



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL PETITION NO 230 OF 2015**

**ENG. MICHAEL SISTU MWAURA KAMAU .....PETITIONER**

**VERSUS**

**ETHICS AND ANTI-CORRUPTION**

**COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC**

**PROSECUTIONS .....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF THE**

**NATIONAL POLICE SERVICE.....4<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. Until about two months ago when he stepped aside following allegations of corruption made against him in a report presented to the President by the 1<sup>st</sup> respondent, the Ethics and Anti-corruption Commission (hereafter **EACC**), the petitioner/applicant was exercising state power as a Cabinet Secretary in the Ministry of Roads and Transport. He was appointed to the position following the 2013 general election in accordance with Article 152 of the Constitution. He states in his petition that he has held the said position since May 2013.
2. Following the EACC report, the President directed the EACC to complete its investigations within a period of 60 days. At the expiry of this period, the 2<sup>nd</sup> respondent, the Director of Public Prosecutions (hereafter **DPP**), on 28<sup>th</sup> May 2015, determined that there was sufficient evidence to charge the petitioner with the offence of abuse of office and preferred against him charges in ACC No. 11 of 2015. Attempts were made to arrest him on 1<sup>st</sup> of June 2015, as a result of which the

petitioner filed the present petition challenging his intended arrest and prosecution. He also filed an application seeking conservatory orders dated 2<sup>nd</sup> June 2015 in which he sought the following orders:

1. *That due to the urgency of this motion, the same be certified urgent, service of the same be dispensed with and the motion be heard ex parte in the first instance.*
2. *That upon hearing ex parte, the decision made by the 2<sup>nd</sup> respondent at the recommendation of the 1<sup>st</sup> respondent on the 28<sup>th</sup> May 2015 to arrest detain and or charge in court the petitioner herein be stayed and that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents, their agents and/ or servants or anyone acting through them be prohibited and/or refrained from arresting, detaining, charging and/or arraigning in court the petitioner herein pending the hearing and determination of this application.*
3. *That upon hearing inter partes, the decision made by the 2<sup>nd</sup> respondent at the recommendation of the 1<sup>st</sup> respondent on the 28<sup>th</sup> May 2015 to arrest detain and or charge in court the petitioner herein be stayed and that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents, their agents and/or servants or anyone acting through them be prohibited and/or restrained from arresting, detaining, charging and/or arraigning in court the petitioner herein pending the hearing and determination of the substantive petition.*
4. *That this Honourable Court do give directions on the hearing of the substantive petition*
5. *That the costs of this application be borne by the respondents in any event.*
3. The application was based on the following grounds:
  1. *That the investigations carried out by the 1<sup>st</sup> respondent were biased, flawed, irregular, unlawful and null and void as the same were provoked and or ordered by the Executive arm of the Government contrary to the clear and mandatory provisions of Article 79, as read together with Article 249(2) of the constitution of Kenya and section 28 of the Ethics and Ant-corruption Commission Act.*
  2. *That the 1<sup>st</sup> respondent commission lacked locus to initiate, conduct and or carry out investigations against the petitioner herein as the same was is not legally constituted in accordance with Articles 250(1) of the constitution read together with section 4 Ethics and Anti-Corruption Commission Act, 2012 and therefore the purported recommendations and finding against the petitioner have no force of law and are a nullity ab-initio.*
  3. *That notwithstanding the fact that the commission was not properly constituted it went ahead to recommend that the petitioner herein be charged in court and the petitioner stands to be deprived of his freedom following recommendations made to the 2<sup>nd</sup> respondent by an incompetent and/or non-existent commission.*
  4. *That the decision by the 2<sup>nd</sup> respondent made on 28<sup>th</sup> May 2015 is in violation of the petitioners constitutional right, has no basis in law and is contrary to the provisions of article 157(11) of the constitution and is therefore a nullity in law.*
  5. *That to allow the petitioner herein to be prosecuted on the basis of the recommendations made by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent is tantamount to sanctioning an illegality or a nullity in law and courts of law do not sanction illegalities.*
  6. *That the offences being preferred against the petitioner herein by the 2<sup>nd</sup> respondent on recommendation of the 1<sup>st</sup> respondent were allegedly committed almost 10 years ago, there*

*is therefore no prejudice to either of the parties if conservatory orders are issued as prayed in the motion awaiting the determination of the weighty constitutional issues of great public importance raised in the petition herein.*

7. *That a balance of convenience tilts in favour of granting the orders sought by the petitioner rather than refusing for if the petition herein in the most unlikely event finally fails, the petitioner will be available to be charged and prosecuted, but if he is now prosecuted and probably sent to prison he will have suffered irreparable loss if the petition in the most likely scenario finally succeeds.*
  8. *That without the intervention of this Honourable Court, the petitioner's constitutional rights stand violated*
  9. *That it is in the interest of justice that the orders sought are granted.*
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application and filed grounds of opposition both dated 3<sup>rd</sup> June 2015. In its grounds of opposition, EACC contends:
1. *The Constitutional Petition and Notice of Motion filed by the petitioner is blatantly incompetent as the petitioner has failed to set out with reasonable precision that of which he complains and the manner in which his constitutional rights have been infringed by the 1<sup>st</sup> respondent.*
  2. *The 1<sup>st</sup> respondent as constituted has the legal mandate to carry out its statutory mandate and make the necessary recommendations to the 2<sup>nd</sup> respondent, under section 35 of the Anti-corruption and Economics Crimes Act.*
  3. *That the investigations against the petitioner were initiated way back in the year 2013 when a formal complaint was made and as such the petitioner is misguided that the investigations were as a result of a directive from the Executive made on 27<sup>th</sup> March 2015 as alleged.*
  4. *Anti – Corruption cases, which are criminal in nature, are exempt from the provisions of the Limitations of Actions Act therefore the petitioner's argument that the matter was committed 10 years ago cannot stand in law.*
  5. *The petitioner has not adduced any evidence to demonstrate violation or imminent threat of his constitutional rights but has instead relied on newspaper reports which lack probative value and as such has failed to demonstrate any loss alleged.*
  6. *That the 1<sup>st</sup> respondent followed due process in the course of its investigations and the petitioner's application is an abuse of the court process and an attempting to subvert the course of justice.*
5. The petitioner made the application ex parte on 2<sup>nd</sup> June 2015 when the Court certified it urgent and directed that it be served on the respondents for inter partes hearing on 3<sup>rd</sup> June 2015. The application was canvassed before me on 3<sup>rd</sup> June 2015.

#### **The Petitioner's Case**

6. The petitioner's case as presented by his Counsel, Mr. Njuguna and Mrs. Wambugu, is that the decision of the DPP to charge the petitioner at the recommendation of the EACC cannot stand as the EACC is not legally constituted contrary to section 4 of the Ethics and Integrity Act and Article 250 of the Constitution which states that it should have 4 commissions. The petitioner further submits that the decision to charge him with abuse of office is in breach of Articles 79, 249 and 250 of the Constitution.

7. According to Mr. Njuguna, the petitioner's constitutional rights to freedom of movement and equality before the law, as well as his right to fair trial under Article 50, are also being violated.
8. The petitioner further contends that the offences with which he is being charged were allegedly committed 10 years ago, and to take him before the court before the issues raised in this petition are heard will violate his rights and his integrity.
9. The petitioner argues that the process leading to the decision of the DPP to charge him was irregular, flawed, null and void; that EACC is set up pursuant to Article 79 of the Constitution as read with Article 249 and 250; and that under Article 249, the EACC should serve the observance of the Constitution and rule of law. It is also his contention that under Article 249(2) of the Constitution and section 28 of the EACC Act, the EACC should also be independent. The petitioner argues that at the time the EACC purported to investigate him and forward its recommendations, it was not properly constituted under Article 250 as well as section 4 of the EACC Act as the Commissioners had ceased to hold office.
10. Mr. Njuguna submitted that the petitioner's problems arose out of the report of the EACC to the President, pursuant to which the President instructed the EACC to investigate, among others, the petitioner, within 60 days. He submitted further that the petitioner was re-investigated and a report forwarded to the DPP with recommendations that the petitioner be charged with abuse of office. According to the petitioner, in complying with the directions of the Executive, the EACC was acting in contravention of Article 249.
11. In joining Mr. Njuguna in asking the Court to issue the restraining orders sought by the petitioner, Mrs. Wambugu posed the question whether there is any likelihood that the petitioner's rights have been violated by the recommendation to charge him. Mrs. Wambugu's response to this question is that under Article 50, the petitioner is entitled to a fair hearing, and that if the Court finds that EACC does not exist or exists in flagrant violation of the law, the effect of the recommendation to charge him would be to violate his right under Article 50. It was her submission that the petitioner having brought out that there exists no Commission, and the Commission having recommended his arrest and prosecution, a stay should be granted as the Court has power under Article 23 to do so.
12. Mrs. Wambugu further submitted that the offence that the petitioner was charged with took place 10 years ago. It was her submission that if it has taken the respondents 10 years to investigate the charges, no harm would be done if an order of stay of prosecution was granted. She contended that the petitioner is entitled to a fair trial and protection from abuse of process, and that he had made out a case for the grant of the orders sought.
13. Mrs. Wambugu further submitted that the Secretary could not usurp the powers of the Commission as its powers were not donated to the Secretary. She urged the Court to grant the orders sought by the petitioner, noting that he was aware that the matter was of great public importance and was willing to proceed with it expeditiously. No authorities were cited by the Counsel for the petitioner in support of his case.

### **The EACC's Response**

14. In her response on behalf of the 1<sup>st</sup> respondent, Ms. Shamalla relied on the grounds of opposition filed on its behalf. She observed that the petitioner's case was that the EACC is independent and should not get any directive from the Executive. Its case, however was that contrary to this allegation by the petitioner, it had already received a complaint against the petitioner on 15<sup>th</sup> January 2013. She relied in support of this submission on the petitioner's annexure, at page 44 of the EACC report to the President. It was its contention that the matters alleged against the petitioner had already been investigated and were at the stage of analysis of evidence, and there was therefore no violation of the Constitution as the complaint against the petitioner was received pursuant to Article 252(1)(a).
15. To the petitioner's contention that he had been tried in the press, EACC's response was, first, that

- publicizing of reports under the EACC Act is allowed. Secondly, that the petitioner could not claim to have been tried in the press as courts of law have processes, the report also includes many others, and the petitioner has not been singled out. It was also its case that it had not been demonstrated that the EACC acted on directives from the President, and that what EACC gave to the President was a status report.
16. On the question of the constitution of the Commission, Ms. Shamalla submitted that the question had been addressed by Majanja J in **Constitutional Petition No 334 of 2012 – African Centre for International Youth Exchange vs EACC and Jane Muthaura** in which the facts were similar to the present case; the EACC Commissioners had not been sworn in, and recommendations for prosecution had been forwarded to the DPP. According to Ms. Shamalla, the Court had reached the decision that the absence of Commissioners did not render the acts of EACC invalid; that in reaching that decision, the Court considered Article 259 of the Constitution, and was of the view that the law cannot be interpreted to defeat itself.
17. Ms. Shamalla also referred the Court to the decision of Achode J in **Misc. Criminal Application No 288 of 2012- Ruth Muganda vs EACC and DPP** in which the Court held that the existence of the Commission is not subject to the appointment of Commissioners or any other member of staff. It was EACC's submission therefore that the petitioner cannot allege that the Commission as constituted cannot forward documents to the DPP under section 35 of the Anti- Corruption and Economic Crimes Act.
18. With respect to the petitioner's contention that he will not receive a fair trial if a stay is not granted, Ms. Shamalla responded that the petitioner has not demonstrated how his right to a fair trial will be violated if the court does not grant a stay.
19. It was also Ms. Shamalla's submission, in response to the contention by the petitioner that the offence charged allegedly took place ten years ago, that the complaint was made exactly two years ago; and that by the time the report was forwarded to the President, the investigations were complete and the evidence was being analyzed. According to EACC, it took two years to complete the investigation, and there was therefore no violation of the rights of the petitioners.
20. Finally, with regard to the composition of the EACC, Ms. Shamalla relied on section 53 of the Interpretation and General Provisions Act to the effect that a board or commission shall not be affected by the absence of a member. She urged the Court not to grant stay as prayed by the petitioner but to direct the petitioner to follow the due process.

### **Submissions by the DPP**

21. Mr. Okello for the DPP and the 4<sup>th</sup> respondent, the Inspector General of Police, agreed with the submissions made by Ms. Shamalla. He relied on the grounds of opposition filed on their behalf dated 3<sup>rd</sup> June 2015.
22. While observing that no allegations had been made against the 4<sup>th</sup> respondent, Mr. Okello noted that the claim against the DPP is that he acted on the recommendations of the EACC, which is non-existent in view of the fact that it has no Commissioners. Mr. Okello submitted that this was the extent of the petitioner's case, that the EACC is non-existent as the commissioners are not in place, and its actions are therefore null and void. It was his submission, however, that even without Commissioners, the EACC is still in existence and can perform its duties. He relied on Article 250(12) of the Constitution to submit that the Constitution recognized the office of the Secretary to the Commission who is the Chief Executive Officer.
23. Counsel further relied on Article 251 to submit that if the President were to set up a Tribunal to investigate the Commissioners of the EACC, this would not mean an end to the Commission; that the Commission would not stop functioning, and that had it been the intention of the Kenyan people that the Commission should stop functioning due to the absence of Commissioners, then they would have provided so in the Constitution. Mr. Okello submitted that since there was no

such provision either in the EACC Act or in the Constitution, the Commission can still function even without the Commissioners. Counsel relied on the decision in **Misc. Criminal Application No. 288 of 2012 - Ruth Muganda vs Kenya Anti-corruption Commission and the Director of Public Prosecution** to submit that there was a need to avoid a construction of the Constitution that would be against the public interest.

24. With regard to the application for conservatory orders, Mr. Okello submitted that the principles for the grant of such orders were well settled. He cited in particular the case of **Clinix Health Care Limited & Others vs Director of Public Prosecutions JR. Misc. No 405 of 2013** to submit that the Court noted the public interest in prosecutions and the need to balance it with the interests of an accused. It was his submission that we have a criminal process where the petitioner will be accorded all the safeguards for a fair trial to be achieved and, that there is no evidence adduced to support the allegation of malice in the petitioner being charged. Counsel relied in this regard on **JR Case No. 255 of 2014 - Republic vs Director of Public Prosecutions & Others ex-parte Midlands Limited & Another** to submit that no circumstances have been demonstrated that would warrant a stay of the petitioner's prosecution.
25. Counsel further relied on **Criminal case No 28 of 2011 – R vs PC George OKello and PC Wilson Fondo** on the need not to bar prosecution. It was his submission that the petitioner has not demonstrated the prejudice that he will suffer if he takes a plea in the proceedings against him, and the public interest in criminal prosecutions should take precedence over private rights.

#### **Submissions by the Attorney General**

26. In her submissions on behalf of the Attorney General, Ms. Irari opposed the application for stay and adopted the submissions of the EACC and DPP. She observed that the AG had been brought into the proceedings by virtue of his role under Article 156 of the Constitution, but that no allegations have been made against him; and that since this is not a public interest matter, there was no basis for joining the AG.
27. Ms. Irari submitted further that the petitioner had not demonstrated that the EACC did not follow the due process in investigating him; that no evidence has been adduced to show that if the petitioner appears before the criminal court, his right to a fair trial will be violated as the court will look at the evidence presented by both parties and make a fair determination. Ms. Irari submitted that this case was only meant to curtail the DPP's mandate under Article 157 to institute proceedings against any person who has committed a criminal offence, and the petitioner is no exception. She prayed that the application should fail.

#### **The Petitioner's Submissions in Reply**

28. In her response to the submissions by the respondents, Mrs. Wambugu contended that while the petitioner was challenging the existence of the EACC, the acts giving rise to the matter before the court were done by the EACC, and the Court should investigate whether the Commission exists. It was also her submission that the President did give directions to the EACC in flagrant violation of Article 250 of the Constitution on the independence of the Commission.
29. Mrs. Wambugu sought to distinguish the authorities relied on by the respondents with regard to the composition of the EACC on the basis that the cases arose during the transition while in this case there are no commissioners as they had all resigned.
30. To the reliance by EACC on the provisions of the Interpretation and General Provisions Act to the effect that a commission or board cannot be deemed to be unlawful on the basis that some of its members were absent. Mrs. Wambugu submitted that the provisions of the section could not oust the express constitutional provisions at Article 79 which had insulated the EACC, and the Court was under an obligation to protect the Constitution.

## Determination

31. This petition has been brought on the basis of Article 22 of the Constitution. The petitioner alleges violation of his constitutional rights under Articles 27, 47 and 50. He seeks orders pursuant to Article 23 staying his prosecution in ACC No. 11 of 2015. In accordance with the orders of the Court issued on 3<sup>rd</sup> June 2015, it is expected that he has taken a plea to the charges.
32. The sole issue for determination in the application is whether the Court should grant the orders that the petitioner seeks to stop further proceedings against him in the pending anti-corruption case. In order to do this, the Court must be satisfied that the petitioner has met the criteria for grant of conservatory orders, which the Court has the jurisdiction to grant under Article 23(3) of the Constitution. This Article provides that in petitions brought under Article 22 of the Constitution alleging violation or threat of violation of constitutional rights, the Court has the jurisdiction to grant various orders. It is in the following terms:

*In any proceedings brought under Article 22, a court may grant appropriate relief, including—*

*(a) a declaration of rights;*

*(b) an injunction;*

*(c) a conservatory order;*

*(d)....*

33. The principles on which the Court will grant conservatory orders are fairly well settled. The first is that the petitioner must show a prima facie case with a likelihood of success, and that if the conservatory orders are not granted, he is likely to suffer prejudice. As Musinga J (as he then was) observed in the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General Petition No. 16 of 2011** :

*“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”*

(Emphasis added)

34. In **Muslims for Human Rights (MUHURI) & 2 Others vs Attorney General & 2 Others, Petition No 7 of 2011**, Ibrahim J (as he was then), after citing the words of Musinga J in the CREAW case, stated as follows:

*“I would agree with my Brother, that an applicant seeking Conservatory Orders in a constitutional case must demonstrate that he has a “prima facie case with a likelihood of success.”*

35. In the case of **Martin Nyaga Wambora vs Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014** the Court expressed itself as follows with respect to the grant of conservatory orders:

*[59]“In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [an*

*applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”*

*[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention”.*

*[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory”.*

36. In addition, the Court must consider the public interest principle in determining whether or not to grant conservatory orders. With respect to this principle, the Supreme Court (Ojwang and Wanjala, JJSC) in **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013** stated as follows:

*[86]”...Conservancy Orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”*

*[63] Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest.”*

37. The question is whether, in the present case, the petitioner has met the criteria enunciated in the above decisions. Has he established a prima facie case with a probability or likelihood of success; that if the conservatory orders are not granted, he will suffer prejudice; that the balance of convenience lies in his favour, and has he demonstrated that the public interest in this case would be served by the grant of the orders in his favour?

38. The gist of the petitioner’s case is that the EACC as currently constituted is unlawful and its actions null and void as it does not have Commissioners, the erstwhile Commissioners having resigned. Consequently, its recommendations to the DPP that he should be prosecuted are flawed, irregular, unlawful and null and void. His second argument is that the investigations against him were pursuant to a directive of the President, and were therefore contrary to the provisions of Article 249 and 250 of the Constitution and section 4 of the Ethics and Anti-corruption Act. Thirdly, it is his contention that the charges against him arise out of events that took place more than 10 years ago, the submission of his Counsel being that in the circumstances, no prejudice will be suffered if the conservatory orders are granted.

39. The response of the respondents is threefold. First, it is their case that the EACC, even in the absence of Commissioners, is properly constituted and can carry out investigations and make recommendations to the DPP. The respondents have relied on two decisions of this Court in support of this contention. Their second argument is that the EACC was already investigating the

allegations against the petitioner as is evidenced by the report from the EACC to the President annexed to the petitioner's affidavit, and it was not acting on the directions of the President. Thirdly, it is their contention that the petitioner has not made out a case for the grant of conservatory orders.

40. The petitioner has alleged in his petition violation of his right to fair administrative action under Article 47, equality before the law and non-discrimination under Article 27, his freedom of movement under Article 39 as well as his right to a fair trial under Article 50. However, aside from the submission that the body that investigated the allegations against the petitioner was not properly constituted, no other attempt was made to demonstrate how the preferment of charges against the petitioner were in violation of his rights.

41. I bear in mind that in determining whether or not to grant the conservatory orders in this matter, I must not enter into an analysis of facts and evidence as this will be determined at the hearing of the petition. However, it was important for the petitioner to demonstrate how his rights were threatened in the present circumstances. In the course of the proceedings, I inquired from his Counsel, Mr. Njuguna, whether he could address the Court on the application of the principles for the grant of conservatory orders to the circumstances of the petitioner. He did not. As is apparent from the submissions set out above, the focus of the submissions before me was the status of the EACC.

42. As submitted by the respondents, the question of the composition of the EACC, in the absence of some of its Commissioners, has been considered by the High Court. In the case of **African Centre for International Youth Exchange vs EACC & Jane Muthaura** (supra) Majanja J observed as follows:

*[38.] "This case highlights the challenges faced in the transition process, where uncertainties may be created by litigation and by the mere fact that processes required to effect the transition are controlled by human beings and not machines. The Court is required to consider all the facts and more importantly to address itself to the objects and intent of the Constitution. Article 259(1) requires that the Constitution be interpreted in a manner that promotes, its purposes values and principles, advances, the rule of law, human rights and fundamental rights and freedoms in the bill of rights and permits development of the law and contributes to good governance."*

*[39.] The Ethics and Anti-Corruption Commission is the foundation upon which Chapter Six of the Constitution is built. It is the body required to superintend and enforce the provisions Chapter Six and the Leadership and Integrity Act, 2012 which is the legislation giving effect to Chapter Six. Therefore, any approach to this issue should be to secure the institution rather than diminish its capacity. In the words of Article 259, the approach must be one that meets the Constitutional purposes and objectives and fosters good governance."* (Emphasis added)

43. In the above case, Majanja J cited with approval the words of Achode J in **Ruth Muganda vs Kenya Anti-Corruption Commission and Director of Public Prosecutions Nairobi HC Misc. Crim. Appl. No. 288 of 2012** in which the Learned Judge had expressed herself as follows:

*[45] "... Thus this Court is alive to the fact 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.*

*[46] 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.** (Emphasis added)

44. The effect of the holding in these two decisions is that the acts of the EACC, even in the absence of Commissioners, are valid.
45. Admittedly, as argued by Mrs. Wambugu for the petitioner, these cases were dealing with the question of the existence and functioning of the Ethics and Anti-corruption Commission and the contracts of its staff in the transition between the old and the new Constitution, and the EACC it established. However, in my view, they represent the best judicial authority on this question at this point in time. They certainly far outweigh the petitioner's bare assertion that because the EACC does not have Commissioners, it did not have the legal mandate to investigate him, or to make recommendations to the DPP for his prosecution. In the present circumstances, therefore, I am satisfied that there is no violation or threat of violation of the petitioner's rights demonstrated that would justify the grant of conservatory orders in his favour.
46. In reaching this conclusion, I consider three other factors. First, the petitioner argues that he cannot get a fair trial, and so his rights under Article 50 are threatened. As has been held in various decisions, the leading one and the best exposition of the law on the subject being the decision of the Court of Appeal in the case of **Julius Kamau Mbugua vs Republic Court of Appeal Criminal Appeal No. 50 of 2008 [2010] eKLR**, the rights enshrined in Article 50 are trial related and an allegation of their violation cannot be made prior to the commencement of the trial.
47. Secondly and as a corollary to the first consideration above, if the alleged violations are not trial related, (noting that in this case no trial related violations have been demonstrated or can arise, the trial not having commenced), there are other, more appropriate remedies available to the petitioner. As Meoli J observed in **Malindi Criminal Case No. 28 of 2011 - Republic vs PC Okello and PC Fondo** while considering an application that sought conservatory orders on the basis that there had been a delay in the prosecution of the applicants:

***37. "I can find no better words to capture this conclusion than those used by the South African Constitutional court in Sanderson as regards appropriate relief:***

***Even if the evidence he has 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 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 be seldom warranted in the absence of significant prejudice to the accused...***

***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 prejudice as a result of delay."***

48. Thirdly, I bear in mind the words of the Court of Appeal in **Manilal Jannandas Ramji Gohil vs Director of Public Prosecutions Nairobi Criminal Appeal (Application) No. 57 of 2013**, cited in the case of **Republic vs DPP ex parte Midlands Limited (supra)** in which the Court of Appeal stated as follows:

***"We are mindful that an order staying criminal proceedings would be granted***

*only in the most exceptional circumstances. See Goddy Mwakio & Another vs Republic [2011] eKLR where this Court, in illustration of this point, stated that:*

*“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances.”*

49.No exceptional circumstances as would justify the stay of proceedings against the petitioner have been presented before me. I have noted the arguments by the petitioner that the charges against him are trumped up and intended to tarnish his name and put him to public ridicule, and are an affront to his dignity. This is not, in my view, the kind of “exceptional circumstances’ that would justify the staying of the proceedings. More importantly, this Court cannot, on the basis of the material currently before me, without more, reach a conclusion in this regard. Whether the material to be placed before the trial court passes muster or not is not a question to be dealt with by any other but the trial court. It may cause discomfort and distress to the petitioner, but it is an inescapable consequence of the need to balance societal interests in the prosecution of offenders and the interests of a party in the position of the petitioner. As was observed in the case of **Kuria & 3 Others vs Attorney General [2002] 2 KLR 69:**

*“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.”*

50.In the circumstances, I decline to grant orders staying the prosecution of the petitioner as prayed. The application dated 2<sup>nd</sup> June 2015 is therefore dismissed. Costs shall await the outcome of the petition.

51.While I am not satisfied that the petitioner has made out a case of violation or threat of violation of his constitutional rights that would merit the grant of conservatory orders, I am concerned at the issues that the present petition raises. Of particular concern is the vexed question of the composition of the EACC, and whether, in the absence of commissioners, it is properly constituted. As I have observed above, this question has been addressed in the transition process separately by two judges of the High Court. However, as this petition illustrates, it is a question that requires serious consideration, given the public interest in having an anti-corruption body that is properly constituted, and that the people of Kenya can trust to deal diligently and with integrity, with what Majanja J, in **African Centre for International Youth Exchange** (supra) referred to as “the cancer of corruption” in Kenya.

52.A second critical question that this petition raises is whether or not the EACC acted at the direction of the Executive, and if so, whether it can properly do so, and the implication of such action on the independence of the Commission and the DPP, and their capacity to competently spearhead the war on corruption.

53.In the circumstances, and though none of the parties has made an application in this regard, I am satisfied that it raises a substantial question of law in terms of Article 165(4) to merit referral to the Chief Justice for the empanelling of a Bench of an uneven number of judges to hear and determine the core issues underlying the petition.

54.I therefore refer the matter to the Chief Justice in accordance with Article 165(4) of the Constitution with the recommendation that he constitutes a Bench to hear and determine the

matter.

**Dated, Delivered and Signed at Nairobi this 9<sup>th</sup> day of June 2015.**

**MUMBI NGUGI**

**JUDGE**

**Mr. Njuguna & Mrs Wambugu instructed by the firm of Kangethe & Co. Advocates for the petitioner**

**Mrs. Shamalla instructed by the firm of Judith, Mwanza Shamalla & Co. Advocate for the 1<sup>st</sup> respondent**

**Mr. Okello, Mr Ashimosi & Ms Kahoro instructed the Director of Public Prosecutions.**

**Mr. Njoroge & Ms Irari instructed by the State Law Office for the 3<sup>rd</sup> respondent.**