



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 61 OF 2012

IN THE MATTER OF: NON FULFILMENT OF THE ETHICS AND ANTI-CORRUPTION

COMMISSION'S MANDATE UNDER RTICLES 1, 3, 10, 22, 35, 50,73, 75, 79,

229, 249, 251, AND 252 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: NON FULFILMENT OF THE ETHICS AND ANTI-CORRUPTION

COMMISSION MANDATE VISION AND MISSION OF COMBATING CORRUPTION

IN KENYA UNDER ARTICLES 10 AND 73 OF THE CONSTITUTION 2010

AND

**IN THE MATTER OF: NON OBSERVANCE OF THE CORE VALUES OF COURAGE,
INTEGRITY,**

TEAM WORK, PROFESSIONALISM, FIDELITY TO LAW AND EXELLECE IN SERVICE

AND

IN THE MATTER OF: DELIBERATELY HOODWINKING THE PEOPLE OF KENYA BY

PRESENTING MISLEADING ANNUAL REPORT OF 2010/2011 CONTAINING DATA

INTENDED TO PORTRAY CREDIBLE PERFORMANCE BY THE COMMISSION

BETWEEN

JACKSON MAINA NGAMAUPETITIONER

AND

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

PLO LUMUMBA2ND RESPONDENT

ERICK OKONG'O OMOGENI.....3RD RESPONDENT

EDWARD R. O. OUKO.....4TH RESPONDENT

JUDGMENT

INTRODUCTION

1. By a Petition dated 5th June 2012 and subsequently amended on 2nd October 2012, the Petitioner who describe himself as “a patriotic adult citizen of Kenya of sound mind” sued the Ethics and Corruption Commission of Kenya, its former Director/Chief/Executive and its former chairman of the Board and the Controller and Auditor General, respectively, as the 1, 2, 3 and 4 Respondents for their alleged roles in non fulfillment of the Commission’s mandate to combat corruption and economic crime in Kenya, based on the Commission’s Annual Report of 2010/2011.

2. The Petitioner consequently seek orders for the declaration that the Commission did not fulfill its mandate, declaring the Annual report 2010/2011 null and void and suspending staff transfer and appointments at the Commission, accounts and refund of certain monies considered unlawfully disbursed and for the vetting of the 4th respondent Controller and Auditor General, among other reliefs.

THE PETITION

3. The Petition sets out the reason for the suit against the respective parties in the following paragraphs:

“3. The 1st Respondent, the Commission is being sued specifically in relation to non fulfillment of its mandate of combating corruption and economic and economic crime in Kenya, eight (8) years down the line, despite huge budgetary expenditure averaging over 1.5 billion Kenya Shillings a year, totaling to approximately Ksh.12 Billion in its entire life.

6. The 2nd and 3rd, Prof. PLO Lumumba and Erick Okong’o Omogeni are being sued as the former Director/Chief executive of the Kenya Anti-Corruption Commission (hereinafter referred to as KACC) and Chairman of the Kenya anti-Corruption Advisory Board (hereinafter referred to as KACAB) who were responsible of signing and publication of the misleading report intended to hoodwink the people of Kenya that the Commission was doing credible work commensurate with the huge expenditure incurred.

7. The 4th respondent Edward R. O. Ouko (herein after referred to as Controller and Auditor General) is being sued as the Auditor General for professional negligent by failure to confirm that the public money was not applied in a lawful and in an effective way.”

4. The cause of action of the petitioner is set out in paragraph 9 of the petition as follows:

“This petition is based on the Commission’s annual report of 2010/2011 published in their website www.eacc.go.ke (hereinafter referred to as the report). The huge report of 78 pages contains deliberate inaccuracies, exaggerations, fraud and unprofessional investigations all intended to portray that the Commission is a credible entity desirous in fight against corruption. Annexed hereto is the said Annual Report marked as ‘JMN 1’.”

5. The petition then purports an analysis of the Annual Report “to demonstrate the noted shortcomings in the fight against corruption by the commission” and in the petitioner’s view “the sampled excerpts from the report contain malicious, unprofessional and waste of public money, occasioned by following the wrong fraudulent scheme, are a demonstration that the commission is in dire need of total overhaul if the fight against corruption is to be accomplished.” On the basis of these assertions, the petitioner then seeks the following specific reliefs:

1. *That this Honourable Court be pleased to make an order declaring that the Commissioners did not fulfill its mandate of combating corruption and economic crimes.*
2. *That the Honourable Court be pleased to make an order declaring the Commission unprofessional in their work of combating corruption and economic crime.*
3. *That the Honourable Court do grant an Order for suspension of staff transfer and/or appointments of the Kenya Anti-Corruption Commission staffs until determination of this Petition.*
4. *That the Honourable Court be pleased to make an Order declaring the published Annual Report 2010/2011 null and void.*
5. *That the Honourable Court do grant an order that Ksh.4,603,053.00 being monies overdrawn to procure plant equipment etc. be refunded to the Exchequer.*
6. *That the Honourable Court do grant an order that Ksh.2,914,931.00 reported by the Management stores of the Commission having not been accounted for and hence lost be refunded.*
7. *That the Honourable Court do grant an Order that Ksh.13,654,550.00 being money unlawfully disbursed from the recoverable money be refunded.*
8. *That all amount/expenditure incurred by forensic investigators in tracing non-existent land in Tokyo – Japan be refunded upon presentation of the detailed account.*
9. *That the Honourable Court be pleased to make an order declaring the Auditor General incompetent as provided for in Article 229 (d) 6 and 251(d) and should be vetted.*
10. *That a Declaration be issued to the Commission to lay in this Honourable Court details of expenditures on individual accounts including the property procured and procedure used in procurement for the Financial Year 2010/2011.*
11. *That an order be issued against the Commission to provide account on all foreign trips made.*
12. *That the Honourable Court be pleased to make an order that due to the unprofessionality (sic) of the Commission, the Kenyan innocent tax payers be compensated for loss incurred by the Commission in acts of omission and commission.*
13. *That the costs of this Petition be borne by the respondents in any event.”*

6. Contemporaneously with the petition was filed a Notice of Motion seeking the interlocutory relief in similar terms as the Petition pending the hearing of the Petition as follows:

1. *That this matter be certified as urgent and service of the same be dispensed with in the first instance.*
2. *That the Honourable court be pleased to make a declaration that the Ethics and Anti-Corruption Commission did not fulfill its mandate of combating corruption and economic crimes in the Republic of Kenya.*
3. *That the Honourable Court be pleased to order the suspension of the Kenya Anti-Corruption Commission over its unprofessional conduct of responsibilities until the determination of this application.*
4. *That the Honourable Court be [pleased to issue an Order declaring the Kenya Anti-Corruption Commission [Report] published 2010/2011 un-constitutional.*

5. That the Honnourable Court be pleased to order the Anti-Corruption Commission to account for all the foreign trips made and the cost incurred thereof.

6. That the Honourable Court be pleased to give further orders and directions as it may deem fit and just.

7. That the costs of this application be borne by the Respondents.

7. No affidavit evidence was filed to support the allegations set out in the Petition or in the Notice of Motion filed there-under seeking similar relief pending hearing and determination of the petition.

RESPONSE BY THE RESPONDENTS

8. The 1st - 3rd Respondents first filed a Preliminary Objection dated 20th June 2012 challenging both the petition and the Notice of Motion on points of law as follows:

1. The Petition does not raise justiciable issues.

2. The Court has no jurisdiction to issue the orders sought/

3. No constitutional issues arise.

4. Orders sought are incapable of being granted.

5. The petition and the application violate the independence of the 1st respondent.

6. There is no allegation of breach of fundamental rights of the applicant. In addition, neither the interpretative nor the supervisory jurisdiction of the [court] has been invoked.

7. The petition and application do not conform to The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006.

8. The Petition is not supported by an affidavit as required by law.

9. The orders sought in the application are final.

10. Without prejudice to the above, there is nothing capable of conservation.

11. The application is incurably defective for invoking the provisions of the Civil Procedure Rules.

The Respondents also filed Grounds of Opposition to the entire Petition dated 6th September 2013.

9. For the 4th Respondent filed a Replying Affidavit sworn by Milcah A. Ondiek, a legal officer at the Kenya Audit Office on authority of the Auditor General on 13th February 2013, the principal defence of the 4th Respondent being that there was no claim made against him to warrant the grant of the orders sought. At paragraphs 3-6 of the Replying Affidavit, the deponent states as follows:

“3. The 4th respondent is sued for failure to comply with constitutional requirements as stipulated under article 229 (6) of the Constitution with regard to the Report of the Auditor General on the Financial Statements of the Kenya Anti-Corruption Commission (as it then was) for the year ended 30th June 2011. (Annexed and marked MAO I).

4. That the Auditor General avers in the said Report that the said Statement of the Financial

Position as at 30th June 2011, statement of changes in Equity and the statement of cash flows for the year then ended, and a summary of significant accounting policies and other explanatory information complied with the requisite provisions of section 14 of the Public Audit Act 2003 and due diligence was conducted for purposes of that audit.

5. That the Petitioner in the said Petition has not clearly stated the reason for enjoining the 4th Respondent. It is not clear whether the Petition is challenging the Audit of the Financial Statements or whether negligence and or fraud and conspiracy can be imputed to the Auditor General during and in the course of presentation of the said report.

6. That it is my opinion therefore that the Auditor general has been wrongfully enjoined in the said suit as the the petition cannot stand against the 4th Respondent as the same lacks concrete factual representations and can only be treated as frivolous, vexatious and an abuse of process.”

10. In addition, the 4th Respondent filed Notice of Preliminary Objection dated 25th September 2014 raising the following grounds;

1. That the Petition does not raise triable issues as no breach of fundamental rights or any issues that require interpretation of the Constitution have been raised.

2. That the petition is merely speculative and subjective therefore incompetent and unfounded.

3. That the Honourable Court lacks jurisdiction to grant the orders sought against the 4th respondent.

4. That the matters raised are not justiciable.

11. Considering that the petitioner is an unrepresented and in the interested of an expedited disposal of the dispute without the two-stage hearing in the event that the Preliminary objections taken did not succeed, the Court directed that parties make submission on the entire petition so that the court may make a final determination once and for all.

SUBMISSIONS BY THE PARTIES

12. When the matter came up for hearing on the 25th September 2014, the petitioner, Counsel for 1-3 Respondents, Mr. Muraya, and Counsel for the 4th Respondent, Mr. Eredi, agreed to rely on the written submissions and the pleadings and affidavits filed without making any oral arguments, and judgment was reserved.

13. The Petitioner made his submissions under two headings as follows:

“Submissions

We shall address this Honourable Court on the following issues:

a. Whether this Honourable Court should exercise its jurisdiction over the present proceedings.

b. Whether the respondents complied with the law in their undertakings touching on the present proceedings.

In addressing the above issues, we shall refer to the petition we shall refer to the petition, the petitioner’s supporting affidavit and the annexures thereto [there was in fact no supporting affidavit].

a. Whether this Honourable Court should exercise its jurisdiction over the present proceedings.

Your Lordship, it is instructive to note that every citizen of this country has na obligation to respect, uphold and defend the constitution of Kenya. The constitution vests all sovereign power to the people of Kenya. Your Lorship, the proviso of Article 22 is to the effect that

It is my humble submission that the Bill of Rights is our property, collectively and individually, not the government's. As enshrined in the highest law of the land, the Bill of Rights must be enforced. The highest – the only- priority of public officials must be to enforce the Bill of Rights, and that's the only criterion by which they should be judged and this is what informed my decision to file this petition.

Your Lordship reliance on judicial enforcement of the Bill of Rights is virtually an axiomatic good. Judicial supremacy in the enforcement of rights is the heritage of **Marbury v. Madison** in which Justice Marshall pronounced that -

“It is emphatically the province and duty of the judicial department to say what the law is. Throughout history the court has been by turns deferential and aggressive in asserting its interpretative supremacy. We have today reached a period in which the judiciary should display ‘incredible hubris’ in asserting its ‘interpretative hegemony.’”

a. Whether the respondents complied with the law in their undertakings touching on the present proceedings.

Your Lordship, first and foremost, the Petitioner wished to rely on the excerpts from the report which contains malicious, unprofessional and waste of public money and what forms the case of the Petitioner is the question of credibility and acceptability of the Ethics and Anti-Corruption Commission Annual Report 2010/2011.

Your Lordship, in respect of the Petition filed, it is eminent to note that the Respondents have never filed their answer to the Petition or response thereof, a reason the Petitioner wish to urge your Lordship to the Petition in its entirety.

1st Respondent authored the 2010/2011 report which contained inaccuracies, exaggerations, fraudulent and unprofessional investigations intended to portray that the commission was a credible entity desirous in the fight against corruption.

2nd, 3rd and 4th Respondents owned and signed the said 2010/2011 report as accurate and accept responsibility and further accept responsibility for maintenance of accounting records.

The first step undertaken by a professionally qualified investigator is to interrogate tips from the whistleblowers or any source in order to establish whether the allegations form enough prediction to warrant an investigation. Prediction is the initial analysis of facts and evidence contained in the tips intended to assist the investigator to arrive at a decision whether to proceed with the investigation or not.

Your Lordship, the petitioner argument on the basis of the said report is that in a number of cases, the commission failed in proving their integrity and purely reflected unprofessional was in dealing with corruption issues as it was mandated to.

Therefore, it is the Petitioner's submission that in all fact findings as accurately traced in the respondents 2010/2011 annual report, the petitioner's prayers are that the said report be considered in;

1. That, the commission's functions as stipulated under **section 7** of Anti-Corruption and Economic

crime Act, 2003 (herein after known as ACECA,2003) is to investigate matters that raises suspicion that corruption or economic crime have occurred or is about to occur.

That under section **47A of ACECA 2003** attempt to commit an offence involving corruption or economic crime is an offence punishable under section 48 of ACECA, 2003.

That, as shown under paragraph 6 page Xii of the Respondent's report, within twelve months the respondent intervened and disrupted a possible loss of public funds in excess of **Ksh 1.51Billion** at NSSF, SOTIK Town Council, Kitutu Chache CDF and Postal Corporation of Kenya. This constituted a crime under section 47A of ACECA, 2003 which the respondent was legally mandated to investigate and prosecute.

That, the first Respondent failure to investigate and prosecute culprits who attempted to defraud public funds in excess of **Ksh 1.5Billion** constitutes non fulfillment of its mandate to fight corruption and/or were induced by the perpetrators not to act.

2. That, the First Respondent Annual report 2010/2011 on page 10 table 4, cases 3 & 4 was commenced without enough predication to warrant an investigation in order to avoid wastage of public funds on cases which cannot stand in court of Law.

That, 2008/2009 Appropriation Act provided **Ksh. 900,000,000.00** for construction of Hola-Garsen B8 Road by the National Youth Service under the Ministry of Youth and Sports. **Annex hereto is the said 2008/2009 Estimates of Development Expenditure of the government of Kenya for the year ending 30th June 2010 marked as "JMN 2 a and b"**

That, the Respondents annual report 2010/2011 deliberately hoodwinked the people of Kenya by reporting that there were on-going investigations in cases 3&4 totaling approximately **Ksh. 5.034Billion**, wherein no such amount of funds were approved and allocated by parliament to the Ministry of Youth and sports as shown under 2008/2009 appropriation Act.

That, the Controller and Auditor General then, could only grant authority to withdraw from exchequer a maximum of **Ksh. 900,000,000.00** in the2008/2009 and subsequently audit expenditures equal to or lesser than the same amount. It is then misrepresentation by the Auditor General to give a clean bill to expenses incurred by First respondent to investigate **Ksh. 5.034Billion** funds he never authorized and hence was not public funds.

3.That, the on-going tracing of land in Tokyo, Japan reported on page 16 table 7 case No. 6 is an investigation based on misrepresentation of facts. The Ministry of Foreign Affairs was allocated funds to purchase building under 2008/2009 Development Expenditure Estimates (Appropriation Act) by Parliament. It is therefore, misleading/hoodwinking the Kenyan public by purporting to trace land in Tokyo approximately Ksh. 1.1 Billion whereas there were no such funds allocated by parliament to procure land neither was there any evidence land was purchased.

That, Asset tracing is an investigation of concealed assets acquired from corruption money. Tracing of asset occur after corruption case has been successfully prosecuted.

Annex hereto is the said 2008/2009 Estimates of Development Expenditure of the Government of Kenya for the year ending 30th June 2009 marked as "JMN 3"

That, the Auditor general audited the accounts of the Ministry of Foreign Affairs on the purchase of Tokyo Embassy and gave it a clean bill.

That, the 4th Respondent was in violation of Article 229(6) of the constitution of Kenya by satisfying accounts of the 1st Respondent which contained expenses incurred towards tracing of non-existence land in Tokyo, Japan

Annexed hereto is the said 2008/2009 financial year report of the Controller and Auditor General on Ministry of Foreign Affairs Appropriation Accounts marked “JMN 4”

I urge this honourable court to allow this petition with costs.”

14. The 1-3 respondents identified three issues for determination and their submissions thereon, may be summarized as follows:

1. Whether the petition is fatally defective for want of supporting evidence/affidavit – on which the respondent submit that the petition is defective for want of a supporting affidavit which was required under the applicable Constitution of Kenya (Supervisory Jurisdiction and protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 (Gicheru Rules) arguing that the requirement for an affidavit is not a mere procedural technicality which could be cured by Article 159 (2) of the Constitution of Kenya 2010.

2. Whether the matter raises constitutional issues – which the respondents contended that the matter of the challenge of the Annual report which was a statutory requirement under section 15 of the Anti- Corruption and Economic Crimes Act did not raise any constitutional issues and in any event the petitioner did not bring the petition within the ambit of Article 22 of the Constitution having failed to particularize his claim by setting out the specific rights violated and the manner of violation in relation to him as required by the Rules on the format of the Petition and the principle in *Anerita Karimi Njeru v. Republic* 1976-1980) KLT 1272 which was reaffirmed by the Court of Appeal in *Mumo Matemu v. Trusted Human Rights Society Alliance and 5 Ors.* (2013) eKLR.

3. The issues raised are non-justiciable – on which the respondents contended that *‘the issues raised in this matter fail the cardinal test of redressability fall under the political question doctrine or are otherwise non-justiciable. It is therefore submitted that this suit is one such non-justiciable disputes.’*

15. The 4th Respondent urged that he had observed due diligence in his conduct of the audit report on the financial statements of the 1st Respondent and pleaded lack of any factual substantiation and clarity as to his alleged misconduct relying on the replying affidavit of Milcah A. Ondiek of 15th February 2013, particulars whereof are set out above, and the preliminary points of law set out in the Notice of Preliminary Objection dated 25th September 2014.

ISSUES FOR DETERMINATION

16. The issues addressed by the parties may be considered under a chronology of three issues sequentially in order of relevance as follows:

- 1. Whether the issues raised in the petition are justiciable.**
- 2. If so, whether the constitutional jurisdiction of the court has been properly invoked; and**
- 3. If so, whether the want of a supporting affidavit renders incompetent the Petition and the Notice of Motion filed there-under.**

DETERMINATION

Justiciability

17. At the outset, it may be observed that on account of the nature of the issues of dispute, being primarily the performance of the Commission, the utilization of funds in its operations and the alleged lack of benefit in value for money for the taxpayers of Kenya by way of combating anti-corruption and economic crimes all being in the nature of policy matters, the matters raised in the petition are primarily the

province of the political branches of the Government – the Executive and the Legislature – rather than the judicial branch.

18. The principle of ‘constitutional avoidance’ as discussed by the Supreme Court of Kenya in **Communications Commission of Kenya & 5 Ors. v. Royal Media Services Ltd & 5 Ors.** (2014) eKLR that the Court will not determine a constitutional issue or question even where it is properly before it, if there is another basis upon which the case can be disposed of, does not oust the jurisdiction of the Court but rather calls for judicial restraint in cases where there exists a statutory or other remedy. In addition, in accordance with the rule in **The Speaker of the National Assembly v. Karume** (2008) EG&F, it is now accepted as a principle of constitutional adjudication that where the constitution or statute makes provision for the process for determination of a particular matter that procedure should be strictly followed.

19. In circumstances of this case, the Anti-Corruption and Economic Crimes Act, 2003 in pursuance of which the Annual Report the subject of this Petition provided as follows:

“15.(1) The Director shall cause an annual report to be prepared for each financial year.

(2) The Director shall submit the annual report to the Advisory Board and the Minister within four 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; and

(b) a description of the activities of the Commission.

(4) Without limiting what may be included in the annual report, the annual report shall include-

(a) the information set out in the quarterly reports under section 36 for the year to which the annual report relates;

(b) a summary of the steps taken, during the year, in each civil proceeding instituted by the Commission and the status, at the end of the year, of each such civil proceeding; and

(c) such other statistical information as the Commission considers appropriate relating to complaints to the Commission, investigations by the Commission and reports by the Commission on the results of investigations.

(5) The Minister shall, within thirty days after receiving the annual report, transmit it to the National Assembly.

(6) The Commission shall cause the annual report to be published in the Gazette and in such other manner as the Commission may determine.”

20. In subsection 5 of section 15 on the requirement for transmission of the Annual report to the National Assembly lies the answer to the question of justiciability of the challenge on the annual report. Section 15 was replaced by section 27 of Ethics and Anti-Corruption Act which by subsection 2 places the reporting responsibility on the Commission itself and includes the President as a recipient of the report -

(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.

21. If there was any doubt as to the primary responsible organs of the Government for consideration of reports by Commissions, the same is put paid by Article 254 of the Constitution of Kenya 2010 which gives the Parliament (National Assembly and the Senate) a constitutional duty to consider such reports in

compelling terms as follows:

“254. (1) As soon as practicable after the end of each financial year, each commission, and each holder of an independent office, shall submit a report to the President and to Parliament.

(2) At any time, 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.

(3) Every report required from a commission or holder of an independent office under this Article shall be published and publicised.”

22. Accordingly, any person, like the Petitioner, may following publication of a Commission’s report file a petition in Court under Article 258 of the Constitution, consistently with the constitutional principle of participation of the people in governance, and this must be the constitutional object of the requirement for the publication and publicization of the report under sub-article (3) of the Article 254 of the Constitution of Kenya 2010 so that the greatest attention is called of the Public who may take steps to participate in its consideration and implementation of the Report as necessary. The Petitioner may also petition for the removal of a member of a Commission under Article 251 (2) of the Constitution.

23. There remains, in my view, a residual justiciability should the organs of Parliament and the Executive fail in their primary duties of enforcing the good governance and accountability of the Commission in accordance with the Constitution upon presentation of reports. This would accord with the principle of deference in the first instance to the constitutional text reserving the consideration of reports of the Commission to the Parliament under Article 254 of the Constitution. To the extent that the Petitioner alleged that the Commission and the Auditor General had failed in their constitutional duty, the matter is justiciable under Article 258 of the Constitution for enforcement of the Constitution. Article 258 (1) of the Constitution provides –

“258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”

Whether constitutional issues arise from the Petition

24. The Petitioner did not, however, present his case as an Article 258 claim. Rather than a claim of non-performance of constitutional duty as alleged in the recital to the petition, which would be amenable to adjudication as an enforcement of the Constitution, what came out of the Petition was a challenge on the contents of an Annual Report with reliance being placed upon the provisions of Article 22 of the Constitution for enforcement of Bill of Rights violations.

25. As noted above, the petitioner’s cause of action lies in a challenge on the Annual report 2010/2011 which in his view ‘contains deliberate inaccuracies, exaggerations, fraud and unprofessional investigations all intended to portray that the Commission is a credible entity desirous in fight against corruption.’ If, as the Petitioner contends, these indicated that the 1st respondent had failed in its mandate and the 2nd and 3rd Respondent were guilty of a conspiracy to mislead the public that the 1st respondent was performing its constitutional duty by publication of the Annual Report 2010/2011 and the 4th respondent had failed in his audit role to discover such inaccuracies in the Report, it was not shown how these violated the rights and fundamental freedoms of the petitioner and those he purported to represent.

26. The Respondents relied on the principle in *Anerita Karimi Njeru*, supra, on the requirement of particularity of pleading violations of fundamental rights and freedoms. The petitioner relied on Article 22 of the Constitution of Kenya in support of his submission on the jurisdiction of the Court in the matter. Article 22 of the Constitution provides as follows

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

- (a) the rights of standing provided for in clause (2) are fully facilitated;
 - (b) 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;**
 - (c) no fee may be charged for commencing the proceedings;
 - (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
 - (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.
- (4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.”

27. A question may arise whether in view of the provision for informal documentation in Bill of Rights litigation, the strictures of the **Anerita Karimi Njeru** may be upheld. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides for similar disclosure of particulars through form of Petition under Rule 10 as follows -

“10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

- (a) the petitioner’s name and address;
- (b) the facts relied upon;**
- (c) the constitutional provision violated;**
- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;**
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

28. Rule 12 of the Rules directs the Registrar of the Court to assist in reducing an oral petition into writing in the form prescribed under Rule 10.

“12. The Registrar shall cause a prescribed form to be available in the Registry to assist petitioners who bring oral applications to have them reduced in writing.”

29. I consider that the requirements for particularity of the constitutional claim is an Article 50 imperative for the setting out of the ingredients of the claim so that the respondent knows the case it has to meet. Even where informal documentation is permitted, the substance of the complaint must disclose the elements of the claim which the Registrar in accordance with the Rule will then set down in writing. The principle of *Anerita Karimi Njeru* is, in my view, relevant notwithstanding the provisions for informal access to court. It is the content of the claim rather than its format of presentation that is material.

30. Having failed to set out the alleged provisions of the Bill of Rights violated and the manner of their violation, the petitioner did not succeed in placing before the Court a constitutional dispute based on violation of rights and fundamental freedoms for adjudication by the Court.

31. If, as suggested by the second issue of their submission, the question was whether the respondents had **‘complied with the law in their undertakings touching on the present proceedings’** the same ought to have been the subject of a judicial review application for orders of certiorari, prohibition and or mandamus as appropriate and not a constitutional petition.

Whether a petition unsupported by affidavit competent

32. The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure 2006 applicable at the time of filing the petition required a supporting affidavit to the petition. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides under Rule 10 (3) and (4) for informal application as follows:

“(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”

33. There is no requirement for an affidavit to support a Petition as shown in Rule 11 of the 2013 Rules –

“11. (1) The petition filed under these rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”

34. I would concede that there will be cases where the dispute in the Petition may be determined on the basis of submissions on law where the facts are not in dispute or where the facts in issue are matters of public notoriety as to attract judicial notice without proof. In such situations there would be no need for an affidavit in support of a petition. However, in cases such as the present where serious charges of unprofessional conduct and fraudulent accounting are made such allegations must consistently with the fair hearing principles be supported by an affidavit so that the defendant knows the case he has to meet.

35. I respectfully agree with the position taken by Lenaola, J in *Yasmin Juma, Mohamed Sheikh Dahiye & Bishak Sheikh Ibrahim v. The Trustees of Khokini Muslim Union and 2 Ors.*, (2012) eKLR in reliance on *Prince v Law Society of the Cape of Good Hope and Ors.* (1989) (4) SA 731 and *Ashcroft v. Javaid Iqbal* 129 S. Ct. 1937 on the necessity of information as to the nature of the case to enable the

other party know the nature of the case it has to meet and of the inadequacy of mere recitals of conclusory statements of a cause of action in the absence of evidence.

36. The attempt to introduce documentary evidence by attaching certain documents in the submissions cannot cure the lack of affidavit evidence to support the petition, which violates the respondents' Article 50 fair hearing rights to have the case that they have to meet disclosed in the petition and affidavit in support especially in view of the serious fraud related charges made against them.

37. The Petition was also expressed to have been based on hearsay information from certain unnamed experts and on personal inquiries made by the petitioner whose detailed particulars were not set out in an affidavit. Again as observed by the 1-3 respondents in their submissions, the petitioner based his analysis on an abridged version of the Report without its investigation materials and his reliance on budgetary allocations to query the amounts given for the value of the investigations by the 1st Respondent assumed there were no other sources of funding; his claims of unprofessional conduct were not backed by any standard of professionalism against which the 1st Respondents performance could be measured; and the petitioner does not give any evidence that there was in fact no investigation on land asset in Tokyo. That the petitioner had no evidence to support his analysis on the Report is betrayed by his prayer for an account of all the affairs of the 1st respondent as one of the prayers of the petition.

38. The Petitioner lamented that the respondents had not responded to his petition by affidavit and urged that the petition, therefore, be granted. An applicant cannot rely on failure of a respondent to respond to his undisclosed case to obtain prayers in his petition. There having been no affidavit in support of the petition, the Respondents were understandably embarrassed in the nature of the case they had to respond to and hence their reliance on Preliminary objections and grounds of objection.

39. While the court may understand the petitioner's failure in inadequate presentation of his case by lack of legal knowhow, the magnitude of the issues raised in his petition including unprofessional performance, fraud and other irregularities in the conduct of the Ethics and Anti-Corruption Commission, its officials and the Auditor General cannot forgive casual allegations without evidential proof to found judicial adjudication. It is a cardinal principle of law that matters of fraud must be proved to a standard higher than the regular standard of proof for civil cases on a balance of probabilities, and a supporting Affidavit in this case was necessary and its absence rendered the Petition incompetent.

CONCLUSION

40. Accordingly, the Court finds that the petition herein is at best a presentation of an academic critique setting out the petitioner's views as regards the Report of 2010/11, without any consideration of the information, investigations and materials upon which the report was based. The Petition challenges the accuracy of contents of the Report rather than its constitutionality, and the impact of such inaccuracies – whether fraudulent or innocent - misleading to the public though they may are not shown to have violated any of the provisions of the Bill of Rights on rights and fundamental freedoms of the applicant on his own behalf or on behalf of others of a class, group or association to which he belongs in terms of Article 22 of the Constitution of Kenya. It was also not demonstrated by evidence that the respondents had failed to discharge their duties under the Constitution. The Report is itself a manifestation of compliance with the Constitution and relevant statute, and any inaccuracies and irregularities therein could only the subject of administrative action or judicial review proceedings as a last resort.

41. While the Court commends the petitioner's patriotism and public spiritedness in pursuing a cause for the redressing perceived failures and shortcomings in the Ethics and Anti-Corruption Commission's performance - an noble venture indeed - the petition presented before the court is lacking in credible evidence to support the Petitioner's analysis of the situation allegedly portrayed in the 2010/2011 Annual Report.

42. Moreover, for the nature of remedies sought, it may be more effective to make his appeal through the Executive and or Parliament, as expressly prescribed by the Constitution, which organs may consider his analysis and make executive, legislative as well as fiscal remedies relating to the commission, including

recovery of any embezzled or misappropriated funding and future allocations or the surcharge of personnel involved and or their removal from office to correct the situation.

43. The Court views with admiration the petitioner's vigour in his prosecution of this petition, but he must accept that his petition did not meet the constitutional requirements for evidence to support the conclusions of impropriety charged against the 1-3 Respondents in their conduct reflected in Report and against the 4th respondents in his audit of the financial statements of the 1st respondent which are the subject of the Report, and the manner in which such impropriety offended his constitutional rights and those of the taxpayers he purported to represent.

ORDERS

44. Accordingly, for the reasons set out above, the Petitioner's Amended Petition filed on 2nd October 2012 and the Notice of Motion dated 5th June 2012 filed therein are dismissed. In view of the public nature of the Petition, I do not make any orders as to costs.

Dated and Delivered on the 11th day of June 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mr. Jackson Maina Ngamau..... Petitioner in Person

N/A.....for 1st – 3rd Respondents

N/A.....for 4th Respondent

Mr. Buoro..... Court Assistant.