowing up the cover.

96. The 9th -11th petitioners further tool the position that since the Constitution states that the report should be presented at the end of the financial year, the report was premature and suspect as it was presented by the wrong person, and it was presented when it is either too early or too late. Whereas the President has the mandate of fostering good governance and even fighting graft, that mandated must be exercised in accordance with the Constitution, specifically under Article 131(2) (a) of the Constitution which requires the President to respect, uphold and safeguard the Constitution. They further argue that apart from that, Articles 2 & 3 of the Constitution obligates every person to respect, uphold and defend the Constitution, and that every person here includes the President. In this respect they relied on **Centre For Rights Education & Awareness (CREAW) & 8 Others vs. Attorney General & Another [2012] eKLR 20**.

97. It was therefore the Petitioners' case that the President's speech presented on 26th March 2015 was unconstitutional to the extent that he gave directives to the Commission and tabled its report in Parliament.

98. It was the Petitioners' position that by tabling the said report, their rights to fair hearing, fair administrative action and freedom to be protected from psychological torture and right to human dignity were violated. To them the right to fair hearing encompasses the right to notice, representation, adjournment and giving of reasons and that Article 50(2)(a) of our constitution stipulates that every accused person must be afforded a fair hearing, and an important right that concerns this petition is that an accused person has a right to be presumed innocent until the contrary is proved and has the right to be notified of the charges. To the Petitioners, what is envisaged by an accused person is not necessarily a suspect in a trial but it is any person whose rights are to be adjudicated upon and who stands to face some sort of consequences after the process as held by **Mabeya, J** in **Stephen Nendela vs. County Assembly of Bungoma & 4 others [2014] eKLR** that:

> **"Although Article 50 (2) uses the term an "accused person", I am of the view and so hold that, an accused person in this case does not denote or refer to a person accused in a criminal trial only, but also to any person accused of any allegation which if proved against him, the consequences would be prejudicial to him."**

99. It was the Petitioner's case that the investigation of a person with the very aim of recommending him for prosecution is a process with serious implications on the standing and life of the person being investigated. Further, if a person is to be named in a high profile report like that of EACC and thus be required to step down from a public office, then due process must be followed.

100. The Petitioners' case was that when the report was tabled by the President on 26th March, 2015, the mentioned persons were not aware that their names were in the report nor were they aware of the charges facing them. As such, most of them had to visit the Commission's office to get the information after the report had already gone public and when others had stepped down from their offices. Further when the report was tabled, the mentioned persons were already presumed to be guilty and were condemned by the public opinion court and even by the legislature.

101. It was further contended that when independent commissions like the Commission allows itself to take directions from the President and even delegate their mandate to the President, then their impartiality becomes questionable. Further, the Commission is mandated under section 12(c) of the ***EACC Act*** to act in accordance with the principles of natural justice, and as such, when the Commission does not afford persons being investigated natural justice, it fails in its statutory and constitutional mandate.

102. It was further averred that when the heads of the Commission are implicated in the same vice which they ought to eliminate, then the credibility of the Commission's reports becomes suspect.

In this respect the Petitioners relied on **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012**. They added that the evidentiary standard of unfitness of the chairperson and vice chairperson of the Commission was satisfied when Parliament heard a petition seeking their removal and instead of staying put to prove their innocence, the commissioners decided to quit, indicating that the evidence in favour of their incompetence was overwhelming.

103. While seeking that the orders sought in their petition be granted, the 9th -11th Petitioners urged the Court to find that these being public interest suits each party should bear its own costs.

104. The 12th and 13th Petitioners made averments and submissions along the same lines as detailed above in respect of the 1st -11th petitioners, and we need not repeat them here.

105. Accordingly, the Petitioners sought various reliefs which we summarise as hereunder:

a. **A declaration do issue to the effect that the Commission is not and was not properly constituted in accordance with Articles 79, 249 and 250 of the constitution of Kenya and section 4 of the Ethics and Anti-Corruption Commission Act of 2012 and therefore its purported investigations and findings on the Petitioners are null and void and cannot be a acted upon by the DPP.**
b. **A declaration that the directives and ultimatum issued by the President to the Commission to carry out investigations on the Petitioner are in effect a clear violation of the provisions of Article 249(2) of the constitution and therefore the said investigations and recommendations made pursuant to that directive are null and void.**
c. **A declaration that the Director of Public Prosecutions neglected and abdicated his constitutional duty by failing to prevent and avoid the abuse of the legal process in violation of Article 157 (11) of the Constitution of Kenya, 2010.**
d. **A declaration that there is no prosecutable case that the Director of Public Prosecution can mount against the petitioners and that the purported investigations and findings by the Commission on the Petitioners were based on extraneous considerations and are therefore null and void.**
e. **An order of certiorari be issued to bring to this court and quash the decisions of the Commission and the DPP made on to prefer charges against the Petitioners herein of whatever nature.**
f. **An order of *prohibition* directed at the Director of Public Prosecutions and the Ethics and Anti-Corruption Commission from prosecuting the petitioners.**
g. **An order of *prohibition* directed at the Chief Magistrates' Court, Anti-Corruption Court, Milimani from proceeding and conducting the trial against the petitioners.**
h. **An order of Prohibition be issued prohibiting the Respondents from arresting, detaining, interrogating, arraigning in court and or in any other manner interfering with the Petitioners' freedom arising from the findings and recommendations of the Commission and the DPP.**
i. **Costs of the Petitions.**

The 1st Respondent's Case

106. According to the Commission, on 15th January, 2013, it received allegations against the 1st and 8th Petitioners, among other public servants, to the effect that they conspired to embezzle public funds by disregarding road designs drawn up by an independent consultant contracted by the Ministry, with respect to the Kamukuywa-Kaptama-Kapsokwony-Sirisia Roads project and substituting therefor their own designs. Thereupon, the Commission investigated the matter and by 20th March, 2015 when the Commission submitted the report to the President, the investigations were complete.

107. As a result of the said investigations, the Commission recommended to the DPP that corruption charges be preferred against the 1st and 8th Petitioners amongst others, a recommendation which the DPP concurred with and the said Petitioners were arraigned in Court.

108. According to the Commission, the speech by the President did not direct the Commission or any of its employees in respect of the investigations and it was impossible for the President to do so

since, by the time of the said speech, the investigations were either complete or were already in progress and a number of the Petitioners were in fact arraigned in Court well beyond the 60 day timeframe. With respect to the 8th Petitioner, it was contended that the rules of natural justice were complied with and the said Petitioner was interviewed and recorded his statement ten months prior to the said Speech.

109. To the Commission the said Presidential address did not violate the Petitioners' constitutional rights. To the contrary it abided by section 42(7) of the ***Leadership and Integrity Act*** enacted pursuant to Article 80 of the Constitution; granted access to information under Article 35 by attaching the report of the Commission; urged the Commission to forward its files to the ODPP without delay; cautioned against delayed justice; and reiterated the constitutional independence of the Commission and the DPP under Articles 79 and 157 of the Constitution.

110. It was averred by the Commission that Commissioners **Jane Onsongo**, **Irene Keino** and **Mumo Matemu** resigned on 31st March, 2015, 30th April, 2015 and 12th May, 2015 respectively hence the investigations were commenced and completed when all the Commissioners were in office. However, investigations into allegations against the 2nd Petitioner in respect of the Karen and Waitiki lands were completed when the Commissioners had left office. The Commission however, observed that while the 2nd Petitioner challenged the recommendation for her prosecution in respect of the Karen land, she had not challenged her exoneration by the Commission in respect of the Waitiki land.

111. To the Commission, none of the Commissioners were appointed investigators and none of them conducted investigations which function fell under the Investigation Directorate and investigators appointed under section 23 of the ***ACECA***, hence the question of locus to conduct investigations does not arise. The investigators, it was contended, conducted investigations objectively and independent of directions from the Commissioners or any other person.

112. In the Commission's view, the intention of the provisions of Article 250(1) of the Constitution, which are similar to the provisions of section 4 of the ***EACC Act***, was to provide for the minimum and the maximum membership of the Commission that can be appointed at any one moment and they are separate and distinct to the Commission which is a body corporate with perpetual succession with powers donated to it by the ***EACC Act***. To the Commission, the Constitution under Article 250(12) includes its Secretary, who, under the said Article, is the Chief Executive Officer, who is still in the office. Further, section 18 of the ***EACC Act*** provides for a Secretariat which undertakes the functions of the Commission as set out in the Constitution and the statutes one of which is to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under the Act or any other law enacted pursuant to Chapter Six of the Constitution.

113. It was contended that the Commission's powers under section 13 of the ***EACC Act*** to conduct investigations either on its own initiative or on a complaint made by any person is exercisable whether or not the Commissioners are in office hence their exercise does not depend on whether or not the Commissioners are in office. It was further contended that the making of recommendations to the DPP is a function of the Secretariat and not the Commissioners whose absence therefore does not affect the technical and professional work of the officers at the Secretariat.

114. In the Commission's view, the functions of the Commissioners as spelt out in section 11(6) of the said Act relates to policy formulation, ensuring that the Commission and its staff, including the Secretary, perform their duties to the highest standards possible in accordance with the Act and giving strategic direction to the Commission as contained in the Strategic Plan which had already been formulated and adopted prior to their resignation. To the Commission, this position was reinforced by the office of the Attorney General in his opinion dated 30th April, 2015.

115. It was accordingly contended that any interpretation of the law in the manner proposed by the Petitioners would be out of context and contrary to public interest with the potential of winding up the Commission in the face of runaway corruption amidst a spirited fight to combat it.

116. It was asserted by the Commission that the Petitioners' right to equal protection and benefit of the law, as well as their rights to fair trial, remain intact and that there is no evidence of violation that would warrant the orders sought in these petitions.

117. It was submitted on behalf of the Commission that the petitioners raised three common grounds that can be summarized as follows:

1. **That the Commission, in absence of the Commissioners, is not properly/constitutionally constituted. As a consequence, the recommendations made to the DPP to charge the Petitioners with the various offences of corruption and economic crimes are illegal.**
2. **His Excellency the President, in his state of the nation address delivered in Parliament on 26th March 2015 purported to give directions to the DPP and the Commission to investigate and prosecute the cases which directions are unconstitutional.**
3. **The Petitioners' fundamental rights and freedoms, as particularized in their respective petitions, have been infringed or threatened with infringement.**

118. On the issue whether the Commission was, in the absence of the Commissioners, properly constituted and whether the Commission could legally make recommendations to the DPP, it was submitted that the Commission is a body corporate capable of suing and being sued. As a body corporate, it is an autonomous legal unit/person with perpetual succession and like other body corporate, the Commission has a separate legal personality and continues to exist independent of any human management or governance. Its constitutive charter comprises of the Constitution of Kenya as read with the establishing and tasking statutes namely the ***Ethics and Anti-Corruption Commission Act***, the ***Anti-Corruption and Economic Crimes Act, 2003*** and the ***Leadership and Integrity Act, 2012***. As an indivisible legal person, the only way to dissolve or otherwise terminate its existence is to amend or repeal its constitutive charter.
119. According to the Commission, at all times material to the petitions, the law provided that EACC shall consists of 3 members of the Commission (read Commissioners) and the Commission had all 3 Commissioners as at 30th March, 2015 but did not have any Commissioner with effect from 12th May, 2015. The Commission admitted that Commissioner **Jane Onsongo** publicly resigned on 31st March, 2015 and thereafter Commissioner **Irene Keino** resigned on 30th April. 2015. Finally Commissioner **Mumo Matemu**, who was also the Commission Chairman, resigned on 12th May, 2015. Effectively, the Commission had no Commissioner with effect from that date. In the Commission's view, though the resignation of one Commissioner meant that the Commission did not have the required minimum number of Commissioners with effect from 31st March, 2015, the date that the first of the three Commissioners resigned, two Commissioners constituted a quorum for purposes of a Commission meeting in terms of the Second Schedule of the ***EACC Act***.
120. It was contended that since none of the Commissioners is required to have an investigative or other operational/technical qualifications, the resignation of the Commissioners did not amount to proscription or abolishment of the said offices, since fresh appointees would take up the positions. In law and in fact, there is no inconsistency with the provisions of the Constitution since it is an enduring fact that one of the options that will remain open to the Commissioners, now and in the future, is a right to resign. The membership of the Commission will therefore not only constantly change but it is possible to have no sitting member of the Commission, as in the present circumstances, or at least in theory.
121. It was the Commission's case that under Article 250(12) each Commission shall have a secretary who shall be the Chief Executive Officer and in this case the Secretary to the Commission, upon whom executive powers rests, was and still is in office. It was therefore contended that the constitution of the Commission includes the office of the Secretary.
122. To the Commission, under section 35 of the ***ACECA*** as read with section 11(d) of the ***EACC Act, 2011***, the Commission is mandated to prepare a report of the results of its investigations to the Office of the Director of Public Prosecution (ODPP) which report is required to, amongst others, communicate any recommendation that the Commission may have that a person be prosecuted for corruption or economic crimes. This obligation, it was contended the Commission dutifully complied with by preparing and forwarding its reports, duly signed by the Secretary, who is the Chief Executive Officer of the Commission, to the DPP.
123. It was the Commission's position on the issue of the composition of the Commission that this issue calls for a decision on important points of law and public corporates' governance principles with far reaching consequences on, not only the Commission, but all other constitutional commissions and independent offices. It was reiterated that the Commission's corporate status and perpetual succession is a provision of the Constitution under Article 253.
124. According to the Commission, Article 250(1) provides that each commission shall consist of at least 3 but not more than 9 members otherwise known as commissioners**.** Under Article 250(12)

the Constitution provides for the office of the secretary who shall double up as the chief executive officer. To the Commission, the members referred to in Article 250 are consistently titled commissioners in the statutes. In its view, from Articles 250, 253(1) and 253(12), the Constitution did intend to create/constitute each commission and independent office as a corporate person independent of its members and office holders. Notably, the Constitution does not provide that the membership of the commission shall be a body corporate. The Constitution intended all commissions (EACC included) to function as an institution and not a collection of individuals or offices. It is therefore only logical that, in relation to the body corporate, any other body or entity conceived/constituted by the Constitution is function oriented as opposed to giving the Commission a legal form. By providing that "…*each commission shall consist of…*" at Article 250(1), the Constitution is simply constituting offices of members just like it constitutes the office of the Secretary at Article 250(12). By constituting these offices, the Constitution is in effect prescribing an organization structure by creating offices at different levels; prescribe their holders (members/commissioners, secretary and staff) in their capacity as agents of the body corporate (at Article 250) and provide for a process of appointment to these offices that guarantees independence and merit (at Article 250(2)). If this were not the case, the Constitution would simply have created Commissioners for Ethics and Anti-Corruption as the institution which it did not.

125. It was submitted that the Constitution then proceeded to provide for the general functions and powers of all commissions at Article 252(1) and acknowledged that additional and more specific powers and functions may be provided by legislation. Notably, all functions and powers are vested in the body corporate (commission) which is distinct from the members who constitute the commission. None of the mandates and powers have been assigned to the person of the members of EACC or the Secretary but to their respective offices. The constitutive charter (the Constitution and tasking statutes) does not envisage a situation where the body corporate is paralyzed or stands dissolved solely on account of a vacancy in any or all of the offices. This position, it was contended, is reiterated by section 53 of the ***Interpretation and General Provisions Act*** (Cap. 2). In effect the Commission's position was that notwithstanding the vacancy in its ranks, the Commission, being a body corporate continues to carry out its constitutional and statutory mandate.

126. The Constitution, it was submitted, however, unambiguously vests (at Article 250(12)(b)) the power and responsibility to execute the functions, which belongs to the body corporate, upon the office of the Secretary. It is constitutionally correct to aver that the exercise of executive power reposes upon the Secretary. Therefore, it was averred, the legitimate use or application of any of the powers to carry out any functions of the body corporate is by conferment/delegation, again by statute. Granted its corporate character, the question as to whether EACC can exercise/carry out its investigative function or all of its powers when offices of the members (or even secretary) are vacant, is fundamentally not a question of its constitution, but one of capacity to function. Consequently, according to the Commission, the germane question to ask is whether the function was undertaken by an office to which it is constitutionally or statutorily conferred.

127. It argued, further, that one may as well ask, why then provide for the number of members who shall constitute the Commission? Clearly, according to the Commission, to conduct the business of the Commission, it calls for a meeting whose procedure is regulated under Schedule Two of the ***EACC Act***. The minimum number of members must be present to constitute a quorum. The quorum is two thirds of the members plus the secretary who executes all decisions of the Commission in such a meeting. However, the business in that meeting must be of the nature envisaged under Schedule Two. Since Commissioners are a significant constituent of such meeting, it is only logical that the Commission's business envisaged in Schedule Two of the said Act must be that which concerns or relates to the functions of the Commissioners. Suffice it to say that none of the powers of the Commissioners concern investigations or any operational programmes of the Commission for that matter. Simply put, according to the Commission, the constitution of the Commission for purposes of a meeting under Schedule Two of ***EACC Act*** is contextual and must be interpreted in the context of business relating to functions of Commissioners. It is wrong, the Commission submitted, to broaden the scope of "constitution", used in this context, to mean legal status of the Commission. To do so would be to conflate distinct references of the "Commission" as a body corporate and a sitting of commissioners plus

secretary (full Board meeting as opposed to that of Committees) to exercise specified functions of the Commission. In this regard the Commission relied on the definition of the term "constitute" in ***Black's Law Dictionary*** which defines the term as:

1. ***To give legal or appropriate procedural form to something; to establish by law***
2. ***To appoint to an office, function, or rank***
3. ***To make up or form***

128. To the Commission, the 1st and 3rd meanings of constitute, in respect of the 1st Respondent would relate to its constitution as the body corporate. Any other reference to this term in respect of a body corporate would only regard the 2nd meaning; that of appointment to an office, function, or rank i.e. to constitute an office which, in the Commission's view, is the correct interpretation that should be given to Article 250(1). To the Commission, for EACC the proper question to frame, when any of the statutory offices falls vacant is: What is the function conferred to that office (read commissioners)? The answer definitively points to what EACC can or cannot do in that state. In the same breath, the question as to whether EACC could investigate and make any form of recommendations against any person (to include the Petitioners) in the absence of members of the Commission is also answered.
129. The Commission then proceeded to submit on the issue whether the EACC can undertake investigations and make recommendations to DPP and the functions of members of EACC and the Secretary. In its view, neither the offices of the members of EACC (read Commissioners) nor the Secretary (read Secretariat) is an idle appendage. Each has complementing but distinct functions which determines what powers they can legitimately exercise for and on behalf of EACC. In essence, this Court is being called upon to determine which office or individual has the authority to signal decision made in respect of such an operational function as an investigation by the 1st Respondent. To the Commission, the subsisting legal framework provides the answer and to this end it was submitted that as a creation of the Constitution and the statute, the functions that the offices of members of the EACC can discharge are circumscribed by section 11(6) of the ***EACC Act***. Likewise, the functions that the office of the Secretary can perform and the powers it can exercise are circumscribed by Article 250(12) of the Constitution, section 16(7) of ***EACC Act***, amongst other provisions.
130. According to the Commission, under section 11(6) of the ***EACC Act:***

The functions of the Commissioners shall be to—

a. ***assist the Commission in policy formulation and ensure that the Commission and its staff, including the Secretary perform their duties to the highest standards possible in accordance with this Act;***
b. ***give strategic direction to the Commission in the performance of its functions as stipulated in this Act;***
c. ***establish and maintain strategic linkages and partnerships with other stakeholders in the rule of law and other governance sector;***
d. ***deal with reports, complains of abuse of power; impropriety and other forms of misconduct on the part of the commission or its staff; and***
e. ***deal with reports of conduct amounting to maladministration, including but not limited to delay in the conduct of investigations and unreasonable invasion of privacy by the Commission or its staff.***

131. To the Commission, an analysis of these functions discloses, the following. The first three functions vest the Commissioners with the duty of formulating appropriate policy and a sustainable strategic direction for the Commission. The last two functions complement the first three; they give the Commissioners the responsibility of dealing with any dilatory conduct that is not in consonance with policy or may threaten the realization of the strategic objectives of the Commission. Clearly, substantive functions of the Commissioners are at the level of planning. They entail formulation of policy that will ensure observance of highest standards in performance of duties and give strategic direction and establish strategic linkages with other stakeholders and

dealing with any disciplinary issues that threaten to derail the performance of its functions. These functions are especially fashioned to ensure that EACC is pulling together towards, and remains focused to, known strategic objectives such as the preparation of the Strategic Plan. To account for implementation of this strategic plan, the 1st Respondent is statutorily mandated to publish an annual report in accordance with section 17 of the ***EACC Act*** which annual reports are available on the said website.

132. To the Commission, there is nothing operational in these functions. Indeed, it would be against the principles of good governance if the Commissioners, who play a leadership role, were to take over managerial and operational functions placed under the charge of the Secretariat headed by the Secretary. For their role, the Commissioners (not the Commission) can meet once every three months, or as duty demands, as provided for under section 11(7) of ***EACC Act***. The infrequency of their meetings, it was contended, underscores the fact that it is not envisaged that the Commissioners shall be involved in the day-to-day running of the Commission's operations which would demand holding of daily operational meetings to make operational decisions. This fact is affirmed by the recent amendments to the ***EACC Act*** that changed the Commissioners' terms of service from full to part time, quite in line with their role in the Commission. In support of this position, the Commission relied on the Canadian case of **Just Versus R in Right of B.C. (Vancouver No. C822279),** in which **Justice McLachlin** of the Supreme Court of British Columbia observed thus:

"In general, policy refers to a decision of a public body at the planning level involving the allocation of scarce resources or balancing such factors as efficiency and thrift. The operational function of government, by contrast, involves the use of governmental powers for the purpose of implementing, giving effect to or enforcing compliance with the general or specific goals of a policy decision...one hallmark of a policy, as opposed to an operational, decision is that it involves planning...A second characteristic of a policy decision as opposed to an operational function is that a policy decision involves allocating resources and balancing factors such as efficiency or thrift."

133. It was further submitted that more significantly, the learned Judge stated, as a matter of settled law, that generally public bodies cannot be held liable for policy decisions but for the manner in which those policies are, eventually, operationalised. At paragraph 8, the learned Judge rendered himself thus:

"The law distinguishes between conduct of a public authority which falls within the realm of "policy" and conduct which is "operational". A governmental body cannot be held liable in a court of law for its policy decisions. It is, however, liable for its operational functions if negligence is established…A second characteristic of a policy decision as opposed to an operational function is that a policy decision involves allocating resources and balancing factors such as efficiency or thrift."

134. It was therefore submitted that with the exception of the powers to discipline, the functions of the commissioners are wholly at a policy and planning level distinguishable from routine and operational functions that implement such policy and plans and that this can be contrasted with the executive powers and authority granted to the Secretary by the establishing and tasking laws.

135. On the said tasking laws, it was submitted that under Article 250(12) of the Constitution, the Secretary is charged with the duty of being the secretary to the Commission and the chief executive officer of the Commission and under section 167(7) of the ***EACC Act*** is tasked with certain functions as hereunder:

The Secretary shall be—

a. ***the chief executive officer of the Commission;***
b. ***the accounting officer of the Commission; and***

responsible for—

i. ***carrying out of the decisions of the Commission;***
ii. ***day-to-day administration and management of the affairs of the Commission;***
iii. ***supervision of other employees of the Commission;***
iv. ***the performance of such other duties as may be assigned by the Commission."***

136. Since the office of the Secretary is properly constituted through a process prescribed by the ***EACC Act***, it was submitted that the Secretary/CEO has express constitutional and statutory authority to carry to effect/execute all functions of corporate EACC and undertakes this function through the secretariat which he/she is the head. Section 18 of the ***EACC Act*** provides for a Secretariat comprised of professional, technical, administrative officers and support staff which undertakes the functions of the Commission as set out in the Constitution and the Acts. Unless otherwise stated in the law, all responsibilities that are in consonance with the executive authority of the body corporate lawfully appertain to the office of the Secretary. This means that the Secretary has the widest powers to manage the Commission, its business, operations and administration and to carry all activities that may be necessary and appropriate according to its objects and purposes. He shall, except as otherwise indicated in the law, without limitation manage the business and financial affairs of the Commission, represent the Commission and sign all documents that may be required or necessary, execute and perform for the Commission in its name all things which shall be necessary or desirable concerning the matters of the Commission as the Commission could do to attain its objects. Only the functions specially delineated to the Commissioners constrain the Secretary. The interlinkages between the Commissioners and the Secretary (and even the staff) are essential as none can work in isolation. However, these interlinkages and working relationships are not matters before the court or are otherwise non-justiciable.
137. Accordingly, it was contended that it is for good cause that both the Constitution and, in particular the ***EACC Act*** and the ***ACECA***, provide for the functions. It was submitted that, in respect of authority expressly granted by the Constitution and Parliament through a statute, no resolution in a meeting of the Commission envisaged in Schedule Two of the EACC Act, can divest as it would be in conflict with the constitution and the law and hence unlawful. If members of the Commission purport to undertake the functions of the Secretary and vice versa, they would be acting in excess of their authority. In support of this position, the Commission cited section 43 of the ***Interpretation and General Provisions Act,*** which provides that where a written law imposes duties on a certain office those duties must be performed by the holder of that office for the time being and relied on the Malindi Court of Appeal's decision in **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic (2015) eKLR**. In that case, it was held that the Chief Justice could not lawfully extend the jurisdiction of a judicial officer appointed to perform a given function without offending section 43 of ***Interpretation and General Provisions Act***.
138. In the Commission's view, a meeting of Commissioners, provided for in section 11(7) and the Second Schedule cannot decide on recommendations to be made pursuant to an investigation undertaken by the Commission. Such recommendations are based on evidence, professionally gathered and evaluated and not a boardroom resolution of the Commission. The Commissioners cannot purport to direct an investigation, research and education programmes or any other operational function of the Commission as vindicated by the consequential amendments effected to the ***ACECA***.
139. Dealing with the said amendments, the Commission reproduced the long title of the ***ACECA*** to the effect that it is the statute that provides "…for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith" and averred that it is the statute that provides for corruption and economic crimes and penalty under sections 38 to 48 and compensation and recovery of improper benefits under sections 51 to 56C. It added that the power to carry out investigations are more particularly provided for under Part IV of the ***ACECA***, as amended by ***The Statute Law (Misc. Amendments) Act No. 18 of 2014*** under sections 23, 24, 26, 27(1), 28 and 32 as hereunder:

23. (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, the Evidence Act, the Police Act 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 provisions 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.

24. (1) The Commission shall issue identification documentation to an investigator and such identification shall be evidence that the person to whom it is issued is an investigator.

(2) The identification documentation issued by the Commission shall be signed by the Secretary.

26. (1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property…

(2)…

(3) The powers of the Commission under this section may be exercised only by the Secretary.

27. (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 in the order, a written statement stating, 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.

140.The Commission also relied on section 35 of the same Part IV, of the ***ACECA*** which provides as follows:

(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.

141.With respect to the definition of "power" the Commission referred to section 2 of the ***Interpretation and General Provisions Act,*** (Cap.2) as including "*any privilege, authority or discretion"*. Accordingly, the proper import of section 23(2) of the ***ACECA***, is that the Secretary has all the privilege, authority and discretion in the exercise of all the powers conferred upon the Commission under Part IV with regard to investigations. This includes the duty to forward a report of an investigation to the Director of Public Prosecutions making any recommendation to prosecute on behalf of the Commission as provided under 35(1) and (2) of the ***ACECA***. Since there is no mention of Commissioners or members of the Commission in the entire Part IV of the ***ACECA***, it was submitted that there is no role for the Commissioners. To the Commission, this submission is further reinforced by section 43 of the ***Interpretation and General Provisions Act,*** which provides that where a written law imposes duties on a certain office, those duties must be

performed by the holder of that office for the time being, a position consistent with the exercise of investigative powers by the former Director of the defunct Kenya Anti-Corruption Commission (KACC), the predecessor of EACC.

142. The Commission further contended that outside the statutory directives, this court does not have independent judicial criteria to determine who should be vested with what functions or who is best suited to execute what powers and the extent of deviation from such criteria. The court is constrained by the clear language of the provisions outlined above. Besides, there is good cause to have an identifiable office to account for the exercise of coercive powers of the state. Collegial decisions in the nature of board proceedings would not augur well for the two conflicting imperatives that characterize operations; flexibility and accountability.

143. On the issue whether reports of investigation to the ODPP under section 35 comprise "a decision of Commission" envisaged in paragraph 9 of the Second Schedule of the ***EACC Act***, it was submitted that much capital was made out of a consultative letter written by the DPP to the 1st Respondent on the question of who should signify reports making recommendations to him. According to the Commission, an opinion by the AG settled the matter. That notwithstanding, it was submitted that the Second Schedule to the ***EACC Act*** provides for the procedure of conducting the Commission's business. The thrust of the Second Schedule, as the title suggests, is to provide for procedure in meetings of the Commission. Consequently, the decisions being addressed in paragraph 9 are decisions of the Commission in such meetings. Since commissioners must be in attendance, it can safely be assumed that the decisions must relate to the functions identifiable with and assigned to Commissioners.

144. In the Commission's view, as distinguished above, the functions of Commissioners are mostly of a policy and strategic type with the exception of the disciplinary functions. The latter being regulative does not extend to operations. These decisions are, therefore, profoundly distinct from operational reports which communicate results of an investigation with recommendations to the DPP which reports convey a professional evaluation of evidence gathered by operatives in exercise of the investigative mandate of the Commission. In contrast, decisions envisaged under the Second Schedule of the ***EACC Act***, are readily identifiable with leadership and managerial decisions of a regulative (such as disciplinary) or constitutive (such as policy) nature. While such decisions underlie and guide operational decisions, they are distinct and by no means co-extensive.

145. According to the Commission, the Second Schedule outlines what is fairly comparable with requirements for commercial corporate's resolution making process. Needless to say, such meeting requires to be convened by way of a notice setting out the agenda of the meeting.

146. It was therefore submitted that for a resolution of EACC to be valid it must be passed at a meeting, which is properly convened and satisfies the quorum requirements; be arrived at unanimously or by vote; be entered in the minute book(s) kept by the EACC for that purpose as a record of resolutions made; and be signed by the Chair of the meeting at which the resolution was passed and by the Secretary. To the Commission, policy decisions are the blueprints for the execution of functions while operational decisions implement the blueprints. It is the manner in which an operation is undertaken that exposes a public body to liability other than policy decisions such as how much resources (human, physical and financial, for example) will be allocated to such an operation from the institutions budget. It is characteristic of policy decisions to be arrived at by consensus or through democratic principles. Quite plainly, paragraph 10 of the Second Schedule directs that these decisions must be arrived at either unanimously or subjected to vote. Since the Secretary takes and keeps minutes of the Commission, it follows that he/she should signify the decisions in conjunction with the Chair Person. This is quite typical of board room proceedings.

147. It was therefore submitted that the answer to the question as to which office should signify reports of the Commission being forwarded to the DPP lies on the scope of application of paragraph 9 of the Second Schedule. The more fundamental question is whether a report containing results of investigations comprises a "decision of the Commission" envisaged under paragraph 9 of the Second Schedule. There is no dispute that paragraph 9 of this schedule states that *"…all instruments made by and decisions of the Commission shall be signified under the hand of the Chair Person and the Secretary."* However, granted the context in which the word 'decision' in paragraph 9 is used, it is not in doubt that it does not extend to reports under section 35 of ***ACECA*** or section 11(1) of the ***EACC Act***. A correct interpretation, in the Commission's view, of paragraph 9 should rightly be constrained by a reading of the entire Second Schedule.

This is necessary to appropriately contextualize the paragraph. Even if a communication of the results of investigations is taken to be a decision of the Commission, a choice of meaning of the "decision" envisaged under paragraph 9 should be determined by the context in which it is used. Indeed it is difficult to overstate the importance attached to context in which a word or phrase is used in construction of legislations. As a corollary, it is impossible to ignore the context in which words are employed. The Commission therefore submitted that an interpretation of paragraph 9 that would extend its scope to decisions taken on operational matters is erroneous. In its view, such interpretation is not only out of context but indeed transposed to a different statute. To the Commission, it is implausible that this was the intention of the Legislature on at least two accounts; business efficacy and reasonableness.

148. It was averred that a restrictive (read contextual) interpretation of paragraph 9 is necessary for business efficacy. A liberal application of this paragraph across statutes implies that results of investigations will, of essence, be an item of agenda in the Commission's meetings and decisions either made unanimous or subjected to a vote. Embracing this course would also fail the test of reasonableness and necessity; a canon of construction. It means that all operational decisions in exercise of any of the Commission's functions, to include decision to institute suits for recovery of assets for example, will have to be underlain in a Commission meeting whose decision is signified by the Chair Person and the Secretary. Indeed the negative value to this proposition extends to past business of the Commission. It, for instance, jeopardizes hundreds of previous reports and cases signified only by the Secretary/CEO despite the presence of the Chairman and his vice chairperson or even recommendations to prosecute and administrative actions taken after resignation of the Commissioners. Such proposition, it was contended goes against principles of good corporate governance by blurring the line between policy and operations.

149. The Commission then dealt with the issue whether investigations should be the subject matter of a Commission meeting envisaged under the Second Schedule of the ***EACC Act*** and submitted that the Commissioners and the Secretary constitute the government/leadership of EACC whose procedure of meetings and decision making is regulated under the Second Schedule. While not interfering with the necessary discretion, the frequency of meetings and procedure of such meetings has not been left to the whims of the leadership.

150. It was contended that proceedings of investigation is not a product of management and board room negotiations and resolutions. It is the product of professional and technocratic work for the reason that a decision whether or not to recommend charging a person is solely a factor of objective professional evaluation of evidence gathered in the course of investigations as opposed to a fair but subjective judgement in conformity with some policy. Gathering of evidence is a highly skilled and regulated affair and so is analysis of the evidence against applicable law. It cannot be the subject of boardroom negotiations to be determined on a unanimous or majority vote.

151. In the Commission's view, constituting commissions and independent offices as body corporates is a clear and intentional departure from the position in the repealed Constitution where constitutional commissions and independent offices were created and established as non-corporates such as the Attorney General. Incorporation of commissions and independent offices served to promote a readily identifiable public interest. The effect of this approach was to give perpetuity to both the institution and the offices of the institution created. Upon departure of the occupants of the offices, the offices merely become vacant. In this case, EACC and the offices of the secretary and members of EACC exist irrespective of any or all being vacant. It was submitted that to ensure that exit or absence of the constitutional office holders does not lead to paralysis, the constitution as well as establishing statute (***EACC Act***) provide for clear and distinct functions for the Commissioners, Secretary and the secretariat. If the Constitution intended to constitute commissioners as a body corporate it would have said so and aptly named the institution "The Commissioners for Ethics and Anti-Corruption" which it did not. The Commission added that while nothing much may turn on a name, an approach that aggregates commissioners as the body corporate would produce anomalous results and in breach of the rule against absurdity, one of the cannons of statutory interpretation. To the Commission, that would render constitutional and statutory provisions identifying and assigning functions idle vestiges as there would have been no need to specify functions for the commissioners and the secretary and confer respective powers between the two. If commissioners were to exercise all powers and make all decisions, ranging

from policy, strategic and operational, there would have been no need to have such specific provisions defining their functions. To the Commission, an interpretation that commissioners are the commission either defeats or renders the different provisions of the Constitution and the statutes inconsistent. It defeats legal logic why the ***EACC Act*** would at sections 11(6) and 16(7) provide for distinct functions of the Commissioners and Secretary respectively, only to make all functions to be the subject of board room decisions.

152. The Commission added that if commissioners were the commission, it means all powers and functions of the commission, as provided by Article 252 (1) of the Constitution, repose upon them. The said Article provides as follows:

(1) Each commission, and each holder of an independent office—

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

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

(c) shall recruit its own staff; and

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

153. Such an interpretation, it was contended, would mean that no power can be exercised, no function can be operationalized or business transacted in the absence of the commissioners. For all practical purposes, the Commission ceases to exist once commissioners exit, except as a legal fiction. Indeed, no suit can be commenced against EACC, or any court process be properly served upon EACC or defended in the name of the EACC, this petition included.

154. It was argued that this Court is enjoined by Article 259(1) of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, fundamental rights and freedoms, permits development of the law and contributes to good governance. Such an interpretation that paralyses operations of a constitutional Commission would ran counter to the public interest to advance the fight against corruption and prudent use of scarce public resources. Besides it does not accord with the Constitution and the public interest that a public function mandated upon a public body corporate stalls on account of a vacancy particularly to an office without a procedure for anyone to come in in an acting capacity. It would be against public interest to have EACC, which has staff with a technical and operational capacity and a secretary constitutionally bestowed with executive authority of EACC offices, closed down, even temporarily, because the offices of the commissioners are vacant.

155. In the Commission's view, there would be serious sacrifices on administrative and executive efficiency, if not paralysis, in constitutional commissions and independent offices if every decision to exercise power and the carrying out of every function of a technical or non-technical nature becomes the business of the Commission to be discussed and voted for in a board room. In this particular case, every case under investigations will be required to be tabled as an item of agenda in a meeting of the Commission contemplated under Schedule Two of the ***EACC Act***, the merits and demerits of the proposals discussed and decision taken unanimously or by vote. It may as well create another procedural protection for persons under investigation since they can rightfully assert that an adverse decision is being made against them and they have a right to be given an opportunity to be heard. Decisions by professionals would be subject to board room

bargains and trade-offs opening space for extraneous considerations.

156. It was submitted that the court would be extending functions of the commissioners to include executive authority and powers exclusively granted to the Secretary by the Constitution that the legislature never intended to allocate to their offices. Serious incursions and violations of the harmonious organization of the Commission as structured by the Constitution and the statutes would be made.

157. To the Commission therefore, it is plainly wrong to say membership of EACC (read commissioners), severally or jointly, constitute the legal entity "commission" and vice versa since by creating the commissions and independent offices with a corporate character, the Constitution envisages a situation where these institutions exist independent of and without their members (Commissioners) or holder of the independent office. In other words, an abolishment of the Commission cannot be accomplished through sacking or resignation of all members (including the secretary) as such eventuality would only create vacancies. Effectively, it was asserted the EACC remains "constitutionally constituted" if the constitutive charter (read EACC Act) establishes the minimum number of offices envisaged by the Constitution, irrespective of the existence of a vacancy in those offices and by parity of reasoning, the same case applies to all commissions and independent offices. The significance of constituting commissions and independent offices as legal persons, it was averred is to preserve and advance public interest even on the face of vacancies in the Commissions or independent offices. Therefore, it is not in the public interest to have EACC, which has staff with a technical and operational capacity and a secretary constitutionally bestowed with executive authority of EACC offices closed down, even temporarily, because the offices of the commissioners are vacant.

158. To the Commission, the Commissioners are not an idle appendage to the structure of the EACC or any other constitutional commission. They do have their right place and space clearly identifiable by their important functions of formulating policy, giving strategic direction, overseeing implementation of the strategic plan, maintaining crucial interlinkages with other stakeholders and ensuring discipline to check any dilatory conduct. However, investigation, evaluation of evidence and making appropriate recommendations, based on evidence, is neither identifiable with the functions of Commissioners nor is it in the nature of business of the Commission envisaged in the Second Schedule of the ***EACC Act***. The Court was therefore urged to find that the Petitioner's cases were lawfully investigated and recommendations made to the DPP. Consequently the petitions should be dismissed and the respective cases be allowed to proceed before the Anti-Corruption Court to their logical conclusion.

159. On the issue of the State of the Nation address given by the President to Parliament on 26th March, 2015 amounting to executive interference with the operations of an independent office/commission, the Commission reproduced the said speech as hereunder:-

"The latest report I have received from the Ethics and Anti-Corruption Commission contains a catalogue of allegations of high-level corruption touching on all arms and levels of Government. It is the view of the CEO of the Ethics and Anti-Corruption Commission that the institution and especially its Secretariat are under siege because of the nature of the cases they are currently investigating. I know that Parliament is seized of this matter and urge them to deal with it expeditiously.

Today, I take the extra-ordinary step of attaching the afore-mentioned confidential report from the CEO of the Ethics and Anti-Corruption Commission as an annex to my annual report on Values to Parliament.

Consequently, I hereby direct that all Officials of the National and County governments that are adversely mentioned in this report, whether you are a Cabinet Secretary, Principal Secretary, or Chief Executive of a state institution, to immediately step aside pending conclusion of the investigations of the allegations against them. I expect the other arms of Government, namely the Legislature and the Judiciary, to do the same.

The investigating authority must ensure that the Director of Public Prosecutions has received the subject files without delay.

I also want to caution that this should not be an open-ended process, justice must be expeditious, as justice delayed is justice denied. Therefore, this exercise should be concluded within the next 60 days."

160. In the Commission's view, the President was making reference to a report that he had received from the Commission hence the chain of events culminating in these proceedings was set off by EACC and the President. It was disclosed that under Article 254(2) of the Constitution the President, the National Assembly or the Senate may require any Commission or a holder of an independent office to submit a report on a particular issue which reports are required to be published and publicized. It cannot therefore be said that the rights of those named in the list the President presented to Parliament were contravened as the Petitioners contend since the Constitution, under Article 254(3), stipulates that the reports are to be published and publicized. It was upon receipt of the said report that the President made his address to Parliament on 26th March, 2015. To the Commission, since it is patently obvious that there was already in existence a report on the status of matters under investigations by the Commission, any comments regarding those ongoing investigations, by any person, could only have been made after the said investigations were underway. It cannot then be said that the President directed EACC to act when actions had already been taken.
161. With respect to the 60 days' timelines, it was submitted that there is no evidence that EACC, in response to the President's statement, forwarded files with appropriate recommendations to the DPP within 60 days. Furthermore, according to the Commission, the Petitioners engaged in selective reading and/or interpretation of the address made before Parliament. The true context of the statement is found in the preceding sentence where justice is the main theme. Under section 42(7) of the ***Leadership & Integrity Act*** [Cap 182] Laws of Kenya, a state officer may be suspended from office pending the investigation and determination of allegations made against that State officer where such suspension is considered necessary. To ensure justice, it becomes eminently desirable for the process to be expeditious not least where the subjects under inquiry are public officers performing key roles in Government and have been suspended. To the Commission, this Court is invited to contemplate a truly unconstitutional proposition – where law enforcement actions, such as investigation and prosecution, are visited upon an individual indefinitely. To the Commission, the President's statement was consistent with the aspirations of the Constitution of Kenya 2010 in the following manner:-

a. It abides by Section 42(7) of the ***Leadership & Integrity Act*** which is anchored by Article 80 of the Constitution relating to leadership & integrity;
b. It grants access to information under Article 35 by attaching the confidential EACC report to his annual report on Values to Parliament;
c. It urges EACC to forward files to the ODPP without delay thereby ensuring persons mentioned in the confidential EACC report received equal protection and equal benefit of the law under **Article 27** including full and equal enjoyment of all rights and fundamental freedoms;
d. It cautions against delayed justice and emphasized administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair under Article 47 - hence the 60 day limit;
e. It reiterates the constitutional independence of EACC under Article 79 and ODPP under Article 157 by stating that it was not the role of the Presidency to determine the guilt or otherwise of any of the people mentioned in the said report.

162. According to the Commission, the President did not make any directions regarding the manner in which investigations ought to be carried out, nor did he make reference to any specific individual named in the report.
163. To the Commission, its actions were consistent with the letter and spirit of the Constitution and that there were no materials placed before this court to controvert that assertion. In the premises, the Petitioners have failed to show how the President acted unconstitutionally for the Court to grant the declaration they seek.
164. The Commission added that Article 132(1)(c) of the Constitution enjoins the President once every year to report in an address to the nation on all measures taken and progress achieved in the realization of the national values set out at Article 10 of the Constitution. Some of the national

values listed in Article 10 of the Constitution include good governance, integrity, transparency and accountability. The State Officers and public officers mentioned in the report that the President presented to Parliament were expected to have upheld the Constitution, especially Chapter Six on leadership and Integrity, and to apply the national values and principles of governance whenever they made or implemented public policy decisions in accordance with Article 10(1)(c) of the Constitution. It was stated that Chapter Six of the Constitution on leadership and Integrity sets out the responsibilities of leadership and that some of the guiding principles of leadership are objectivity and impartiality in decision making and ensuring that decisions are not influenced by improper motives or corrupt practices. On the other hand Article 249(2) of the Constitution stipulates that Commissions are only subject to the Constitution and the law; and that they are independent and are not subject to any person's control or direction.

165. Addressing the unique issues raised in the 1st Petitioner's Petition Number 230 of 2015 (*Eng. Michael Sistu Mwaura Kamau versus Ethics and Anti-Corruption Commission and 3 Others*), the Commission submitted that the 1st Petitioner raised issues other than those which were referred to the Chief Justice for empanelling of a bench. To the Commission, the fact of its Report, '***The Current Status of Corruption Matters under Investigations to the Presidency***' not having been sealed and signed was not pleaded in the Amended Petition; yet it is settled law that parties are bound by their pleadings. In any case the issue was denied. On the issue of the Presidential ultimatum, the Commission denied that fact and cited **Wamwere vs. The A.G (2004) 1 KLR** and **Randu Nzau Ruwa & 2 Others vs. Internal Security Minister & Anor [2012] eKLR,** for the position that:

"…media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the petitioners to demonstrate violation of the Constitution by the respondents".

166. Similarly the allegation that the 1st Petitioner was summoned for interrogation by the Commission after the President 'ordered' them to step aside pending conclusion of investigations, was disputed as the summons of 9th April 2015 were in respect to interrogation on a totally different matter that was still under investigations.

167. On the allegation that during subsistence of investigations against the Petitioner the 1st Respondent's Commissioners resigned and/or vacated from their respective offices, it was contended that investigations relating to the Petitioner had been concluded long before the Report was forwarded to the President and was at the evidence analysis stage by the Commission's attorneys. The allegation that the 1st Petitioner was singled out and had his case tried through the media by holding press briefings to update the public on matters corruption was similarly denied. To the Commission, under section 29 of the ***EACC Act***, the Commission had a duty to inform the public of matters that are of great importance. Further, from the exhibited newspaper cuttings, it is evident that the fourth estate was reporting on the status of all the matters that were on the Report and not the Petitioner alone as claimed.

168. On the issue whether the Petitioners' rights have been violated, it was submitted that the law is now settled that any party alleging violations of Constitutional Rights, must give evidence supporting the allegations of violation; the party must also set out with precision particulars of the alleged violations. In other words, the Petitioner must meet the Constitutional threshold that was set in the case of **Anarita Karimi Njeru vs. The Republic (1976-1980) KLR 1272** and reiterated in the **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.**

169. According to the Commission, Article 27 of the Constitution provides for equality of each and every person under the law and goes further to protect every person from discrimination of whatever kind. The 1st Petitioner's contention that other members of the tender committee, who were involved in the procurement process that was found to have been flawed, were not charged and that he was the only member of that Committee who was singled out and charged, thus discriminated against was disputed by the Commission which averred that wholesome investigations were carried out when the complaint was received and after investigations were concluded, members of the said tender committee who were found to be culpable were charged as

shown in the Charge Sheet exhibited by the Petitioner in his Amended Petition.

170. With respect to violation of the 1st Petitioners' right to freedom of movement, it was contended that rights guaranteed by the Constitution under the Bills 0f Rights are not absolute and that Article 24 of the Constitution provides that rights can be limited by law to the extent that the limitation is reasonable and justifiable in an open and democratic society. However, in the Commission's view, the 1st Petitioner had again failed to give particulars as to how the Commission violated his right to freedom when it decided to carry our investigations in respect of a complaint against him yet investigations is a core function of the Commission given by Article 252 (1) (a) of the Constitution and section 11(1)(d) of the ***EACC Act***. To the Commission, the 1st Petitioner is subject to the Constitution and any other law and as long as the Commission demonstrates that investigations were carried out within the parameters of the law, in a fair and professional manner, a question of violation does not arise.

171. With respect to Article 47, it was submitted that a clear reading of section 4(3) of the ***Fair Administrative Action Act***, Act No. 4 of 2015 to give effect to the provisions of Article 47 (2) of the Constitution does not presuppose an application of the provision to criminal investigations by an investigation agency like the Commission, the Criminal Investigations Directorate and the Kenya Police. To the Commission, it is bestowed with powers to investigate by the Constitution, the ***EACC Act*** and the ***ACECA***. The offences under Part V of the ***ACECA*** are all criminal in nature and it is noteworthy that the 1st Petitioner was charged with the offence spelt out in section 45(2)(b) of the ***ACECA***, which is criminal in nature and as such the investigations thereof cannot be administrative in nature. To the Commission, the provisions of Article 47 do not apply to criminal proceedings as the rights of the accused person are clearly protected in Article 50 of the Constitution and reliance was placed on **Dry Associates Limited vs. Capital Markets Authority and Anor. Petition No. 328 of 2011 [2012] KLR** and **George Taitumu vs. Chief Magistrates' Court, Kibera & Anor. Petition No. 81 of 2014.**

172. It was contended that the affidavits and documents exhibited therein raise factual matters that can only be resolved through *viva voce* evidence, which evidence will be considered by the trial court. However, the Commission averred that it carried out its investigations professionally and in a fair manner, and it observed rules of natural justice by giving the 1st Petitioner an opportunity to give his own account of what transpired in relation to the complaint that was made against him.

173. With respect to violation of the right to fair hearing under Article 50 of the Constitution, it was contended that the provisions of Article 50, are intended to protect the accused person during trial in civil and criminal trials and not any other time. Having demonstrated that the investigations involving the 1st Petitioner were carried out while the Commissioners were in office, the claim by the Petitioner that the recommendations to charge him were a nullity has no legs to stand on. To the Commission, the 1st Petitioner's apprehension of violation is not supported by any evidence that he will be denied any of the rights spelt out by the trial court.

174. It was contended that the 1st Petitioner having failed to demonstrate how his rights are being violated since he has already taken plea and released on bail of Kshs 1,000,000.00 and as all his rights have been observed in the Trial Court, his petition must fail.

175. With respect to the 8th Petitioner's case, it was contended that the 8th Petitioner conceded in the affidavit in support of his Petition that his name was not in the Report submitted to the President. As a result the 8th Petitioner could not be a victim of the so called Executive directive.

176. On the issue of the exclusion of certain individuals from being arraigned in Court, it was contended that the alleged excluded individuals were prosecution witnesses. It was contended that 8th Petitioner's contention he had been denied the chance to call certain members of the Ministerial Tender Committee as Defence witnesses by reason that they shall be giving evidence for the prosecution had no basis since a perusal of the Charge Sheet reveals that under Count V, the 8th Petitioner is charged together with 8 other suspects for engaging in a project without prior planning. The nine (9) individuals collectively facing these two counts were all members of Ministerial Tender Committee and only one individual, **Kenneth N. Mwangi**, who served as secretary to that Committee, was omitted. To the Commission, all members of the Ministerial Tender Committee were investigated and their statements recorded.

177. It was contended that the recommendation of prosecution of any individual is not arrived at lightly and that the ODPP is required by law to evaluate such recommendations before making any

decision to prefer charges against any suspects.

178. To the Commission, there is a genuine risk that the 8th Petitioner will draw this court into matters that ought to be ventilated before the trial court, such as whether it is just for certain individuals to be charged whilst others are not. In the Commission's view, no discrimination was established hence this case is distinguishable from that of **George Joshua Okungu & Another vs. Chief Magistrate's Anti-Corruption Court & Another [2014] eKLR.**

179. Regarding the 2nd petitioner's case, it was contended that her participation in these proceedings is as a result of investigations into her co-petitioners regarding fraudulent acquisition of a parcel of land reference L.R. 3586/3 situated in Karen, Nairobi. In the course of the said investigations, the 2nd Petitioner was reported as having directed officers working in her Ministry not to surrender official records to the EACC. As a result, charges were preferred against the 2nd Petitioner for obstruction in **Anti-Corruption Case Number 13 of 2015.**

180. To the Commission, the Petition was an abuse of the process of court for want of clarity or certainty of representation. Whereas the Petition was drawn and filed by one firm of advocates it appeared to have also been executed/signed by seven (7) different law firms. Additionally, there was no Affidavit in support of the Petition and whereas the rules permit it, the Petitioner denied this court an opportunity to discern the nature of their grievance by way of facts and the manner in which the 2nd-7th Petitioners' Constitutional rights were violated in the absence of factual statements.

181. It was further contended that though the 3rd Petitioner in her affidavit in support of the conservatory application sworn on 21st July, 2015 deposed that she has full authority to make depositions on behalf of the 4th, 5th, 6th and 7th Petitioners, there was no evidence of such authority and a party cannot claim to make factual assertions on behalf of fellow litigants without a written authority so to do and in support of this position, reliance was sought in **Ndungu Mugoya & 473 others vs. Stephen Wangombe & 9 others [2005] eKLR** where the Judge held that:

"In the absence of such written authority filed in court it is incumbent upon all the plaintiffs mentioned in the plaint to file verifying affidavits as provided by Order VII rule 1(2) of the Civil Procedure Rules. The other situation where a number of plaintiffs who have filed a joint suit are exempted from filing verifying affidavits is where a representative suit has been filed. In the present suit, I hold that the 473 co-plaintiffs to Ndungu Mugoya having not filed verifying affidavits, their suit is not competent. It can only be cured and life breathed to it if they make an appropriate application and invoke the jurisdiction of the court to allow them to file verifying affidavits. As things stand, the suit by the 473 other plaintiffs is incompetent."

182. It was contended that the Petition was incompetent and the position holds even if the affidavits in support of the Notice of Motion application for conservatory orders filed on 22nd July, 2015 were deemed to be part of the record. As a consequence, the 2nd - 7th Petitioners have failed to set out, with a reasonable degree of precision, that of which they complain, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

183. It was contended that whereas it is true that in so far as the 2nd petitioner was concerned, the allegations revolving around Karen land L.R 3586/3 (Karen land) were not part of the EACC report presented to H. E the President, the 3rd, 4th, 5th and 6th Petitioners are named therein. It was however submitted that if the President directed EACC to carry out investigations, then the 2nd Petitioner was not affected by such directive and cannot claim to have suffered any violation of her rights under the Constitution of Kenya 2010. It was however contended that investigations regarding the 2nd-7th Petitioners commenced as long ago as 17th October, 2014 according to documents exhibited by the 1st Petitioner and the President's State of the Nation address was made five (5) months later on 26th March, 2015 when investigations were almost concluded as shown in the **EACC Report on Current Status of Corruption Matters in Kenya** dated 20th March, 2015 at page 12 thereof where it states that the file was "about to be submitted to the DPP."

184. On the concurrency of criminal and civil proceedings in particular with respect to **Nairobi ELC**

Case Number 1180 of 2014-Muchanga Investments vs. Habenga Investments & Others, it was contended that there is no evidence that the prosecution is intended to produce a certain result in the civil proceedings before the ELC since it had not been demonstrated that there was any or real danger of causing injustice in the criminal proceedings. Furthermore, there exists no principle in law that demands the stay of criminal proceedings simply because there are concurrent civil proceedings in respect of the same subject matter. In this respect the Commission relied on **Jefferson Ltd. vs. Bhetcha [1779] 2 All ER 1108** and submitted that where there are good reasons to exercise discretion to stay proceedings, it is the civil matter that is stayed to prevent disclosure of materials that may affect the conduct of the Defence in the criminal trial.

185. With respect to the 9th, 10th and 11th Petitioners' case, it was submitted that whereas Article 22(2) of the Constitution extends the scope of those who may institute proceedings to include one acting on behalf of someone who cannot act in his own name; a member of a group; a person acting in public interest or an association acting on behalf of its members, the Petitioners had not shown that the persons named in the report whose rights and freedoms the Petitioners allege were contravened when EACC gave its report to the President, lacked the capacity to institute the suit themselves as envisaged by Article 22 of the Constitution to justify why the Petitioners brought these proceedings. Further, the Petitioners were incapable of proving to the Court how the rights of those named in the report were denied, violated, infringed or threatened. In this respect the decision of **Majanja, J** in **Joshua Karianjahi Waiganjo vs. the Attorney General and 4 Others Nairobi High Court Petition No. 42 of 2013**, was cited.

186. To the Commission, in this case there was no nexus between the Petitioners and the persons named in the report that EACC presented to the President as those named in the report can act in their own names and indeed some persons named in that report have already filed proceedings in the High Court claiming that their fundamental rights and freedoms were infringed. Further reliance was sought from the decision in **Thuku Kirori & 4 Others v County Government of Murang'a [2014] eKLR** where **Ngaah, J** expressed himself as hereunder:

> **"Moreover, where a statute or the Constitution for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs…this court will be hesitant to intervene and curtail these organ's efforts to execute their statutory or constitutional mandates; it is the duty of this court to interpret the Constitution in a purposive rather than a restrictive manner."**

187. Whereas in **Stephen Nendela vs. The County Assembly of Bungoma & Others, Bungoma HC Petition No. 4 of 2014** the Court evaluated each allegation of infringement of the Petitioner's Constitutional rights and made findings that indeed there had been breaches and proceeded to grant the declarations sought since the Petitioner stood in the place of an accused person under Article 50 of the Constitution since his position as Member of the County Executive Committee for Bungoma was at stake and if the allegations against him were proved, the consequences would be prejudicial to him; in this case, it was contended that the Petitioners herein are not accused persons pursuant to Article 50 of the Constitution and no allegations have been made against these three Petitioners who stand to suffer no prejudice at all from the investigation and prosecution of those in the list.

188. To the Commission, the President did not act in an unconstitutional manner when he urged EACC to speed up its investigations on those in the list so that justice would not be delayed. It was further argued that since EACC is a constitutional Commission and expends taxpayers' money in conducting investigations, it will not serve any useful purpose and would not augur well for the public interest to stay the intended prosecutions or to order that fresh investigations are to be conducted at taxpayers' expense.

189. It was reiterated that investigations are conducted by investigators duly appointed pursuant to section 23 of the ***ACECA***. The Commissioners who the Petitioners allege were incompetent to investigate corruption at the time EACC gave the list to the President never conducted investigations. The role of the Commissioners under section 11 (6) of the ***EACC Act*** do not include conducting investigations which is a role undertaken by staff of the Commission who have been appointed as investigators.

190. Consequently, the Commission submitted that the Petitioners have failed to demonstrate any of

their rights were breached or threatened with breach and prayed that the petition be dismissed with costs.

2nd and 4th Respondent's Case

191. On the part of the DPP it was contended, with respect to the 1st petitioner, that the Ethics and Anti-Corruption Commission (EACC) received a complaint that the petitioners together with other members of the ministerial tender committee were involved in alleged corruption. The Commission completed investigations and forwarded the file, pursuant to section 35 of the ***ACECA*** and section 11 of the ***EACC Act,*** to the Director of Public Prosecutions to make a decision on whether or not to charge the suspects. Upon receiving the report from the Commission, the DPP independently reviewed the files and analyzed the evidence and was satisfied based on sufficiency of evidence in making the decision to charge the petitioner in Anti-corruption case No. 11 of 2015 Chief Magistrates Court Nairobi **Republic vs. Eng. Michael Sistu Mwaura Kamau and Others.**
192. It was averred that in reaching the decision to charge the petitioners, the DPP acted impartially, independently, competently and professionally after considering the totality of the evidence, the circumstance of the case and public interest underlying prosecution of corruption offences. To the DPP, the recommendations forwarded by the Commission pursuant to Article 35 of ***Anti-corruption and Economic Crimes Act*** (**ACECA**) and his decision, in exercise of his constitutional mandate conferred by Article 157 of the Constitution, 2010 to charge the 1st petitioner was based on sufficiency of evidence and the public interest underlying prosecution of corruption cases. According to the DPP, he did not abrogate, breach, infringe or violate any provision of the Constitution or any human rights and fundamental freedoms of the petitioners, nor did he violate any other written law or regulations made there under.
193. It was therefore the DPP's position that the Petitioners have not demonstrated a prima facie arguable case on breach of any constitutional provision or fundamental rights and freedoms or any other provision of the law that would warrant grant of prayers in the petition. To the contrary, the petitioner merely alleged breach of their right under Articles 27, 39, 47, and 50 of the Constitution but failed to demonstrate with precision how the same were breached by the DPP while undertaking his constitution mandate of making decision to prosecute. It was his argument that he was properly guided by the safeguard provided under Article 157(11) of the Constitution in making the decision to prosecute.
194. To the DPP, there are sufficient constitutional safeguards available to those charged with corruption offences under the Constitution and the ***Criminal Procedure Code*** during the process of the trial in the subordinate Court.
195. It was further averred that the EACC is a body corporate with perpetual succession capable of suing and being sued and is therefore properly constituted notwithstanding the vacancies in the office of the Commissioners. It has the Secretary appointed pursuant to Article 250(12) who is the Chief Executive Officer and further the accounting officer as provided for by sections 16(7)(b) of the ***EACC Act***. The secretary therefore derives his authority from the Constitution and the ***EACC Act***. To the DPP, it is the chief executive officer of the EACC who makes and forwards the report under section 35 of ***ACECA*** and section 11(1) of the ***EACC Act*** to the Director of Public Prosecution on all enquiries and allegations.
196. It was the DPP's case that as provided in Article 254 of the Constitution, 2010, the President, the National Assembly or the Senate may require a Commission or holder of an independent office to submit a report on a particular issue and every such report shall be published and publicized. That therefore the report presented by the EACC to the President and the publication and pollicisation of the said report was in exercise of, and not in breach of a constitutional duty. To the DPP, the Petitioner failed to demonstrate that in exercise of their respective mandates either the EACC or the DPP were directly or indirectly acting under direction, pressure or influence from either the President or the executive arm of the government.
197. On the allegation of selective prosecution, it was contended that the DPP considered the evidence of the investigation file and made a decision to charge the persons whom he found a prosecutable case against, and who are the persons charged in the said Anti-corruption case, and the said decision was therefore not done selectively against the Petitioner or some members of the

ministerial tender committee. To the DPP, in making the decision to charge the petitioners, the DPP was fulfilling his constitutional mandate pursuant to Article 157 of the Constitution and was guided by the law and sufficiency of evidence and the public interest underlying prosecution of criminal offences.

The 2nd and 4th Respondents' Submissions

198. It was submitted on behalf of the 2nd and 4th Respondents that the following issues arises for determination:

i. **Whether the presentation of the report by the Ethics and Anti-Corruption Commission to the president and the tabling of the said report in Parliament by the President was unconstitutional.**
ii. **Whether in the absence of Commissioners, the EACC Commission can investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption.**
iii. **Whether the Ethics and Anti-Corruption Commission and the Director of Public Prosecution in recommending and directing prosecutions of the petitioners named in the report tabled in Parliament of 26th March, 2015, acted independently and in accordance with the constitution, written laws and rules made thereunder.**

199. On the issue whether the presentation of the report by the Ethics and Anti-Corruption Commission to the President and the tabling of the said report in Parliament by the President was unconstitutional, it was submitted that under Article 254 of the Constitution the President, the National Assembly or the Senate may at any time require a commission or holder of an independent office to submit a report on a particular issue and that every such a report shall be published and publicized. It was therefore submitted that the report presented by EACC to the President and the publication and publicization of the said report was in exercise of a constitutional duty and therefore constitutional. These constitutional provisions, according to these Respondents, are replicated in section 27(2) of the ***EACC Act*** which provides that the EACC should provide annual report to the President and the National Assembly.

200.. On the issue whether, in the absence of Commissioners, the Commission can investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, the said Respondents' view was that to comprehensively address this issue it is necessary to consider whether the Commission exists separately from the Commissioners, to what extent it can continue to function without the Commissioners, and finally, the public interest underlying the fight against corruption.

201. On whether the Commission exists separate from its Commissioners, it was contended that **Article 79** of the Constitution gives Parliament powers to enact the ***EACC Act*** which was to establish an independent Ethics and Anti-Corruption Commission with the status and powers of a Commission. Subsequently, section 3(1) of the ***EACC Act*** established the Ethics and Anti-Corruption Commission which Commission came to being by operation of the law with the powers to *"do or perform all such other things or acts for the proper discharge of its functions under the Constitution …."* (Section 3(2)(b) ***EACC Act***). It was disclosed that a reading of the Constitution and the ***EACC Act*** gives a distinction between the Commission and the Commissioners by virtue of when and how they came into existence. The Commission came into being upon the commencement of the Act on 5th September, 2011 whereas the Commissioners were appointed on 11th May, 2012. Therefore the Commission came into existence by operation of the law and not upon the assumption of office by the Commissioners.

202. The said Respondents contended that **EACC** is a body corporate with perpetual succession pursuant to ***Article 253*** of the **Constitution** which provides that each Commission:-

a. ***Is a body corporate with perpetual succession and a seal; and***
b. ***Is capable of suing and being sued in its corporate name.***

203. They further cited ***Black's law Dictionary,*** 9th Edition as defining "body corporate" as *"an entity having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely…"* To the Respondents, the first

element that makes up a "body corporate with perpetual succession" is that it is distinct from the members and that it is capable of surviving the life of its members. Therefore, since the Commission is a body corporate it is distinct from the Commissioners. The second element of a body corporate is perpetual succession which ***Black's Law Dictionary***, 9th Edition defines as *"the continuous succession of a corporation despite changes in shareholders and officers for as long as the corporation legally exists."* Succession is further defined as *"the act or right of legally or officially taking over a predecessor's office rank or duties"*.

204. It was their view that perpetual succession can be interpreted as that quality which allows a corporation to continue in existence and manage its affairs over time despite a change in its membership. To them, sections 9 and 10 of the ***EACC Act*** anticipate that a vacancy may arise in the office of the chairperson or member of the Commission and provide a procedure for replacement hence in this sense the Commission does not become defunct on the absence of its Commissioners. In support of this submission, they relied on the House of Lords case of ***Salmon V Salmon & Co. Ltd (1897) AC 22***.

205. Their submission was that since the Commission is a legal person capable of surviving despite any change in its membership, such change does not affect normal business or the continuity of the commission. They relied on Article 251 of the Constitution which provides for the resignation or removal of the commissioners. Upon the establishment of a tribunal, the President may suspend the commissioners pending the verdict of the tribunal. However in the absence of the commissioners, the commission will continue to function otherwise the constitution and the ***EACC Act*** would have expressly stated so.

206. With respect to the extent to which the Commission can continue to function without the Commissioners, the 2nd and 4th Respondents relied on section 11(1) of the ***EACC Act*** which provides that, in addition to the functions of the Commission under Article 252 and Chapter six of the Constitution the Commission shall investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or the violation of codes of ethics or other matter prescribed under this Act or other law enacted pursuant to Chapter six of the Constitution. In this respect the functions of the Commission enumerated in section 11(6) of the ***EACC Act*** were relied upon.

207. It was their view therefore that the Commission undertakes both advisory and technical roles hence the role of the Commissioners is *purely advisory*; they play an oversight role as stewards on policy formulation and strategic direction of the Commission, while under section 18(2) of the ***EACC Act***, the technical functions of the Commission are carried out by the Secretariat who comprise of professional, technical, administrative and support staff. It was reiterated that investigation and making recommendations is a technical role undertaken by the Secretariat hence despite the vacancies occasioned by suspension and or resignation of the Commissioners, the Commission can carry out investigation and recommend to the DPP the prosecution of any act of corruption.

208. As to whether such recommendations are considered to be decisions, reliance was sought from section 16(7) (c)(i) and paragraph 9 of the Second Schedule of the ***EACC Act***. That provision provides that the Secretary is "responsible for carrying out of the decisions of the Commission" and "Unless otherwise provided by or under any law, all instruments made by and decisions of the Commission shall be signified under the hand of the chairperson and the Secretary" respectively.

209. According to the DPP, recommendations made to the Director of Public Prosecutions to prosecute do not constitute a decision since they have no direct legal effect. They cannot establish, change or withdraw any existing rights. In support of this position the said Respondents relied on **Kenya Anti-Corruption Commission vs. First Mercantile Securities Corporation (2010) EKLR** where the court observed that:

> **"…the Appellant is not a prosecuting authority; it cannot institute any criminal prosecution in court. That role is reserved for the Attorney-General of Kenya. None of the functions set out in section 7 of the Act includes that of prosecution. All that the Appellant can do is to investigate alleged or suspected crimes under its mandate and if there is to be a prosecution, the Attorney-General takes over."**

210. It was contended that pursuant to Article 250(12) of the Constitution as read with section 16(7)

(b) of the ***EACC Act***, the Secretary derives his authority to carry out his duties from the Constitution and the ***EACC Act*** and as the Chief Executive Officer, he is clothed with the authority to ensure implementation of the core mandate of the Commission.

211. While submitting on the issue of public interest underlying the fight against corruption, the said Respondents cited **Francis Bennion** in ***Statutory Interpretation,*** 3rd Edition at page 606, that:

"it is the basic principle of legal policy that law should serve the public interest. The court… should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".

212. Further reliance on the same issue was sought from **Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamani and 4 Others, [2014] EKLR** that:

"…a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large".

213. Further reference was made to **National Association of Parents vs. Teachers Service Commission and 2 Others [2014] EKLR** that:

"in giving effect to the provisions of the Constitution, the Court should not undermine the existence of a Constitutional body by interpreting the Constitution in a manner that will cause chaos within the education sector, violate the right of a citizen to education and create a situation where good governance is undermined".

214. It was therefore submitted that interpreting the Constitution in a way as to undermine the existence of the Commission would in the end affect its ability to contribute to the fight against corruption. It would be unable to initiate investigations or even continue with already existing investigations on matters relating to corruption. The fight against corruption is in the public interest as in the end if it is left to thrive it is the State that suffers.

215. To the said Respondents, the Commission can continue to investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption in the absence of Commissioners. Further, any interpretation to the contrary would lead to an absurdity as Article 259(1) of the Constitution provides that the Constitution be interpreted in a manner that promotes its purpose, values and principles and contributes to good governance, and that any reference to public office or officer, or a person holding such office, includes a reference to the person acting in or otherwise performing the function at any particular time. This position, it was submitted, is supported by the holding in **African Centre for International Youth Exchange (ACIYE) and two others vs. Ethics and Anti-Corruption Commission and another HC Petition No. 334 of 2012 (2012) EKLR** where the Court held that the then acting secretary of the commission who was so acting as the CEO, prior to the appointment of the commissioners was performing functions of a state officer within the meaning of article 74, and the Constitution and the Court allowed her to continue acting pending the appointment of the chairman and commissioners. Therefore the commission functions and continues to execute its mandate even in the absence of the commissioners.

216. In further support of this position the 2nd and 4th Respondents relied on **Ruth Muganda vs. Kenya Anti-Corruption Commission and Director of Public Prosecutions Nairobi HC Misc. Crim. Appl. No. 288 of 2012.** The same position, the said Respondents averred, was upheld by **Mumbi Ngugi, J** in **Engineer Michael Sistu Mwaura Kamau vs. EACC and Another petition number 230 of 2015 (2015) eKLR**

217. As to whether the Ethics and Anti-Corruption Commission and the Director of Public Prosecution in recommending and directing prosecutions of the persons named in the Report tabled in Parliament on 26th March, 2015, acted independently and in accordance with the Constitution, written laws and rules made thereunder, it was submitted that from the reading of the status report presented by the commission to the President, it contained a report on matters, some of which had already been finalized and registered in courts for prosecutions. Further investigations on various matters was at different stages indicated in the report most of which

commenced long time before the said Presidential ultimatum of 60 days and it cannot be argued that EACC acted based on the Presidential directive but was acting independently either on its own motion or based on complaints received on corruption matters. Upon conclusion of investigation on case to case basis and in accordance with section 35 of the ***ACECA*** and section 11 of the ***EACC Act*** the EACC forwarded various recommendations to the Director of Public Prosecutions who, in exercise of his constitutional duty conferred by Article 157 of the constitution either made a decision whether or not to charge persons as recommended by the EACC based on the sufficiency of evidence and public interest underling prosecution of Anti-Corruption Cases. The DPP decision as regards the second petitioner and indeed all the petitioners was not done in a selective manner but the DPP was guided by the evidence that there was a prosecutable case against the petitioners. Indeed all the petitioners admit that their statements were recorded by the investigators and therefore they were given a fair opportunity to be heard before a decision to charge was made.

218. It was submitted that the law is that the Courts ought not to usurp the constitutional mandate of the Director of Public Prosecution conferred pursuant to Article 157 of the Constitution as appreciated in **Kenya Commercial Bank Limited & 2 others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) eKLR**.

219. On the question of the circumstances under which the court will grant an order prohibiting the commencement or continuation of criminal proceedings, the said Respondents relied on **George Joshua Okungu and Another vs. Chief Magistrate Court Anti-Corruption Court at Nairobi and Another (2014) eKLR** where the Court summarized some of the considerations that will not form the basis for the court to interfere with the DPP's Constitutional mandate thus:

"The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defense is always open to the Petitioner in those proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim".

220. To them, section 193A of the ***Criminal Procedure Code*** Cap.75 expressly provides that the concurrent existence of civil and criminal proceedings is not a bar to the institution or continuation of criminal proceedings. With respect to the contention that there was parallel investigation by the Ethics and Anti-Corruption Commission and the Directorate of Criminal Investigation, it was submitted that the correct position was that the investigation by the Directorate of Criminal investigations were not completed and did not exonerate any petitioner but the same was taken over by the Ethics and Anti-Corruption Commission which completed investigation and made recommendation to the DPP.

221. It was averred that abrogation, breach, infringement or violation of fundamental human rights and freedoms had not been pleaded with precision and the cases of **Anarita Karimi Njeru vs. The Republic (1976-80) 1 KLR 1283** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance, Civil Appeal No 290/2012 (2013) eKLR,** were cited in this regard.

222. In the final analysis, it was submitted that the Petitioners failed to prove breach of any provision of the Constitution or any other written law or rules made thereunder or their fundamental rights, freedoms and rights or abuse of discretion and breach of rules of natural justice and the Court was urged to dismiss the petitions with costs.

The 3rd and 5th Respondents' Case

223. It was contended on behalf of the 3rd and 5th Respondents that legal proceedings cannot be founded on what happens in Parliament since Parliamentary proceedings are privileged legal

proceedings, and further, that under Article 232 of the Constitution, matters relating to the Presidency cannot be brought before this Court. Their contention is further that a Presidential address, being a constitutional function, cannot be the basis of a constitutional petition, and reliance was placed for these submissions on the *Government Proceedings Act* and the ***National Assembly (Powers and Privileges) Act*** **(The *Privileges Act*)**. Additionally, it was contended that the petition does not meet the evidential threshold since the documents relied upon by the petitioners were not certified in accordance with the provisions of the ***Privileges Act***.

224. With regard to other issues, the 3rd and 5th respondents made substantially the same submissions as were made on behalf of the other respondents.

Analysis and Determinations

225. We have considered the pleadings and submissions of the parties to these consolidated petitions. While each of the petitions has a factual basis peculiar to the circumstances of each petitioner, the core issues around which they revolve are the same. We have therefore identified the issues falling for determination in this matter, and classified them as preliminary and core issues. The following are the preliminary issues for determination in the matter, and which we propose to address in the following pages:

a. Whether the matters forming the subject of this petition are privileged and therefore outside the jurisdiction of this Court;
b. Whether the present petitions are in violation of the ***Government Proceedings Act***;
c. Whether the 9th -11th Petitioners have Locus to file their petition;
d. The effect if any of the failure to plead with precision the provisions of the Constitution alleged to have been violated and the particulars of the alleged violation;
e. Procedural technicalities

Privilege

226. On the issue of privilege, **Article 2** of the **Constitution** states that:

> ***(1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.***
>
> ***(2) No person may claim or exercise state authority except as authorised under this Constitution.***

227. On this issue, the words of **Kasanga Mulwa, J** in **R vs Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000** remain true one and half decade later that:

> **"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."**

228. We agree and would add that when any of the state organs steps outside its mandate, this Court will not hesitate to intervene. The Supreme Court has ably captured this fact in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows

> **"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In**

this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

229. Subsequently, the Supreme Court in **Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR** stated as follows:

"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "

230. The Court went on to state as follows;

"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of are solution in plebiscite, is only the Courts."

231. We are duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under **Article 165(3)** of the **Constitution**, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the consolidated Petitions before us allege a violation of the Constitution and violation of the constitutional rights of the Petitioners by the Respondents and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioners' grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court.

232. To our mind, this Court has the power to enquire into the constitutionality of the actions of Parliament notwithstanding the privilege of *inter alia*, debate accorded to its members. That finding is fortified under the principle that the Constitution is the Supreme Law of this country and Parliament must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the doctrine of parliamentary privilege. In any case a distinction ought to be drawn between the actions of Parliament which are covered by privilege and those actions taken in Parliament but not by Parliament. The latter may not necessarily be covered by privilege. That is all there is to say on that subject.

Non-Compliance with the Government Proceedings Act

233. With respect to non-compliance with the provisions of the ***Government Proceedings Act***, the preamble to the ***Government Proceedings Act*** states that it is:

An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters.

234. The instant matters are however, in our view, not civil matters relating to ***"the affairs or property of government"*** in the manner contemplated under the provisions of the ***Government Proceedings Act***. The petitions before us seek the application and interpretation of the Constitution. They cannot therefore be deemed to be *"civil proceedings"* as contemplated in the ***Government Proceedings Act***. In our view, the provisions of the said Act do not apply to petitions alleging violation of constitutional rights or contravention of the Constitution.

Locus

235. The third preliminary issue is whether the 9th to 11th Petitioners had the *locus standi* to bring their Petition. It was contended on behalf of the Respondents that these Petitioners had not shown the nexus between themselves and the case before the Court with respect to violation of fundamental rights. While appreciating that Article 22(2) of the Constitution extends the scope of those who may institute proceedings to include one acting on behalf of someone who cannot act in his own name; a member of a group; a person acting in public interest or an association acting on behalf of its members, it was contended that the Petitioners had not shown that the persons named in the report whose rights and freedoms the Petitioners allege were contravened when EACC gave its report to the President, lacked the capacity to institute the suit themselves as envisaged by Article 22 of the Constitution to justify why the Petitioners brought these proceedings. Further, the Petitioners were incapable of proving to the Court how the rights of those named in the report were denied, violated, infringed or threatened. In support of this position reliance was placed on the decision of **Majanja, J** in **Joshua Karianjahi Waiganjo vs. the Attorney General and 4 Others Nairobi High Court Petition No. 42 of 2013**, where the learned Judge expressed himself as hereunder:

"I appreciate that the Article 22(1) and (2) has expanded the horizons of *locus standi* in matters of enforcement of fundamental rights and freedoms but even where one purports to enforce the rights of another there must be a nexus between the parties particularly where a case has a direct effect on the person whose rights are affected."

236. Before delving into this issue, it is important to interrogate the rationale behind the need to demonstrate standing. The issue of standing was dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others…"

237. The Court continued:

"Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of

law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law…The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue….Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"…Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members."

238.**Nyamu J** concluded the issue as follows:

" A direct financial or legal interest is not required in the test of sufficient interest…In my view the Courts must resist the temptation to try and contain judicial review in a strait jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them…The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."

239.Article 3(1) of the Constitution obliges every person to respect, uphold and defend the Constitution. Similarly Article 258(1) empowers every person to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention. Accordingly, where a person is of the *bona fide* view that a provision of the Constitution has been violated or is threatened, the person is not only entitled to but is enjoined to bring an action to protect the Constitution. In the circumstances of this case, we are unable to accede to the Respondents' position that the 9th -11th Petitioners had no business instituting these proceedings.

240. To the Commission, in this case there was no nexus between the Petitioners and the persons named in the report that EACC presented to the President as those named in the report can act in their own names and indeed some persons named in that report have already filed proceedings in

the High Court claiming that their fundamental rights and freedoms were infringed.

241. This issue was dealt with by the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** Civil Appeal No. 290 of 2012 in which case the Court expressed itself *inter alia* as hereunder:

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution."

Precision in Constitutional Petitions

242. The Commission cited **Anarita Karimi Njeru vs. The Republic (1976-80) 1 KLR 1283** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance, Civil Appeal No 290/2012 [2013] eKLR,** for the proposition that infringement of human right and fundamental freedoms must be stated with precision and not merely generalized, devoid of proof thereof. In the former, it was held that:

"…if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

243. On the issue whether this Court can determine the Constitutional issues raised without compliance with the requirements stipulated in **Anarita Karimi Njeru vs. Attorney General** (supra), it is our view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant or petitioner ought to set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in our view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice."

See **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others**

244. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.
245. In our view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is our view and we so hold that the later ought to prevail over the former. Ours is not a lone voice shouting in the wilderness. The Court of Appeal in **Peter M. Kariuki vs. Attorney General [2014] eKLR,** declined to adopt the ***Anarita Karimi*** (supra) position, line, hook and sinker when it expressed itself *inter alia* as follows:

"Although *section 84(1)* was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like *ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154,* the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal…The narrow approach in *ANARITA KARIMI NJERU* was ultimately abandoned in Kenya, in favour of purposive interpretation of *Section 84(1)*."

246. We associate ourselves with the decision in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** to the effect that.

> **"A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing… Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution."**

Procedural Technicalities

247. With respect to the issue of lack of authority to swear affidavit on behalf of the other parties raised in respect of the 3rd to 8th petitioners, it is our view that this was precisely what was contemplated under Article 159(2)(d) of the Constitution in order to cure the mischief that prevailed under the regime of the retired Constitution.
248. In this respect we wish to refer to **Kuria & 3 Others vs. Attorney General** (supra) where it was held that:

> **"It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter…The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear**

for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court."

249. We believe we need not say more on this point, and we now turn to consider the substantive issues raised in this petition.

Parallel Investigations and the Role of the DPP

250. It was submitted on behalf of the 2nd -8th petitioners that since the Directorate of Criminal Investigations ("DCI") conducted investigations into the acquisition of the Karen land and found no fault with the 2nd Petitioner, there was no basis upon which the Commission could conduct parallel or subsequent investigations into the Karen land with different outcomes. To the petitioners, the conduct of parallel investigations by the DCI and the Commission to arrive at different conclusions was a clear abuse of the legal process which the DPP is constitutionally mandated to prevent and avoid in terms of Article 157(11) of the Constitution. It was argued that immediately the EACC made its recommendations which were contradictory with the recommendations made by the DCI, the DPP was constitutionally mandated to treat with circumspection the investigations by the Commission and scrutinise, with scrupulous fairness, the contradictory reports given by the two investigative agencies.
251. This submission raises the issue as to the role of the Director of Public Prosecutions vis-à-vis the police. Under Article 157(4) of the Constitution, the Director of Public Prosecution is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General is obliged to comply with any such direction. In other words the DPP is not bound by the actions undertaken by the police in preventing crime or bringing criminals to book. He is, however, under Article 157(11) of the Constitution, enjoined to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. In other words the DPP ought not to exercise his/her constitutional mandate arbitrarily.
252. The independence of the DPP, is anchored both in the Constitution and in the legislation under Article 157(10) of the Constitution and section 6 of the ***Office of the Director of Public Prosecutions Act, 2013.*** Article 157(10) provide as follows:

"The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

253. Section 6 of the ***Office of the Director of Public Prosecutions Act, 2013*** provides that:

Pursuant to Article 157(10) of the Constitution, the Director shall–

a. ***Not require the consent of any person or authority for the commencement of criminal proceedings;***
b. ***Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and***
c. ***Be subject only to the Constitution and the law.***

254. In our view, the mere fact that the Directorate of Criminal Investigations has conducted its own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the Commission or the DPP from undertaking its mandate under the foregoing provisions. Conversely, the two bodies are not bound to prosecute simply because the DCI has formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding

whether or not to institute prosecution. See ***The International and Comparative Law Quarterly*** Vol. 22 (1973).

255. However, we must hasten to add that the fact that the DCI undertook investigations pursuant to which it arrived at a particular conclusion may be a factor to be considered by the DPP in deciding whether or not investigations or even prosecution ought to be carried out. However, the mere fact that the DPP arrives at a decision different from that of the DCI does not automatically amount to a wrong exercise of discretion. We shall later in this judgement deal with the issue whether the DPP is bound by opinions made by other authorities.

Pendency of Civil Proceedings

256. The Petitioners raised the issue of the pendency of civil proceedings before the Environment and Land Court being **ELC Case No. 1180 of 2014** where the 12th and 13th Petitioners were claiming ownership of the Karen land. The Petitioners based their case on the fact that in those proceedings, the Attorney General, while representing the Ministry of Land, Housing and Urban Development and the Government officials, being the 3rd, 4th and 5th Petitioners herein, took the position that according to the public records held by the Ministry, the Karen land is legally owned by the 13th Petitioner. It was therefore submitted that the DPP was obligated to take into consideration the existence of the civil proceedings in relation to the dispute over the ownership of the Karen land before making the decision to prosecute. To fail to do so, according to the Petitioners, was not only an abuse of the legal process by the DPP to charge the 2nd, 3rd, 4th, 5th, 12th and 13th Petitioners with criminal offences relating to the documentation of the ownership of the Karen, but also a blatant contempt of court calculated to embarrass, influence and pre-empt the fair determination of the ownership dispute by the Environment and Land Court. The said criminal proceedings, it was their view, was designed to aid one of the disputants.

257. We agree with the Court's position as expressed in **David Mathenge Ndirangu vs. Director of Public Prosecutions & 3 Others [2014] eKLR** at paras 37 & 39 in which the case of **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703,** was cited with approval for the position that:

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

258. However, the first port of call in such circumstances must always be section 193A of the ***Criminal Procedure Code*** which provides that:

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

259. This provision was considered by the Court in **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** in which the court stated that:

"The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim…."

260. Caution, however, ought to be exercised and as was held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR:**

"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations"

261. Where there is a probability of the criminal and civil courts arriving at diametrically opposed and mutually irreconcilable positions, it is our view that it would be imprudent to permit both processes to proceed at the same time. Where therefore it is clear that the subsequent proceedings have been instituted in a manner which amounts to an abuse of the Court process, the Court would be duty bound to stop such proceedings. This, in our view is the reasoning in **R vs. DPP & Others Exparte Qian Guo Jun & Anor [2013] eKLR** at para 25, where it was held that:

"Although under Section 193A of the Criminal Procedure Code the existence of civil proceedings do not act as a bar to the criminal process, where the criminal process has been instituted as a means of hastening the civil process by either forcing the applicants to concede the civil claim or abandon their claim altogether, the commencement of the criminal proceedings are an abuse of the process of the court…."

262. Therefore notwithstanding the provisions of section 193A of the ***Criminal Procedure Code*** the court is still bound to ensure that its process is not abused and also to protect itself against the abuse of its process by litigants. This is our understanding of the Court's position in **Floriculture International Limited and others vs. Trust Bank Ltd & Others High Court Misc. Civil Application No. 114 of 1997** at page 46 - 47**,** where the Court stated:

"I am, of course, very clear in my mind, and I am alive to the well-known principle, that the existence of alternative remedies is not a bar to the pursuit of a criminal redress. Thus, the

power to stop a private criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit filed against him relating to matters in the criminal proceedings...The policy of the law is to confine a litigant to one litigation in one forum over the same or like forensic controversy, and to allow him only to pursue any other right available to him after the conclusion or termination of the litigation commenced first in time, and to exhaust such litigation as far as he can go in the judicial hierarchy."

263.In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

"It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

264.In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer....."

265.Therefore, in the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

266.The question therefore that this Court must deal with is whether in the institution of the criminal proceedings against the Petitioners, the Respondents are abusing the Court process. What amounts to abuse of the Court process? The Court of Appeal dealt with this principle in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229** where it expressed, itself based on the Nigerian cases of **Attahiro vs. Bagudo 1998 3 NWLL pt 545 page 656** and **Sarak vs. Kotoye (1992) 9 NWLR 9 (pt 264) 156 at 188-189 (e),** as hereunder:

"the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it....The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice".

267. The same Court went on to give examples of the abuse of the judicial process *inter alia* as follows: -

i. **Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**
ii. **Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**
iii. **Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.**
iv. **Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.**

268. In the matter before us, if we understood the 3rd to 6th Petitioners correctly, their contention that the criminal proceedings amount to an abuse of the Court process was grounded on the existence of the civil proceedings. Where for example the criminal proceedings are based on the dispute touching on ownership of the suit land which is the subject of the civil proceedings, it would be clear to the Court that the possibility of convicting the accused for an offence for example of fraudulently acquiring the said land may lead to a ridiculous situation if the civil Court were to find that the same land actually belongs to the accused after the said conviction. In such circumstances, the Court may well be justified in halting the criminal process, at least until the civil proceedings are determined.

269. In this case however the charges facing the Petitioners are not limited to ownership of the land the subject of the civil proceedings. The charges include obstruction of investigations. Such a charge in our view may not necessarily be in conflict with the finding in the civil court. Whereas the Petitioners may well succeed in convincing the trial court that they are innocent, that is not a ground for halting the criminal process.

Merits of the Petitioners' Cases

270. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings, determine, *inter alia*, whether there is a violation of the Constitution or the petitioners' rights. It follows that where a Petitioner brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the Petitioner is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in our view amounts to abuse of the judicial process.

271. The Court in these kinds of proceedings is mainly concerned with the question of fairness to the Petitioner in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the Petitioner. In this respect, in **R vs. Attorney General exp**

Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 it was held that:

"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed..."

272.The Court continued to hold that:

"A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

273.We therefore associate ourselves with the decision of **Majanja, J** in **Kenya Commercial Bank Limited & 2 others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) eKLR,** where the learned Judge held that:

"the office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law. But

these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution".

274. Therefore, the Courts have, in the exercise of their constitutional mandate under Article 20(3)(b), to develop the law to the extent that it does not give effect to a right or fundamental freedom, adopted inter alia the twin principles of proportionality and legitimate expectations as grounds for the enforcement of human rights and fundamental freedoms and interpretation and application of the Constitution. In our view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

275. In this case both parties have supported their case by what, according to them, is evidence which either exculpates or incriminates the Petitioners. On our part we agree that the correct prosecution policy is the one expounded in ***Code for Prosecutors of the Crown Prosecution Service of the United Kingdom*** ("the Code") as reflected in our own prosecution policy, ***The National Prosecution Policy***, revised in 2015 which was relied upon by the Petitioners herein. The ***Code***, provides, *inter alia* that:

> ***4.4 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.***
>
> ***4.5 The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty."***

276. ***The National Prosecution Policy***, revised in 2015 on the other hand provides at page 5 that:-

> ***2. Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?"...***

277. This was the position in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where it was held that:

> **"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".**

278. Therefore, criminal process ought to be invoked only where the prosecutor has a conviction that he has a prosecutable case. Whereas he does not have to have a full proof case, he ought to have in his possession such evidence which, if believable, might reasonably lead to a conviction. He does not have to have evidence which discloses a *prima facie* case under section 210 of the ***Criminal Procedure Code*** since a decision as to whether a *prima facie* case is disclosed is a jurisdiction reserved for the trial Court. He however, must have evidence which satisfies him that his is a case which ought to be presented before a trial Court. He must therefore consider both incriminating and exculpatory evidence in arriving at a discretion to charge the accused. Unless this standard is met, the Court may well be entitled to interfere with the discretion of the prosecutor since that discretion is not absolute. See **Ronald Leposo Musengi vs. DPP & Others [2015] eKLR**

279. According to the ***National Prosecution Policy***, at page 5, the decision to prosecute as a concept envisages two basic components, namely, that the evidence available is admissible and sufficient and that public interest requires a prosecution be conducted – the two stage test in making the decision to prosecute. In the said policy, it is stated that each aspect of the test must be separately considered and satisfied before the decision to charge is made and that the evidential test must be satisfied before the public interest test is considered. With respect to the evidential test the Policy states that in order to make the determination the following should be considered:

a. **If the identity of the accused is clearly established through admissible evidence.**
b. **The strength of the rebuttal evidence.**
c. **Would the evidence be excluded on the basis of its inadmissibility, for instance under the hearsay and the bad character rules?**
d. **Reliability of the evidence considering; whether there would be concern about accuracy, credibility or motivation of the witness? What is the suspect's explanation? Is the confession believable? How was evidence obtained?**

280. In this respect we rely on **Okungu's Case** (supra) in which the Court approved **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323** that:

> **"Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable."**

281. As was held in **R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006**:

> **"It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants' fundamental rights."**

282. Similarly, as was appreciated in **Githunguri vs. Republic KLR [1986] 1:**:

> **"A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed. "**

283. We also defer to **R vs. DPP & Others Exparte Qian Guo Jun & Anor** (supra) where the Court held that:

"Although the Court appreciates that the discretion given to the police to investigate offences and that given to the Director of Public Prosecutions ought not to be lightly interfered with, where an applicant places before court material which prima facie show that the dispute between the applicant and the interested part is purely civil in nature and that the criminal proceedings are being undertaken with ulterior motives, it behoves the respondents to place some material before the court which though not conclusively proving the guilt of the applicant warrants their action to charge the applicants. In absence of such material and in light of the material placed before the court by the applicant, the Court would be left with no option but to believe the applicant's version that being the only factual version before it. As was held in R –vs- A.G. Ex-parte Kipng'eno Arap Ng'eny High Court Civil Application No. 406 of 2001 (supra) a prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."

284. In the case of **R vs. A.G & Anor. Ex-parte Kipng'eno Arap Ng'eny**, the High Court of Kenya consisting of two judges observed as follows:-

"It is an affront to our sense of justice as a society to allow the prosecution of individuals on flimsy grounds. Although in this application we cannot ask the Attorney General to prove the charge against the accused, there must be shown some reasonable grounds for mounting a criminal prosecution against an individual. There must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the individual and put him to unnecessary expense and agony. The Court may, in a proper case, scrutinize the material before it and if it is determined that no offence has been disclosed, issue a prohibition halting the prosecution."

285. **Justice Kuloba** in **Floriculture International Limited and Others vs Trust Bank Ltd & Others** (supra) remarked:

"It is, in fact, unfair to an accused person, and a palpable waste of the restricted public resources of the criminal justice system to put on trial a person when it cannot be predicted with a reasonable measure of confidence, that he is more likely than not, to be convicted."

286. This Court therefore appreciates that a distinction must be made between a situation where what is alleged is insufficiency of evidence as opposed to where the evidence to be adduced does not disclose an offence. In the former, the right forum to deal with the matter is the trial Court. In the latter, it would amount to an abuse of the criminal process to subject the applicant to such a process. That was the position in **Williams vs. Spautz [1992] 66 NSWLR 585**, at 600, where the High Court of Australia consisting of seven judges observed that:

"If the proceedings obviously lack any proper foundation in the sense that there is no evidence capable of sustaining a committal, they will obviously be vexatious and oppressive. In such a case, the proceedings themselves are an abuse of the process of the Local Court and will inevitably result in the discharge of the defendant...And that the charges against the defendant lack any foundation, the Supreme Court would be justified in intervening to halt the proceedings in limine in order to prevent the defendant from being subjected to unfair vexation and oppression...For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court [of its inherent power to prevent abuse of its process."

287. However, as was aptly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the

police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court…As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

288. It was also along those lines that, in our view, **Ojwang', J** (as he then was) in **Republic v Attorney General & another Ex parte Vaya & another** (supra), expressed himself that:

"One critical custodian of this public policy is the Attorney General in his prosecutorial role; and in a matter such as the one in hand, this Court ought not hold that no prosecutions may be brought against persons suspected of committing offences touching on national resource use. Accordingly I hold that there is no public policy to limit the competence of the Attorney General to prosecute persons in the position of the applicants."

289. This balance was clearly appreciated by the Court in **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another [2014] eKLR** to the effect that:

"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney

General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

290. Nevertheless, the power of the Court to scrutinize the material before it and determine whether an offence has been disclosed does not permit the Court to take over the role of the trial Court or the Prosecutor. It was in recognition of this fact that the House of Lords in **Director of Public Prosecutions vs. Humphreys [1976] 2 All ER 497 at 511** cautioned that:

"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval…If there is a power…to stop a prosecution on indictment *in limine*, it is in my view a power that should only be exercised in the most exceptional circumstances.".

291. In this case the Petitioners have contended that there is not only absent any realistic prospects of a conviction but the evidence collated and looked at fairly and impartially cannot found the basis of a prosecutable case of obstruction of investigators against the 2nd Petitioner. According to the 2nd Petitioner, from the totality of evidence collated by the Commission's investigators, it was impossible to establish the crime of obstruction. The Respondents on the other hand have averred that based on the evidence in their possession, they were justified in making a determination that the Petitioners be charged. Here, therefore is a case in which both parties believe that they have sufficient evidence to prove their cases. Whether or not those pieces of evidence are credible is not for this Court in these proceedings to scrutinise, investigate and determine. The Petitioners and the Respondents will have to adduce evidence, which evidence will be subjected to cross examination before the trial Court can determine whose version is credible and believable. In our view, the positions adopted by the Petitioners are matters for the defence. Whether or not those pieces of evidence are credible is not for this Court in these proceedings to scrutinise, investigate and determine. The Petitioners and the respondents will have to adduce evidence, which evidence will be subjected to cross examination before the Court can determine whose version is credible and believable. In other words the position adopted by the Petitioners is a matter for the defence.

292. Whereas the Petitioners may well be correct that there are factors which go to show their innocence, these are not the proper proceedings in which the correctness of the evidence or the truthfulness of the witnesses is to be gauged. That task is solely reserved for the trial Court which is constitutionally bound to determine the proceedings in accordance with the law. These allegations go to the sufficiency and veracity of the evidence and the innocence of the Petitioners, matters which are not within the province of this Court.

293. Such issues as whether the facts constitute an obstruction under section 66(1)(a) of the ***ACECA*** in the absence of justification or lawful excuse and whether in light of the provisions of section 79 to 82 of the ***Evidence Act,*** the 2nd Petitioner and other officers of the Ministry were justified in retaining original documents and to only release certified true copies are in our view matters which go to the innocence of the 2nd Petitioner hence matters for the trial Court.

294. In other words, this is not the correct forum to determine whether the totality of the evidence to be adduced proves that the Petitioners committed the offences in question.

295. In **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013**, it was held:

" … I am afraid that the High Court at this point is not the right forum to tender justifications concerning the subject transaction let alone test the nature and veracity of these allegations…the Court held that "It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the

function of a trial court". Similarly…the point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial."

296. The 2nd Petitioner contended that her role being that of a whistleblower was indicative of the state of mind incompatible with the necessary *mens rea* required to obstruct the same investigations she initiated. As this Court held in **Republic vs. Director Of Public Prosecutions Ex Parte Muthama Nairobi Misc. Civil Application No. JR. 424 of 2014:**

"The mere fact that a person offers to furnish the police with evidence does not in my view bar the police from subsequently preferring charges against him if in their opinion the cumulative effect of the evidence collected point to that person as the culprit. As to whether or not the prosecution will succeed is another matter for the trial Court. Caution must however be taken in light of the provisions of Article 50(4) of the Constitution which excludes from admission evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. That however is a matter which can only be determined after analyzing the nature of the evidence in question and its impact on the right to fair hearing, a matter which cannot be determined at this stage in these proceedings but must await its consideration by the trial Court."

Rules of Natural Justice and the Right to be Heard

297. It was contended that prior to the institution of the criminal proceedings, the EACC and the DPP were under a constitutional and legal mandate to hear the Petitioners' side of the story. However this was not done as they were not asked to give an explanation of the allegations against them. In this respect, the Petitioners relied on section 12(c) of the ***EACC Act*** and section 4 of the ***ODPP Act***. It is true that in exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the basis of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

298. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations which can either be express or can be gathered from the circumstances surrounding the prosecution. Whereas a prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies, the mere fact, however, that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. We say ordinarily because the mere fact that the version of one

of the parties is not considered is not necessarily fatal to the prosecution. However, where exculpatory evidence is presented to the police in the course of investigation and for some reasons known only to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power.

299. In this case it is contended by the Respondents that the Petitioners recorded their statement with the Commission. The Petitioners have not addressed the Court on specific exculpatory material which the Respondents ought to have, but never, considered. In the absence of the specific matters which were not considered rather than what, in the Petitioners' view, prove their innocence, it would be improper for this Court to interfere with the discretion of the Respondents.

300. Whereas the Petitioners may well be correct that there are factors which go to show their innocence, these are not the proper proceedings in which the correctness of the evidence or the truthfulness of the witnesses is to be gauged. That task is solely reserved for the trial Court which is constitutionally bound to determine the proceedings in accordance with the law. These allegations go to the sufficiency and veracity of the evidence and the innocence of the Petitioners, matters which are not within the province of this Court.

Application of Article 47 of the Constitution to Investigations

301. Closely intertwined with the right to be heard is the application of the provisions of Article 47 of the Constitution to investigation by the Commission.

302. It was contended that the provisions of Article 47 of the Constitution do not apply to criminal investigations by an investigation agency like the Commission, the Criminal Investigations Directorate and the Kenya Police. We have already dealt with the role of the police when conducting investigations and it is our view that the same position applies to the Commission while conducting its investigations.

303. We appreciate that the general position with regard to a body whose task is limited to making recommendations was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

> **"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."**

304. Similarly, in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** the Court stated:

> **"The notice that is under challenge in these proceedings gave the applicants 14 days to**

vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application."

305. However, in **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice....That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."

306. It is therefore clear that when it comes to the application of the provisions of Article 47 to a particular set of facts, there cannot be any hard and fast rules. Each case must be decided on its peculiar facts and circumstances. It must however be emphasized that the rights to a hearing is the rule and not the exception and this was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where it was held by the Court of Appeal that:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...*There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice*...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at..."

307.The Court proceeded to hold that:

> **It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."** [Emphasis ours].

308.The Commission contends that its inquiry is not administrative in nature. Section 2 of the ***Fair Administrative Action Act***, 2015 defines "administrative action" to include:

> ***(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***
>
> ***(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;***

309.In our view the definition of "administrative action" under the said Act is broad enough to encompass the actions of the Commission, the subject of this Judgement. The position taken by the Commission as the distinguishing factor seems to be the source of the power. However, as was appreciated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8:**

> **"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…*the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter*."** [Emphasis ours]

310.In other words it is not just the person or authority making a decision that determines whether a decision is administrative or not but rather the effect of the decision in the administration of justice. Under Article 20 of the Constitution the Bill of Rights applies to all law and binds all State organs and all persons. In other words the enforcement of human rights and fundamental freedoms is both vertical and horizontal.

Adverse Media Publicity

311.It was contended that the 1st Petitioner was singled out and had his case tried through the media by holding press briefings to update the public on matters corruption. We appreciate that unlike adverse comments during the trial of the case especially criminal trials that attract the wrath of the court, "media trials" often create a wrong impression about the innocence of the subject of their

reporting and the subsequent trial in court. In **John D. Pennekamp vs. State of Florida** (19460 328 US 331 it was stated that:

"No judge fit to be one is likely to be influenced consciously, except by what he sees or hears in court and by what is judicially appropriate for his deliberations. However, judges are also human and we know better than did our forbearers how powerful is the pull of the unconscious and how treacherous the rational process—and since judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print".

312. Similarly, **Isha Tyagi** and **Nivwdita Grover** in an article titled, ***Media Trials and the Rights of the Accused,*** state:

"Another worrying effect of "media trials" is that of prejudicing the judges presiding over a particular case. The American view appears to be that the jurors and judges are not liable to be influenced by media publications, while the Anglo-Saxon view is that judges, at any rate may still be subconsciously (though not consciously) influenced and members of the public may think that judges are influenced by such publication under such a situation. Therefore, Lord Denning stated in the Court of Appeal that judges will not be influenced by the media publicity, a view that was not accepted in the House of Lords. Cardozo, one of the greatest judges of the American Supreme Court, referring to the "forces which enter into the conclusions of judges" observed that "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by".

313. The seminal writing of **Benjamin N. Cardozo** the former Justice of the Supreme Court of America, could not have put it better when referring to many issues that may influence the judge when adjudicating over a case when he expressed himself in ***The Nature of the Judicial Process***, Yale University Press, New Haven, 6th print (1928) thus:

"I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that there existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. I wish I might have found the time and opportunity to pursue the subject farther. I shall be able, as it is, to do little more than remind you of its existence. There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by. We like to figure to ourselves the processes of justice as coldly and impersonal."

314. This does not however necessarily mean that every time a matter the subject of investigations appears or is leaked to the media, the Court must halt the criminal proceedings in respect thereof. Each case must be decided on its peculiar facts and circumstances. The issue of adverse publicity was dealt with in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** as hereunder:

"The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means.

Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial..."

315. We are also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

"Every litigation is inconvenient to every litigant in one way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."

316. As was held in **Jago vs. District Court (NSW) 106**:

"..it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."

317. In this case it has not been alleged that there is a risk that as a result of the adverse publicity so far generated by the subject of these proceedings, the Petitioners' rights to fair trial are threatened. In fact no allegation has been made against the trial Court along those lines and in these proceedings. At the time these petitions were filed, the trial Court in fact was yet to commence the criminal proceedings involving the Petitioners.

318. Accordingly, we are not satisfied that the alleged adverse media publicity have made it improbable or impossible for the petitioners to have fair trials.

Selective Prosecution

319. It was contended that the Petitioners were singled out for prosecution while some other persons were excluded therefrom. The issue of selective prosecution was the subject of **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another** (supra) where the Court expressed itself as follows:

"This Court appreciates the fact that the discretion on whom to prefer charges against is on the prosecuting authority who was then the Attorney General and now the Director of Public Prosecution (hereinafter referred to as the DPP). It is also within the discretion of the said Authority and it is perfectly in order for the Authority to call some of the accomplices in a criminal trial as prosecution witnesses. The weight of their evidence is of course subject to the law relating to accomplice evidence…It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the *Office of the Director of Public Prosecutions Act*. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself… Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the *Office of the Director of Public*

***Prosecutions Act,* that would, in our view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion."**

320. In our view, it is not the mere exclusion of persons who would reasonably be expected to be charged alongside the Petitioner that justifies the grant of the orders sought. Rather, it is the effect of such exclusion that is of paramount consideration. It is therefore not enough to mechanically state that certain persons were selectively excluded from the prosecution. The Petitioner must go further and show how such exclusion violate his right to a fair trial or hearing. This has not been done in the present case, and in our view, this contention has no merit.

Political Considerations

321. It was contended by the Petitioners that the criminal charges were instituted for purely political and extraneous purposes other than the pursuit of legitimate criminal grievances. First and foremost, we must reiterate that in determining whether or not to halt criminal proceedings, the Court must consider the dominant motive for bringing the criminal proceedings. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene. See **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another** (supra) and **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).
322. Where it is not the predominant purpose the Court ought not to interfere. Where the ground relied upon to halt the same is some collateral motive which on its own does not warrant the halting of the said proceedings, the Court ought not to take such exceptional step of bringing to an end criminal proceedings where there possibly exist other genuine motives. Therefore, even if it is true that the Respondents intend to settle some political scores, that would not warrant the halting of the criminal proceedings if that is not the dominant motive. We are however not convinced that the predominant purpose of the commencement of the criminal proceedings is for the achievement of a political purpose other than the vindication of a criminal offence.

Delay

323. It was contended by some of the petitioners that preferring charges against them ten (10) years after the alleged offence was committed smacks of bias, witch hunt and discrimination and should not be allowed by this Court. Article 50 of the Constitution provides for the right to fair trial and under Article 50(1)(e) fair trial includes the right to have the trial begin and conclude without unreasonable delay. Therefore both the commencement and the conclusion of the trial must be conducted without an unreasonable delay. This delay in our view not only encompasses the period between the arraignment and the commencement of the hearing but also includes the period between the discovery of the commission of an offence and the arraignment in court. However what is reasonable depends upon the circumstances of the case such as the nature of the offence, the collation and collection of the evidence as well as the complexity of the offence. Whereas this Court is not competent to make a definitive finding thereon this view seems to resonate with the view expressed in **Bell vs. Director of Public Prosecutions and Another [1986] LRC 392** where the Privy Council expressed itself as follows:

"..in giving effect to the rights granted by sections 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions."

324. Again of paramount importance is the effect of the delay on the viability of a fair trial.
325. However as was held by **Kriegler, J** in **Sanderson vs. Attorney General-Eastern Cape 1988 (2) SA 38:**

"Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice...Ordinarily, and particularly where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay."

326. In **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court At Nairobi & Another [2014] eKLR** the Court further held while citing **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323**:

"It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic* Case, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. Whereas the decision whether or not the action was expeditiously taken must necessarily depend on the circumstances of a particular case, on our part we are not satisfied that the issues forming the subject of the criminal proceedings were so complex that preference of charges arising from the investigations therefrom should take a year after the completion of the investigations. From the charges leveled against the Petitioners, the issues seemed to stem from the failure to follow the laid down regulations and procedures in arriving at the decision to sell the company's idle/surplus non core assets. In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made. That notwithstanding, it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial."

327. In this case, whereas delay is relied on, the Petitioners do not contend that as a result of the said delay, there has been a change in the circumstances which militate against a fair trial. Such change in circumstances may be shown for example by the fact of unavailability of the applicant's potential witnesses or evidence resulting from the said delay. We are therefore not satisfied that in the circumstances of this case the delay in bringing the charges against the 1st Petitioner, without more, merits the termination or prohibition of the criminal trial. In this case, the Petitioner has not contended that as a result of the long delay in bringing the criminal charges his defences have been compromised for example by making it impossible for him to efficiently present formidable defences which he could have done had the charges been preferred earlier on. In fact a consideration of the 1st Petitioner's position reveals that in his view, he has a formidable defence to the prosecution case. If this is the position then the 1st petitioner should present the said defences before the trial Court rather than subject this Court to a determination of the same.

328. Our finding on the issue of delay is supported by **Richardson, J** in **Martin vs. Tauranga District Court [1995] 2 LRC 788 at 799** where he held:

"...where the delay has not affected the fairness of any ensuring trial though; for example unavailability of witnesses or the dimming of memories of witnesses so as to attract

consideration...it is arguable that the vindication of the appellant's rights does not require the abandonment of trial process; that the trial should be expedited rather than aborted and the breach of Section 25(b) should be met by an award of monetary compensation. That would also respect victims' rights and the public interest in the prosecution to trial of alleged offenders."

329. In the same case, **Hardie Boys, J** aptly put it as follows:

"The right is to trial without undue delay, it is not a right not to be tried after undue delay. Further, to set at large a person who may be, perhaps patently, guilty of a serious crime, is no light matter. It should only be done where the vindication of the personal right can be achieved in no other satisfactory way. An alternative remedy may be an award of damages."

330. This position was alluded to in **Githunguri vs. Republic KLR [1986] 1** in which it was held:

"… as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious…If we thought, which we do not, that the applicant by being prosecuted is not being deprived of the protection of any of the fundamental rights given by section 77(1) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an abuse of the process of the Court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event."

Constitution of the Commission and the Role of the Commissioners

331. That brings us to the issue whether the Commission, as constituted, both during the time when the investigations were conducted and also at the time the recommendations to charge the petitioners were made, had the constitutional and legal mandate to conduct investigations and make recommendations to the DPP to charge them. It was the Respondents' position that Commissioners **Jane Onsongo**, **Irene Keino** and **Mumo Matemu** resigned on 31st March, 2015, 30th April, 2015 and 12th May, 2015 respectively. According to them, the investigations in respect of the other complaints were commenced and completed when all the Commissioners were in office. It was however, agreed by both the Petitioners and the Respondents that the investigations into allegations in respect of Karen and Waitiki lands were completed when the Commissioners had left office.

332. That brings us to the issue of the role of the Commissioners. The EACC is established pursuant to Article 79 of the Constitution which provides as follows:

Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

333. Once established by an Act of Parliament pursuant thereto, the EACC acquires the status and powers of a commission under Chapter Fifteen. Article 249 of the Constitution provides that:

(1) The objects of the commissions and the independent offices are to—

(a) protect the sovereignty of the people;

(b) secure the observance by all State organs of democratic values and principles; and

(c) promote constitutionalism.

(2) The commissions and the holders of independent offices—

(a) are subject only to this Constitution and the law; and

(b) are independent and not subject to direction or control by any person or authority.

334. Under Article 249(1)(9) of the Constitution, the Commissions exist to *inter alia* protect the sovereignty of the people. This is the sovereignty decreed under Article 1(1) of the Constitution.

335. Therefore to deliberately set out to extinguish the Commissions, otherwise than as provided under the Constitution and the law, amounts in our view to a violation of the spirit of the Constitution as it amounts to an assault on the people's ability to protect their sovereignty. Anybody that therefore sets out to deliberately cripple a Constitutional Commission or an independent office by intimidating the Commissioners or holders of independent offices to vacate their positions must necessarily be deemed to be in breach of Article 10 of the Constitution. It must be noted that the national values and principles of governance in Article 10 are not exclusive since the operative word therein is "includes" as opposed to "means". Sovereign power is one of the principles recognized in the preamble to our Constitution. We adopt the position taken in **Olum & Another vs. Attorney General (2) [1995-1998] 1 EA 258** that although the national objectives and directive principles of State policy are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it is fairly possible to do so without violating the meaning of the words used.

336. In **Ndyanabo vs. Attorney General [2001] EA 485,** it was held that:

The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile documents; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.

337. Luckily for us, our Constitution has not left us in the wilderness. Article 259(1) of the Constitution gives guidance on the manner of interpretation of the Constitution and provides that:

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

338.The position was emphasized by **Mutunga, CJ & P** in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** where he expressed himself as follows:

"In Paragraph 8 of my dissenting Advisory Opinion in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion of the Supreme Court* (Reference No 2 of 2012), I endorsed the approach to the interpretation set out in the Constitution itself, and in the provisions of the *Supreme Court Act.* There is no doubt that the Constitution is a radical document, that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism, and 50 years of independence. In their wisdom, the Kenyan people decreed that past to reflect a *status quo* that was unacceptable and unsustainable, through: provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya which they delegate to institutions that must serve them, and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights, giving the whole gamut of human rights the power to radically mitigate the *status quo* and signal the creation of a human-rights State in Kenya; mitigating the *status quo* in land that has been the country's Achilles heel in its economic and democratic development. These instances, among others, reflect the will and deep commitment of Kenyans, reflected in fundamental and radical changes, through the implementation of the Constitution. It is also the will of the Kenyan people that they rely on the Judiciary to protect and develop the Constitution."

339.The learned President of the Supreme Court continued:

"Article 159 of the Constitution deals with the principles governing the exercise of judicial power, identifying the source of that power in the people of Kenya. The constitutional provisions on the Judiciary (its independence, its integrity, its intellectual leadership and the distinction of its judges and its resources) make this abundantly clear. Therefore, the early years of the decisions of the Courts, and in particular those of the Supreme Court, will be seminal and critical for the future development and impact of the Constitution. Although I had categorized the jurisprudence envisaged by the Constitution as robust (rich), patriotic, indigenous and progressive (all these attributes derived from the Constitution itself, and from Section 3 of the Supreme Court Act), perceptions of this decolonizing jurisprudence can be summed up as Social Justice Jurisprudence, or Jurisprudence of Social Justice. Such jurisprudence in all our Courts, and in particular at the Supreme Court, as the apex court in the Republic of Kenya, will ensure that the fundamental and core pillars of our progressive Constitution shall be permanent, irreversible, irrevocable and indestructible – as should also be our democracy."

340.It is our view that the three arms of the Government are under a Constitutional obligation to protect the sovereignty of the people, and to achieve this, they must protect those organs through which sovereignty is expressed such as the Commissions, Independent Offices and the principle of devolution. To fail to do so either by action or inaction is an abdication of their Constitutional mandate.

341.Under Article 255 of the Constitution, an amendment relating to the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies can only be done in a referendum. That clearly shows the importance the people of Kenya attached to these Commissions. In fact this importance is emphasized by the fact that the people of Kenya were of the view that these Commissions were important for the protection of their sovereignty.

342.In our view any act or omission whose effect is geared towards crippling the actions of any Constitutional Commission or independent office cannot be justified on the ground of public interest since as we have held hereinbelow public interest is reflected in the Constitution and the legislation.

343. According to the Respondents, none of the Commissioners were appointed investigators and none of them conducted investigations which function fell under the Investigation Directorate and investigators appointed under section 23 of the ***ACECA***, hence the question of *locus* to conduct investigations does not arise. The investigators, it was contended, conducted investigations objectively and independent of directions from the Commissioners or any other person.
344. In the Commission's view, the intention of the provisions of Article 250(1), which are similar to the provisions of section 4 of the ***EACC Act***, was to provide for the minimum and the maximum membership of the Commission that can be appointed at any one moment and they are separate and distinct from the Commission which is a body corporate with perpetual succession with powers donated to it by the ***EACC Act***. To the Commission, pursuant to Article 250(12) of the Constitution, the Commission includes its Secretary who, under the said Article, is the Chief Executive Officer. This person was in office at all material times and under section 18 of the ***EACC Act*** there is a provision for a secretariat which undertakes the functions of the Commission as set out in the Constitution and the Acts, one of which is to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under the Act or any other law enacted pursuant to Chapter Six of the Constitution. In effect the position taken by the Commission is that the Commission can undertake its functions as long as the secretariat is in place and notwithstanding the absence of the Commissioners.

Role of the Secretariat

345. This discourse brings us to the position of the Secretary to the Commission. Article 250(1) of the Constitution provides that:

> ***Each commission shall consist of at least three, but not more than nine members.***

346. On the other hand Article 250(12) of the Constitution provides as follows:

> ***There shall be a secretary to each Commission who shall be –***
>
> a. ***Appointed by the commission; and***
> b. ***Chief executive officer of the commission.***

347. From the foregoing provisions, it is clear to us beyond paradventure that the membership of a Constitutional Commission is between three and nine members. In other words the composition of a Constitutional Commission ought not to be less than three and not more than nine members. However, the exact number of Commissioners is provided for under section 4 of the ***EACC Act*** which states that:

> ***The Commission shall consist of a chairperson and two other members appointed in accordance with the provisions of the Constitution and this Act.***

348. The said members, otherwise known as the Commissioners, are empowered to appoint the Commission's Chief Executive known as the secretary. To contend that the secretary, who is an appointee of the Commission, is part of the Commission would mean that the Commission would, where the Commissioners are nine, be composed of a membership of ten. One only needs to mention this to realize how ridiculous this argument is. We have no hesitation at all in holding that the Secretary to the Commission is not a member of the Commission as contemplated under Article 250(1) of the Constitution.
349. This issue is closely intertwined with the next one.
350. It was contended that the Commission's powers under section 13 of the ***EACC Act*** to conduct investigations either on its own initiative or on a complaint made by any person, is exercisable whether or not the Commissioners are in office hence their exercise does not depend on whether or not the Commissioners are in office. It was further contended that the making of recommendations to the DPP is a function of the Secretariat and not the Commissioners whose absence therefore does not affect the technical and professional work of the officers at the

Secretariat.

351. In the Commission's view, the functions of the Commissioners, as spelt out in section 11(6) of the said Act, relate to policy formulation, ensuring that the Commission and its staff, including the Secretary perform their duties to the highest standards possible in accordance with the Act and giving strategic direction to the Commission as contained in the Strategic Plan which had already been formulated and adopted prior to their resignation.

352. Whereas we agree that the Commissioners may not possess the technical knowhow to enable them perform the investigative functions of the Commission and that they may in fact rely on the expertise of the Secretariat, it is clear from the provisions of section 18(2)(a) of the ***EACC Act*** that the professional, technical and administrative officers and support staff, are appointed by the Commission in the discharge of its functions under the Act.

353. Section 16 of the said Act is clear on the status of the Secretary to the Commission. He is appointed by the Commission and in our view for the purposes of this power, no one apart from the Commissioners can legally perform the task of appointing the Secretary. He serves on the terms and conditions prescribed by the Commission. In the performance of his functions and duties of office, he is answerable to the Commission. Again we cannot think of any other person apart from the Commissioners to whom the Secretary may be answerable. The powers to remove the Secretary similarly rest with the Commission.

354. We are therefore clear in our mind that the Secretary cannot be placed on the same plane as the Commissioners. To equate the Secretary with the Commission when he is an appointee of the Commission is in our view an anathema to the rules relating to employment and defeats common sense. To do so would amount to creating two centres of power, a scenario which would be a recipe for chaos and disorder. We are not persuaded by the contention on behalf of the Respondents that the framers of the Constitution intended that the powers vested in the Commission, as a composite entity, were also vested in the Secretary, who is not a member of the Commission, to be exercised singularly and/or independently of the Commission. The ultimate result of that would be for the Secretary to override, at his/her whim, the Commission as to the exercise of powers vested in the Commission.

355. This in our view is not in tandem with the provisions of section 16(7)(f)(i) and (iv) of the ***EACC Act*** which tasks the Secretary with *inter alia* the duty of carrying out the decisions of the Commission and the performance of such other duties as may be assigned by the Commission. For the purposes of the said section, such decisions, in our view are decisions made by the Commission through the Commissioners and similarly the assignments are given by the Commission through the Commissioners. To paraphrase the decision of the Constitutional Court of Uganda in **Constitutional Petition No. 46 of 2001** and **Constitutional Reference No. 54 of 2011** between **Hon Sam Kuteesa & Others vs. Attorney General, Uganda & Others,** it is clear to us that under the Constitution and the legislation, the foundation of the powers of the Secretariat is the existence of the Commission. The Secretary and the Secretariat can only carry out the powers vested in their offices when the Commission is in place exercising its powers since they implement what the Commission has resolved upon.

356. Whereas we appreciate that the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, in our view would be absurd. The outcome of the tasks undertaken by the Commission's staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission otherwise unilateral actions taken by the staff may well be deemed to be insubordination. In our view, the recommendations arising out of the investigations of the Commission, which is one of the Commission's core mandate, cannot by-pass the Commissioners and be transmitted directly to the DPP by the staff. This is our understanding of the provisions of paragraph 5 of the Second Schedule to the ***EACC Act***, which provides that:

The quorum for the conduct of business at a meeting of the Commission shall be two-thirds of all the members of the Commission.

357. From the foregoing it is clear that the conduct of the Commission's business can only be performed in a meeting at which two-thirds of the members are present. The said members in our

view are the Commissioners. One of the businesses of the Commission under section 11(1)(d) of the ***EACC Act*** is to:

investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution.

358. If the Commissioners are not in office, it would follow that the business of the Commission contemplated under paragraph 5 of the Second Schedule to the ***EACC Act*** as read with section 11(1)(d) of the ***EACC Act*** cannot be undertaken.
359. In our view a reading of section 18(3) of the ***EACC Act*** clearly reveals that all the employees of the Commission are subject to instructions, orders and directions of the Commission and in order to avoid an absurd interpretation by which the staff take orders from themselves, these instructions, orders and directions must emanate from or on behalf of the Commissioners. Therefore the ultimate decision as to who ought to be recommended to be charged must rest with the Commission members who are the Commissioners. This position in our view is made out from a reading of section 11(6) of the ***EACC Act*** under which the functions of the Commissioners are *inter alia* to assist the Commission in policy formulation and ensure that the Commission and its staff, including the Secretary, perform their duties to the highest standards possible in accordance with the Act; and deal with reports of conduct amounting to maladministration, including but not limited to delay in the conduct of investigations and unreasonable invasion of privacy by the Commission or its staff.
360. In interpreting the said provisions, it is our view that the decision of **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** ought to act as a guidance. In the said case, the learned Judge expressed himself as follows:

"It [literal interpretation] is the voice of strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal grammatical construction of words, heedless of the consequences. Faced with staring injustice, the judges are, it is said, impotent, incapable and sterile. Not with us in this Court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach." In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision ... It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it". Whatever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy...by reading words in, if necessary - so as to do what Parliament would have done, had they the situation in mind...The defect that appears in a statute cannot be ignored by the judge, he must set out to work on the constructive task of finding the intention of the Parliament. The judge should not only consider the language of the statute but also the social conditions which gave rise to it, and supplement the written word so as to give "force and life" to the intention of the Legislature."

361. It is therefore upon the Commissioners to ensure that the Secretary and the Staff attain the highest standards in the performance of their duties which in our view include the investigation of complaints. That the Commissioners are entitled to deal with delay in the conduct of investigations and unreasonable invasion of privacy by the Commission's staff is a clear indication that the overall oversight powers vests in the Commissioners.
362. We therefore agree with the position which was adopted by the DPP in his letter dated 23rd August, 2013 that any steps of the Commission including any investigations or recommendations ought to be under the hand of the Chair for the time being of the Commission. We therefore also agree with the Petitioners that any decision purportedly transmitted to the DPP recommending the prosecution of the Petitioners without the sanction of the Commissioners would not be in compliance with the law.

363.This in our view is the only way in which paragraph 9 of the Second Schedule of the ***EACC Act*** can be properly understood. That paragraph provides that:

Unless otherwise provided by or under any law, all instruments made by and decisions of the Commission shall be signified under the hand of the chairperson and the Secretary.

364.However an attempt was made to distinguish between recommendations and decisions and it was contended that the findings of the Commission are not decisions hence paragraph 9 is inapplicable. To our mind this is a distinction without a difference. The word "decision" was described in **Transouth Conveyors Ltd and Another. vs. Kenya Revenue Authority and 3 Others. Civil Appeal Nos. 89 and 92 of 2007 [2008] KLR 216** where the Court of Appeal while relying on ***Public Administration, A Journal of the Royal Institute of Public Administration, by P H Levin,*** at page 25 defined the word as "*deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity*". What matters, in our view, is the likely effect of the findings rather than the semantics applied in describing them. In this respect we associate ourselves with the position in **Re Pergamon Press Ltd** (supra).

365.We therefore hold that in the absence of the Commissioners, the Commission had no power to recommend to the Director of Public Prosecutions on who to prosecute. Our view is reinforced by the decision in **Hon Sam Kuteesa & Others vs. Attorney General, Uganda & Others** (supra) in which the said Court expressed itself as follows:

"The Inspectorate of Government cannot, through the Inspector General of Government, when he/she is the only one in office, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or public office under Article 230 of the Constitution, when the Inspectorate of Government is not duly constituted in accordance with Article 223(2) of the Constitution and section 3(2) of the Inspectorate of Government Act No. 5 of 2002, which require the inspectorate to consist of the Inspector General and Government and two Deputy Inspectors General."

Effect of Vacancy of Commissioners on the Commission

366.As held hereinabove, the objects of the Constitutional Commissions and the Independent Offices are *inter alia* to protect the sovereignty of the people. What this means is that lack of the Commissions does not necessarily amount to the extinguishment of the Commission. However, under Article 250 of the Constitution, the Commissions consist of between 3 and 9 members. In other words the Commissions are composed of the Commissioners. Whereas a member of the Commission can be removed under Article 251, that removal cannot be equated to the extinction of the Commission itself. Therefore a distinction must be made between the establishment of a Commission and its ability to carry out its functions. We associate ourselves with the view held by **Achode, J** in **Ruth Muganda vs. Kenya Anti-Corruption Commission and Director of Public Prosecutions Nairobi HC Misc. Crim. Appl. No. 288 of 2012** that:

"the envisaged transitional period prescribed in the statute could not foresee all transitional challenges, bearing in mind possibilities of litigation as in the case here affecting the appointment of the chairman and therefore assumption of office by members of the Commission. A purposive approach to this issue requires the Court, in the spirit of the Constitution, to promote the continuing and intended objects and functions of the Commission throughout the transitional process as opposed to extinguishing its existence".

367. Whereas a Commission may be disabled in its ability to perform its functions, such disability does not automatically render the Commission extinct. Such an event in our view only places the Commission in a state of dormancy until such a time as it is able to carry out its functions. To state otherwise would render the provisions of Article 255 of the Constitution a dead letter. To argue that the absence of the Commissioners renders the Commission non-existent would amount to an irregular and unconstitutional amendment of Article 255 of the Constitution which reserves the right to render Commissions extinct to the people. The effect of this is that the Commissions

cannot be disbanded by any other authority save by the authority of Kenyans expressed in a referendum. Parliament or any other state organ cannot therefore disband a Constitutional Commission or an Independent Office.

368. The Constitution provides that the composition of the Commissions is to be in accordance with the national legislation. Accordingly, it is not the national legislation that creates Constitutional Commissions or Independent Offices. Such legislation only provides for their composition. We therefore associate ourselves with the submissions made by the Respondents that the Commission is a body corporate capable of suing and being sued and as such, is an autonomous legal unit/person with perpetual succession and like other body corporate, the Commission has a separate legal personality and continues to exist independent of any human management or governance. This position is captured under Article 253 which provides that:

> ***Each commission and each independent office—***
>
> ***(a) is a body corporate with perpetual succession and a seal;***
>
> ***and***
>
> ***(b) is capable of suing and being sued in its corporate name.***

369. In our view therefore the fact that the Commission was disabled by pressure exerted upon them by third parties, whether deliberate or otherwise, did not obliterate the Commission, and though its ability to effectively carry out its functions was impaired by its incapacitation, the Commission was legally alive but inactive. We however are of the view that the provisions of section 53 of the ***Interpretation and General Provisions Act*** (Cap 2 Laws of Kenya) relied upon by the Respondents are inapplicable. The said section provides as follows:

> ***Where by or under a written law a board, commission, committee or similar body, whether corporate or un-incorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by—***
>
> ***a) a vacancy in the membership thereof; or***
>
> ***b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.***

370. In our view, the above provision applies where there is a reduction in the membership of the Commission and not where all the Commissioners are not in office. The second part thereof also applies to a defective appointment.

371. However, according to the Petitioners, as at the time the investigations and recommendations of the Commission were made to the DPP in relation to the Karen land, the Commission did not have a chairperson or members and accordingly, did not exist in law. To these Petitioners, a trial conducted based on investigations undertaken by a body that does not have the legal or constitutional mandate requisite for its existence is a nullity *ab initio* and ripe for termination. We agree with the Petitioners but only to the extent that during the period when the Commission was grounded, it could not perform one of its core mandate of recommending to the Director of Public Prosecutions the prosecution of any acts of corruption or economic crimes or violation of codes of ethics or other matter prescribed under the ***EACC Act***, the ***ACECA*** or any other law enacted pursuant to Chapter Six of the Constitution.

<u>Whether the President was entitled to receive the Report and when</u>

372. It was further contended that section 27 of the ***EACC Act*** sets out the occasions when the President is entitled to receive reports from the Commission in the following terms:

> ***(1) The Commission shall, at the end of each financial year cause an annual report to be***

prepared.

(2) The Commission shall submit the annual report to the President and the National Assembly three months after the end of the year to which it relates.

(3) The annual report shall contain, in respect of the year to which it relates—

h. ***the financial statements of the Commission;***
i. ***a description of the activities of the Commission;***
j. ***such other statistical information as the Commission may consider appropriate relating to the Commission's functions;***
k. ***any recommendations made by the Commission to State departments or any person and the action taken;***
l. ***the impact of the exercise of any of its mandate or function;***
m. ***any impediments to the achievements of the objects and functions under the Constitution, this Act or any written law; and***
n. ***any other information relating to its functions that the Commission considers necessary.***

(4) The Commission shall cause the annual report to be published and the report shall be publicized in such manner as the Commission may determine.

373. In this case it was submitted that since the report given to the President by the Secretary to the Commission neither emanated from the Commission nor was within the time frame stipulated in law, it did not meet the criteria laid down by the law. We have already held that the core tasks of the Commission can only be performed under the supervision of the Commissioners. It is clear that the report was furnished to the President by the Secretary/CEO. However, under Article 254 of the Constitution the President, the National Assembly or the Senate may at any time require a commission or holder of an independent office to submit a report on a particular issue and that every such report shall be published and publicized. Therefore, if the report the subject of the Presidential address was sought by the President, such a report would not be the same as the report contemplated under section 27 of the ***EACC Act*** which is periodical.
374. It is however our view that no substantial issue turns on the timing of the report. In any event, two of the Commissioners were in office at the time the report was forwarded to the President.

The Effect of the President's Directions on the Timeline

375. However, the President did not simply publicise the report. Instead the President directed the Commission to:

"ensure that the Director of Public Prosecutions has received the subject files without delay. I also want to caution that this should not be an open-ended process. Justice must be expeditious, as justice delayed is justice denied. Therefore, the exercise should and must be concluded within the next 60 days."

376. Articles 79, 249 and 250 of the Constitution provide as follows:

79. Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

249. (1) The objects of the commissions and the independent offices are to—

(a) protect the sovereignty of the people;

(b) secure the observance by all State organs of democratic values and

principles; and

(c) promote constitutionalism.

(2) The commissions and the holders of independent offices—

(a) are subject only to this Constitution and the law; and

(b) are independent and not subject to direction or control by any person or authority.

250 (1) Each commission shall consist of at least three, but not more than nine members."

377. It is therefore clear from the foregoing that the Ethics and Anti-corruption Commission, as is the case with the other constitutional commissions and independent offices, is an independent Commission and in the conduct of its mandate is not subject to direction or control of any person or authority.

378. "Independence" according to ***Black's Law Dictionary***, 8th Edition, page 785 is defined as:

"Not subject to the control or influence of another"

379. This position is reflected in section 28 of the ***EACC Act***, which provides:-

Except as provided in the Constitution and this Act, the Commission shall, in the performance of its functions, not be subject to the direction or control of any person or authority.

380. Therefore the Commission is not only required to be free from any control by any person or authority but is also not supposed to be directed by any such person or authority in the performance of its functions. Every person, including the President, is under a constitutional obligation pursuant to Article 3(1) of the Constitution to respect, uphold and defend the Constitution and this would include safeguarding and securing the independence of the Constitutional Commissions and Independent Offices. By directing the Commission to ensure that the Director of Public Prosecutions received the subject files without delay and that the exercise should and must be concluded within 60 days, the President was clearly directing the Commission on how fast to conduct its investigations. That the Commission did not comply with this direction is neither here nor there; though in one of the newspaper reports the CEO/Secretary of the Commission was reported as saying that the Commission was on course towards the deadline, an unfortunate statement in our view. The President ought not to have given such directions. Such directions though not meant to compel the Commission to act in a particular manner, were no doubt meant to exert pressure on the Commission to finalise its investigations within a definite span of time notwithstanding the complexity and the magnitude of the investigations involved.

381. Under section 11(4) of the ***EACC Act***, the Commission has all powers necessary or expedient for the efficient and effective execution of its functions, under the Constitution, the Act or any other written law. Under section 12 thereof, in fulfilling its mandate, the Commission is expected to adhere to the values and principles under Article 10 of the Constitution. Those values and principles, it is clear, are not exclusive since the Constitution employs the use of the word "includes". Accordingly, under Article 259(1)(c), this Court is enjoined to interpret the Constitution in a manner that permits the development of the law. It is our view that the principle of constitutionalism and adherence to the provisions of Article 47 of the Constitution is part of the national values and principles of governance since the rule of law is expressly stated to form part of the same. This Court is however aware that while a liberal and not an overly legalistic approach should be taken to constitutional interpretation, the charter should not be regarded as an empty vessel to be filled with whatever meaning the court might wish from time to time. See **Karua vs. Radio Africa Limited T/A Kiss FM Station and Others Nairobi HCCC No. 288 of 2004 [2006] 2 EA 117; [2006] 2 KLR 375.**

382. Therefore the Commission must ensure that in the performance of its obligations it meets the principles of constitutionalism. Where it fails to do so there are in our view adequate legal avenues to remedy the situation. However, directing it on how to perform its duties is not one such option.

383. We therefore agree with the Petitioners that by directing the Commission to ensure that the Director of Public Prosecutions received the subject files without delay and to compel the Commission to conclude that exercise within 60 days, the President, with all due respect, exceeded his mandate. His actions amounted to unlawful interference with the actions of an independent commission, an action which the President is barred from taking. In so doing, the President infringed upon the independence of the Commission contrary to the constitutional edict in Article 131(2)(a) of the Constitution which requires the President to respect, uphold and safeguard the Constitution. In directing the Commission as he did, the President not only abdicated his role as a person and as the President but was clearly in breach of the provisions of the Constitution. We wish to reiterate the words of **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010** that:

> **"The new Constitution has enshrined the Bill of Rights of all citizens and to say one group can not enjoy the rights enshrined under the bill of rights is to perpetuate a fundamental breach of the constitution and to legalise impunity at very young age of our constitution. That kind of behaviour, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers. It also raises basic issue of whether a President who has just sworn and agreed to be guided by the provisions of the Constitution can allow his agents to breach it with remarkable arrogance or ignorance. All these, are issues which require sober and attentive judicial mind in order to address the rights and obligations of all parties involved... *Prima facie* the allegations contained in this application is a serious indictment on the institution of the President and whether he is protecting, preserving and safeguarding the interests, rights and obligations of all citizens as contained in the new constitution. This application is a clear indication that the security arms of this country have not tried to understand and appreciate the provision of this new Bill of Rights. It also shows yester years impunity are still thriving in our executive arm of the government."**

384. We wish to say no more on this issue.

Whether the Director of Public Prosecution acted under the influence of the Executive.

385. Article 157(1) of the Constitution provides that:

> ***The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.***

386. Section 6 of the ***Office of the Director of Public Prosecutions Act***, No. 2 of 2013, on the other hand is more explicit on the issue. It provides that:

> ***Pursuant to Article 157(10) of the Constitution, the Director shall—***
>
> a. ***not require the consent of any person or authority for the commencement of criminal proceedings;***
> b. ***not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and***
> c. ***be subject only to the Constitution and the law.***

387. In our view, pursuant to Article 157(10) and section 6 ***ODPP Act***, the DPP is expected to make independent decisions in the exercise of his constitutional and legislative mandate and is not to be under the direction or control of any person or authority. In the exercise of his discretion, he ought to be guided only by the law and the Constitution. Therefore whereas the discretion given to the DPP to prosecute criminal offences is not to be lightly interfered with, that discretion must be

properly exercised, and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes, the Court will not hesitate to bring such proceedings to a halt. Similarly, where the DPP is shown not to be acting independently but just reading a script prepared by other persons or authority or that he has been pressurised to go through the motions of a prosecution, the Court will not hesitate to terminate the proceedings as in such circumstances, the powers being exercised by the DPP would not be pursuant to his discretion but at the discretion of another person not empowered by law to exercise such discretion. This was the position adopted in **Republic vs. Director of Public Prosecution & Another ex parte Kamani Nairobi Judicial Review Application No.78 of 2015,** where the Court expressed itself *inter alia* as follows:

"This Court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed place and ought to be preserved for those matters in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the Office of the Director of Public Prosecutions Act to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a cat-walk."

388. In our view, criminal proceedings ought not to be instituted simply to appease the spirits of the public yearning for the blood of its perceived victims. This is a country governed by the rule of law and any action must be rooted in the rule of law rather than on some perceived public policy or dogmas.

389. To permit the prosecutor to exercise his constitutional power arbitrarily would amount to the Court abetting abuse of discretion and power. It was therefore held in **Regina vs. Ittoshat [1970] 10 CRNS 385** at **389** that:

"…this Court not only has the right but a duty to protect citizens against harsh and unfair treatment. The duty of this Court is not only to see the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner."

390. Similarly in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**:

"I do not think that our Constitution which is one of a democratic state would condone or contemplate abuse of power...The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney General, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts..."

391. In this case, the Petitioners have relied on a newspaper report in which the DPP was quoted as saying that he was working to beat the deadline of 60 days given by the President to complete the cases. However in **Wamwere vs. Attorney General Nairobi HCMCA No. 224 of 2004 [2004] 1 KLR 166, Lenaola, J** was of the view, which view we share, that newspaper reports are not authoritative and courts cannot rely on them as the basis for determining a matter. In this case therefore, we do not have sufficient material on the basis of which we can find the actions of the

DPP to prosecute the Petitioners were informed by the directives of the President or the executive. Suffice it to say that just as in the case of the Commission, such statement if true would be most unfortunate coming from an independent office.

Public Interest

392. It was contended that it is in the public interest that criminal cases, particularly those touching on misuse of public funds, be prosecuted expeditiously. That may be so. It was further argued that since EACC is a constitutional Commission and expends taxpayers' money in conducting investigations, it will not serve any useful purpose and would not augur well for the public interest to stay the intended prosecutions or to order that fresh investigations are to be conducted at taxpayers' expense. To the Respondents, an interpretation that paralyses operations of a constitutional Commission would ran counter to the public interest to advance the fight against corruption and prudent use of scarce public resources. In other words, the Respondents urged this Court to save the criminal proceedings on the grounds of public interest if not for anything else. Public interest, however is just like public policy. Whereas the Courts have recognised that the latter may be a factor to be considered in the exercise of discretion, it is an indeterminate principle or doctrine which has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See **Kenya Shell Limited vs. Kobil Petroleum Limited Civil Application No. Nai. 57 of 2006 [2006] 2 KLR 251** and **Richardson vs. Mellish (1824) 2 Bing 229**.

393. This is not to say that public interest has no role at all to play in making a decision whether or not to institute criminal proceedings. To the contrary under Article 157(11) of the Constitution, public interest is one of the factors that the DPP is enjoined to consider in exercising the powers conferred under the said Article.

394. We are also conscious of the need to always balance the public interest that persons accused of crimes face the criminal justice process and the public interest that alleged offenders are fairly treated and not subjected to prosecutors' misconduct which would bring the criminal justice system into disrepute: see **Godfrey Mutahi Ngunyi vs. Director of Public Prosecutions & 4 Others [2015] eKLR**.

395. It is now trite that contravention of the Constitution or a statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and statute. This was the position in **Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** where the Court held thus:-

"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."

396. We can do no better than to cite the decision in **Kinyanjui vs. Kinyanjui [1995-98] 1 EA 146** where it was held that:

"For a Court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience as would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law."

397. As was held in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77:**

"Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is very impatient with the fact that cases involving corruption or economic crimes hardly go on in the Courts because of the applications like the one we are dealing with. Our short answer to Professor Muigai is this. We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed...The courts must continue to give justice to all and sundry irrespective of their status or former status."

398. It has been said that the Courts must never shy away from doing justice because if they did not do so justice has the capacity to proclaim itself from the mountaintops and to open up the Heavens for it to rain down on us. Courts are the temples of justice and the last frontier of the rule of law. See **Republic vs. Judicial Commission of Inquiry into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400.**
399. Justice, it has been said is not a cloistered virtue and that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and heaven and earth embrace. See **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443.**
400. In our view, whereas public interest is a factor to be considered by the Court in arriving at its decision, where the alleged public interest is not founded on any legal provision or principle and runs contrary to the Constitution and the law, such perceived public interest will not be upheld by the Court. Under Article 10 of the Constitution, all State organs, State officers and all persons tasked with *inter alia* the making and implementation of public policy decisions are bound by the national values and principles of governance one of which is the rule of law. Consequently, any alleged public policy or interest that is contrary to the rule of law cannot be upheld.

The Import and Impact of the Recommendations made to the DPP

401. When we read article 157(4) of the Constitution, we have little option but to associate ourselves with the decision of the High Court of Uganda in the case of **Uganda vs. Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013,** to the effect that:

"...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously… Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP…such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP."

402. This position was similarly appreciated in **Charles Okello Mwanda vs. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR** in which **Mumbi Ngugi, J** held that:

"I would also agree with the 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st

Respondent has no power to 'absolve' a party and thereby stop the 4th Respondent from carrying out his constitutional mandate. Article 157(10) is clear…However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157(10) set out above, the 1st respondent (EACC) has no authority to 'absolve' a person from criminal liability…so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent (DPP) …".

403. It was pursuant to the foregoing that **Majanja, J** expressed himself in **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others** (supra) as hereunder:

"The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10)…These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013…In the case of Githunguri –vs- Republic (Supra at p.100), the Court observed…The Attorney General of Kenya…is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do… this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy …"

404. In our view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013.

405. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP. As is rightly recognised by **Sir Elwyn Jones** in ***Cambridge Law Journal*** – April 1969 at page 49:

"The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration."

406. However, it is upon the DPP to consider those factors and not upon this Court to determine for him/her when such factors militate against the institution of criminal proceedings.

407. In our view, the exercise of discretion, though quasi-judicial, the decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution, the DPP in this case, and it is not the rule, and hopefully it will never be, that suspected criminal offences and offenders must automatically be the subject of prosecution since public interest must under our Constitution be considered in deciding whether or not to institute prosecution. See ***The International and Comparative Law Quarterly*** Vol. 22 (1973).

408. In our view, since the DPP is entitled to rely on any lawful sources to determine whether or not to commence criminal proceedings, the mere fact that the information emanating from a particular body was released without the authority of that body does not bar the DPP from making use of that information as long as the information is admissible in evidence. Whether or not to admit the said information in evidence, however, is the role of the trial Court. We therefore cannot at this stage bar the DPP from relying on the information furnished to it by the Commission merely because the same was not procedurally submitted. We reiterate that had the law been that the DPP is only entitled to act on recommendations of the Commission, that would have been another

matter altogether.

Epilogue

409. In our view, even without receiving a recommendation from the investigators, where it comes to the knowledge of the DPP that a criminal offence has been committed, there is nothing to bar him from commencing prosecution of the offenders. In other words the DPP is not obliged to refer the matter to the Commission or any other investigative agency once he is satisfied that he has in his possession material on the basis of which a prosecutable case can be mounted. That, in our view is the proper construction of the provisions of Article 157(1) of the Constitution as read with section 6 of the ***Office of the Director of Public Prosecutions Act***, No. 2 of 2013. An interpretation to the contrary would amount to unduly fettering the DPP's Constitutional and statutory mandate and discretion.
410. In other words, it is not the source of the evidence that determines whether or not the DPP is entitled to prosecute. What is to be considered is whether the evidence sought to be relied upon contravene the provisions of Article 50(4) of the Constitution which provides that:

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

411. On our part we have considered the issues raised herein and we are not satisfied that that is the position. The issues raised are issues which can adequately be determined by the trial Court. There are sufficient constitutional and legal safeguards in our judicial system to protect persons undergoing criminal trials. One such provision is Article 50 of the Constitution. On this point one needs to remind oneself of the decision in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** to the effect that:

"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

412. Unless there is material upon which the Court can find that the Petitioners are unlikely to receive a fair trial before the trial Court, the Court ought not to interfere simply because the Petitioners may at the end be found to be innocent.
413. The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the Petitioners' chances of being acquittal are high. In **Erick Kibiwott & 2 Others vs. Director of Public Prosecution & 2 Others** (supra) this Court expressed itself as hereunder:

"…In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. Dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review proceedings are not concerned with the merits but with the decision making process."

Summary of Findings

414. We have dealt in the preceding sections with the issues which were raised before us in these consolidated petitions. What remains is to summarise our findings in this admittedly lengthy judgment and our disposition of the consolidated petitions. Consequently we find that:

1. **The issues raised with respect to the propriety of the institution of the criminal proceedings against the petitioners are issues for determination by the trial court.**
2. **The resignation of the members/commissioners of the Ethics and Anti-Corruption Commission did not render the Commission non-existent. It only disabled it from performing some of its core functions.**
3. **Whereas the Ethics and Anti-Corruption Commission, even in the absence of the Commissioners, could continue with its statutory functions, it could not perform one of its core mandate of recommending to the Director of Public Prosecutions the prosecution of any acts of corruption or economic crimes or violation of codes of ethics or other matter prescribed under the *EACC Act,* the *ACECA* or any other law enacted pursuant to Chapter Six of the Constitution.**
4. **The Report which was furnished to the President and which the President publicized was the one contemplated under Article 254 of the Constitution and not the periodic report contemplated under section 27 of the *EACC Act.* Further, the said report was furnished when two of the three Commissioners were still in office. Accordingly, the action of forwarding the report to the President did not violate the law.**
5. **The purported 60 days' timelines given to the Commission by the President to complete investigation of the allegations was unconstitutional and amounted to unwarranted interference with the mandate of the Ethics and Anti-Corruption Commission.**
6. **The DPP was not under obligation to act on the recommendations of the Commission. Accordingly, his decision to prosecute the petitioners was not unlawful.**

Disposition and Remedies

415. The Petitioners have sought various orders and declarations from the Court with regard to the acts of the respondents. Bearing in mind the provisions of the Constitution at Article 23 which give the Court jurisdiction to grant appropriate relief, including a declaration of rights, an injunction, and an order of judicial review, the orders we deem appropriate in the circumstances of this case are as follows:

a. **We declare that subsequent to the resignation of the Chairperson of the Ethics and Anti-Corruption Commission, Mumo Matemu on 12th May, 2015, the 1st Respondent Commission was not properly constituted in accordance with Articles 79, 249 and 250 of the Constitution of Kenya and section 4 of the Ethics and Anti-Corruption Commission Act of 2012.**
b. **We declare that the ultimatum issued by the President to the Ethics and Anti-Corruption Commission to ensure that the Director of Public Prosecutions received the subject files without delay and that the exercise should and must be concluded within 60 days was a clear violation of the provisions of Article 249(2) of the Constitution.**
c. **We declare that the Director of Public Prosecutions is at liberty to rely on any source of information in order to institute criminal proceedings whether the information emanates from the Ethics and Anti-Corruption Commission or not as long as the source is not declared to be unlawful.**
d. **Save for the foregoing we dismiss the other prayers sought in the petitions.**
e. **For the avoidance of doubt, we decline to prohibit the prosecution of the petitioners which we deem to be undertaken in accordance with the constitutional and legislative mandate of the Director of Public Prosecutions.**
f. **As the issues raised herein were issues of great public interest not restricted to the Petitioners, we make no order as to costs.**

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH, 2016

MUMBI NGUGI **G V ODUNGA** **J L ONGUTO**

JUDGE **JUDGE** **JUDGE**

DATED DELIVERED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH 2016

G.V.ODUNGA

JUDGE

Delivered in the presence of:

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