



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 382 OF 2015**

**BETWEEN**

**BUSIA COUNTY GOVERNMENT.....PETITIONER**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner is one of the county governments established pursuant to Article 176 of the Constitution. The Respondent (“**the EACC**”) is likewise an independent commission established under Article 79 of the Constitution as promoted by the Ethics and Anti-Corruption Act, No. 22 of 2011.
2. The EACC was essentially established to assist in the promotion of Chapter Six of the Constitution. In order to achieve efficiency in discharging its mandate the EACC was statutorily empowered “to conduct investigation on its own initiative or on a complaint made by any person”.
3. The issue in this Petition revolves around the authority, extent and medium of the EACC’s investigatory powers. The Petition arose as a result of the execution of certain search and seizure warrants on 4<sup>th</sup> September 2015 by the EACC. The Petitioner subsequently filed the instant cause seeking the reliefs that :

***a. A DECLARATION** be and is hereby made that the seizure of the information, documents and equipment of the County Government of Busia is unconstitutional, unlawful and violation of the Constitutional and statutory powers of the County Government under Article 186 and Schedule 4 of the Constitution.*

***b. A DECLARATION** be and is hereby made that the steps taken by the Respondent and the manner of the investigation are irrational, unreasonable and are beyond the scope of objective investigation.*

***c. A DECLARATION** that all costs born in restoring the documents, equipment and any damage incurred in the process of the search be borne by the Respondent.*

*d. AN ORDER of injunction be and is hereby granted restraining the Respondent, whether by itself, its agents, privies and servants, acting for and on its behalf whether jointly or severally from further interfering in the proper functioning of the County Government guaranteed by the Constitution. Except in accordance with the provisions of the Constitution providing for the investigation a person for the purpose of enforcing the law.*

## **Factual Background**

4. Before I identify and isolate the issue(s) to be determined, it may be valuable to relate the background facts and the litigation history as well as the parties' respective cases. The rather straightforward background may be reprised from the parties' affidavits as follows.

5. On 4 September 2015, officers of the EACC in the company of security personnel raided the offices of the Petitioner and without explaining the purpose proceeded to cart away documents and equipment. It turned out, the EACC was executing search warrants earlier obtained by the EACC before the Chief Magistrates Court at Busia. The raid allegedly led to a dysfunction of the Petitioner as most of its operations were halted with the seizure and detention of crucial documents and equipment including computers.

6. The warrants had been obtained without notice on 3 September 2015 after the EACC received intelligence reports that one Sospeter O. Odeke had allegedly colluded with senior officials of the Petitioner to defraud the Petitioner. Sospeter O. Odeke is the governor of the Petitioner. He had been named as the Respondent in the proceedings before the Chief Magistrate. He was however never served with the court process either before or even after the warrants were issued. The warrants were however directed at the said Sospeter O. Odeke and were to be executed at either his office, residence or business premises. The Petitioner's premises happen to also house the official offices of Sospeter O. Odeke in his capacity as the governor of the county.

## **Litigation history**

7. Alongside the Petition, the Petitioners also filed an application for conservatory orders on 10 September 2015. The application was certified urgent and *ex parte* mandatory orders directing the release of three specific equipment by the EACC was ordered on 11 September 2015. Directions on the Petitions were subsequently taken. The EACC's complied and filed its response by way of a Replying Affidavit on 4 December 2015 sworn by Cecily Mumbi. The EACC also filed its submissions on the Petition on 21 January 2016 in response to the Petitioner's submissions earlier filed on 11 December 2015. A hearing date for the Petition was then mutually slated for 14 December 2015 and the application for conservatory orders duly deemed as dispensed with.

8. The Petition was however later adjourned to 15 March 2016 following a request for such continuance by counsel for the Petitioner. On 15 March 2016, the Petitioner's counsel did not attend court. The Petition was consequently dismissed for want of attendance. A reinstatement order was subsequently issued on 30 March 2016 following an application by the Petitioner and on 30 May 2016 the Petition was finally heard on its merits.

## **The Petitioners' case and arguments**

9. The Petitioner's case may be retrieved from the Petition and the affidavit in support thereof.

10. The Petitioner contended that the EACC acted in violation of the Constitution and in particular Article 47 of the Constitution which demands fair administrative action. The Petitioner also contended that the EACC, in conducting the raid on the Petitioner's offices and carting away items, fettered the lawful functions of the Petitioner to provide services to the county residents and that this was contrary to the provisions of Articles 1(4)(b) and 249 of the Constitution.

11. Finally, the Petitioner contended that the EACC was improperly constituted as at the time it

conducted the investigative raid as there were no commissioners in office contrary to Articles 250, 251 and 252 of the Constitution. The Petitioner added that the EACC had also abused its investigatory powers in confiscating public documents, information and equipment with the purpose of halting the operations of the Petitioner.

12. Mr. Amana Cohen urged the Petitioner's case.

13. Mr. Cohen submitted that the EACC had violated Article 47 of the Constitution. He stated that the investigations had been pegged on unfounded claims with the intention of embarrassing the Petitioner's governor as was evident from the affidavit in support of the application for the warrants.

14. Counsel additionally submitted that prior to any adverse action being taken there was need for a notice to be given to the person to be adversely affected. For this proposition counsel relied on the case of **Geothermal Development Co. Ltd vs. Attorney General & 3 Others [2013]eKLR** where the court declared as fatal actions taken by the Kenya Revenue Authority in conducting tax assessment the absence of a notice. Counsel also relied on the case of **Joseph Mbalu Mutava vs. Attorney General & Another [2014]eKLR**.

15. The Petitioner's counsel further submitted that Section 5 of the Fair Administrative Action Act 2015 ("**the FAA**") had a clear laid down procedure where a public notice was necessary amongst other requirements yet the procedure was never followed.

16. Mr. Cohen then proceeded to submit that the EACC's actions of impounding documents and equipment had effectively "fettered the lawful functions of the [Petitioner] county Government" and this was contrary to the aspirations of the Constitution as well as the express provisions of Article 249 of the Constitution.

17. Finally, the Petitioner submitted that as the EACC was not properly constituted as provided for under Sections 3 & 4 of the Ethics and Anti-Corruption Act 2011, it could not lawfully perform or be deemed to lawfully perform its duties.

### **EACC's case and Arguments**

18. The EACC opposed the Petition.

19. In the Replying Affidavit of Cecily Mumbi sworn on 4<sup>th</sup> December 2015, she averred that the EACC has powers to investigate complaints made by any person or on its own initiative. The EACC contended that intelligence reports led it to investigate the governor of the County of Busia. Acting in good faith, it obtained orders from court allowing it to enter, search and serve documents and other property found at the residential office and business premises of the governor. The EACC contended that it acted in exercise of its constitutional mandate and that it was properly constituted.

20. Mr. Antony Opondo, counsel for the EACC, contended that Sections 13 of the EACC Act donates various powers to the EACC including the power to investigate incidents of corruption or violation of codes of ethics. Counsel also alluded to Article 252(1) of the Constitution as conferring investigatory powers at a commission's own initiative.

21. Mr. Opondo also contended that the Petition was premature as if the Petitioner was dissatisfied with the search warrants it could have moved the High Court under Section 362 of the Criminal Procedure Code or alternatively the same magistrate's court that issued the orders for setting aside. Counsel urged that there had been no violation of the Petitioner's rights under Article 47 of the Constitution as the application for search warrants could be made ex parte. Counsel relied on and extensively quoted from the case of **James Humphrey Oswago vs. The Ethics & Anti- Corruption Commission NBI HCCP No. 409 of 2013**.

22. On the issue whether the Petitioner's operations had been fettered, Mr Opondo submitted that the

Petitioner had failed to tender any evidence to prove or establish such fetter. Counsel stated that all documents and equipment had been copied or scanned and returned to the Petitioner.

## **Discussion and Determination**

### ***Issues***

23. Three issues emerge for determination.

24. First is an issue which would see to it that the Petitioner's position is vindicated if the issue is answered in the Petitioner's favor. The issue is whether the EACC at the time it obtained the search warrants and subsequently raided the Petitioner's premises was lawfully and constitutionally constituted not to render any action by the EACC void. Secondly, is whether the EACC violated the Petitioner's rights enshrined under Article 47 of the Constitution. Thirdly, is whether the EACC exceeded its investigatory powers and fettered the functions and operations of the Petitioner.

25. The issues have been isolated from the wide submissions and pleadings filed by the parties.

### ***Composition of the EACC***

26. It is not in controversy that as at the time the EACC undertook a raid on the Petitioner's premises there were no members of the EACC in office. The three members (commissioners) had all resigned from office as of 12 May 2015. The three commissioners Jane Onsongo, Irene Keino and Mumo Matemu, it is common knowledge resigned on 31 March 2015, 30 April 2015 and 12 May 2015 respectively.

27. The Petitioner argued that the EACC in the absence of commissioners had no constitutional or legal mandate to undertake investigations. The Petitioner however did not contest the power of the EACC, if properly constituted, to investigate. It is not doubted that as a commission established pursuant to Article 79 of the Constitution as read together with Article 250(1) of the Constitution, the membership of the EACC is and must not be less than three and not more than nine members. The question is whether in the absence of the commissioners and consequently absence of quorum as provided under the EACC Act, the EACC could perform and undertake its core functions including investigating economic crimes and making recommendations to the DPP. The Petitioner contended that the EACC was incapacitated. The EACC's response was that it subsisted as an entity capable of performing its tasks and functions under the stewardship of its secretariat even in the absence of the commissioners.

28. A similar question arose in the case of **Michael Sistu Mwaura Kamau & 12 Others vs. Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR** where the petitioners basically advanced similar arguments. It was, inter alia contended that the EACC's powers under Section 13 of the Ethics and Anti-Corruption Act (power to conduct investigations on its own initiative or on a complaint made by a member of the public), is exercisable whether or not the commissioners were in office. The EACC then argued that commissioners functions were limited to policy issues but not such operational matters like investigations which invited expertise and professionalism. Additionally, it was also argued that commissioners are not investigators and that investigators were appointed under Section 23 of the Anti-Corruption and Economic Crimes Act (" **the ACECA**").

29. The court in **Michael Sistu Mwaura Kamau & 12 Others –v- Ethics and Anti-Corruption Commission & 4 Others (supra)**, held that upon establishment by an Act of Parliament the EACC acquired the status of an independent commission settled to protect the sovereignty of the people. Further it was also held that the secretary to the commission as well as the investigators were all appointed and were not members of the commission. They were appointed like all other staff by the commissioners under Section 18 of the EACC Act. The secretariat (secretary and staff) could only act effectively and perform the commissioners' functions when the commissioners were in office. So stated the court:

***[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."*

30. The court then proceeded to hold as follows:

*[362]We therefore agree with the position ...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.*

31. I have no quarrel and entirely agree with the decision of the court in *Michael Sistu Mwaura Kamau's case*. In the absence of the commissioners, the secretariat on its own motion could not and cannot purport to execute and perform the core functions of the EACC. It would be contrary to law. Such core functions include investigating and recommending the prosecution of offenders.

32. It cannot be argued that there may exist a lacuna then in such circumstances in the fight against corruption. The Director of Public Prosecutions is properly enjoined under Article 157(4) of the Constitution to direct the investigation of any criminal conduct and crimes under the ACECA or EACC

Act or under any other law enacted pursuant to Chapter 6 of the Constitution are not exempt. In my view, nothing stops the Director of Public Prosecutions from investigating and pursuing such suspects or offenders .

33. The Office of the Director of Public Prosecutions Act, No. 2 of 2014, under Section 5(2), also empowers the Director of Public Prosecutions to direct investigations to be conducted by an investigative agency or assign his officers to assist in the investigation. Nothing under the law, it would appear, restrains the Director of Public Prosecutions from directing or assisting (in the words of Section 5(3) of the Office of the Director of Public Prosecutions Act) the EACC in undertaking its investigatory role in the absence of commissioners of the EACC. I hasten to add that Article 157 of the Constitution does not make any distinction as to the crimes the Director of Public Prosecutions may urge or direct the national police service to investigate.

34. The essence is to ensure that the independence of the EACC survives or appears to survive past the vacation of office by commissioners or in the absence of any commissioners, just the same way the EACC survives as an entity under Article 253(a) of the Constitution.

35. I come to the conclusion that while the absence of the commissioners did not render the EACC extinct by virtue of its juristic corporate features, in so far as its core functions of investigating economic crimes and recommending the prosecution of offenders was concerned, it had to be dormant until properly reconstituted or assisted through the Director of Public Prosecutions. The EACC in the circumstances of this case had no powers in the absence of the commissioners to initiate investigations of its own motion or any other person's motion, save any directions by the Director of Public Prosecutions.

#### **Did the EACC exceed its investigatory powers?**

36. I need not address the above question in view of my findings on the effect of the absence of commissioners has on investigatory powers of the EACC.

37. I would however have answered the question in the negative. Suffice to point out, that from the record it is evident that the powers were not exceeded. The EACC is enjoined under Section 11(1)(d) of the Ethics and anti-Corruption Act to conduct investigations and make appropriate recommendations to the Director of Public Prosecutions for consideration. Section 23(4) of the Anti Corruption and Economic Crimes Act, 2013 (“ **the ACECA**”)states thus:

***23(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.***

38. Section 29 of the ACECA on the other hand provides that:

***29(1) The Commission may, with a warrant, enter upon and search any premises for any record, property or other thing reasonably suspected to be in or on the premises and that has not been produced by a person pursuant to a requirement under the foregoing provisions of this Part.***

***(2) The power conferred by this section is in addition to, and does not limit or restrict, a power conferred by section 23(3) or by any other provision of this Part.***

39. It is clear that the EACC could, by applying the provisions of both the ACECA and the Criminal Procedure Code, push further any investigations it had started by seeking the court's help. The EACC could move the court through the use of legislation which clearly defined the power to search and seize with a view to achieving the compelling public objective of ensuring that crime is investigated.

40. Pursuant to section 29 ACECA as read together with Section 23(4) of the ACECA, the EACC prompted the court under Section 118 of the Criminal Procedure Code for a search and seizure warrants. The court obliged and issued warrants in the following terms:

*WHEREAS information has been laid before me and on due inquiry thereupon I have been led to believe that the residence, business and office premises of the Respondent Sospeter O. Odeke are used for the deposit of DOCUMENTS and OTHER THINGS NECESSARY FOR THE CONDUCT OF AN INVESTIGATION INTO AN OFFENCE.*

*This is to authorize and require you to enter the said premises with such assistance as shall be required and to use if necessary reasonable force for that purpose and to search every part of the said premises and to seize and take possession of all documents relating to defrauding Busia County Government and any other documents/ information that can facilitate conclusion of the ongoing investigation and forthwith to bring before this Court such of the said DOCUMENTS and OTHER THINGS NECESSARY FOR THE CONDUCT OF AN INVESTIGATION INTO AN OFFENCE that may be taken possession of on returning this warrant with an endorsement certifying what you have done under it immediately upon execution.*

41. The Petitioner contends that in storming the Petitioner's offices, the EACC exceeded its role as well as the precincts of the warrants.

42. I do not view it so.

43. I must first note that the interference with the privacy and property of the Petitioner was authorized by an independent party in the Chief Magistrates' court that approved and granted the warrants. The court considered it right that the rights of the individual governor and the Petitioner had to give way to those of the EACC as an investigating arm. As the courts deemed it that there were reasonable grounds to allow the search and seizure for purposes of preparatory investigations, it authorized it and granted the search and seizure warrants. I did not hear the Petitioner to fault the issuance of the warrants. The warrants must be deemed to have stood in good stead.

44. The warrants authorized the search of the governor's office and residential premises. The governor's offices are housed within the Petitioner's premises. The investigations were not to be limited to the Governor's residential premises but extended to the offices. The extent of the warrants was clearly defined. The warrants also identified the premises to be searched. The warrants additionally conferred authority upon the EACC officers to seize documents and items. I am unable to fault the EACC for executing the warrants the way it did.

***Did the EACC violate the Petitioner's Article 47 rights ?***

45. I would also have answered the above question in the negative.

46. The EACC was exercising a statutory mandate. It moved the court under Section 118 of the Criminal Procedure Code. An investigator may move the court without notice under Section 118 of the Criminal Procedure Code so long as the investigator has solid and reasonable grounds to stand on. The investigator moves the court ex parte.

47. I take note of the fact that Article 47 is not absolute. The statutory framework of the Criminal Procedure Code also limits the provisions of Article 47 and justifiably so with clear criteria that the court must be satisfied on oath that there are reasonable and solid grounds for the warrants to be issued. The preparatory investigations being undertaken in the circumstances of this case were not judicial or quasi

judicial in nature to warrant the application of Article 47 of the Constitution. I am unable to see how the Petitioners rights under Article 47 of the Constitution were violated.

48. I will also quickly add that investigations occasionally inconvenience the party being investigated. It does not however mean that an investigation must be faulted and vacated on that basis unless it is shown to the court that the investigators are simply unreasonable especially where they have to seize items or documents. Public policy would indeed favour inconvenience being occasioned if it is with a view to fighting off crime. The circumstances of each case must however be viewed sui generis. In the instant case, I do not view it that the investigators were unreasonable to deserve condemnation. Neither do I also view it that the actions of the EACC fettered the Petitioner's operations.

### **Summary of findings**

49. I find that the EACC at the time of the impugned investigations was not properly constituted and could not undertake the investigations. The investigations including the search and seizure must therefore be declared null and void.

50. I also find that the Petitioners rights were not violated and neither did the EACC exceed its investigatory powers and fetter the Petitioner's operations and functions.

### **Conclusion and relief**

51. The EACC is now properly constituted. Nothing would stop the EACC from commencing the investigation a fresh. The previous investigations must and cannot however bind the Director of Public Prosecutions. All the items seized and demanded back, the court heard, have already been returned. There would consequently be no need for any mandatory restorative orders.

52. In the meantime however, the Petitioner is entitled to a declaratory relief which I hereby grant as follows:

- a. There shall issue a declaration that the seizure of the information, documents and equipment from the Petitioner's offices on or about 2<sup>nd</sup> September 2015 was unconstitutional and illegal in so far as the same was undertaken by a body then lacking the constitutional capacity to undertake such investigation.

53. I also oblige the Petitioner with costs. The Petitioner shall have costs of the Petition, and it is so ordered.

**Dated, signed and delivered at Nairobi this 7<sup>th</sup> day of September, 2016**

***J.L.ONGUTO***

**JUDGE**