



**IN THE HIGH COURT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 177 OF 2014**

**BETWEEN**

**THE COUNTY GOVERNMENT OF MERU.....PETITIONER**

**AND**

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

**JUDGMENT**

**Introduction**

- a. The petitioner is a County government. The respondent (“the Commission”) is a constitutional Commission established under **Article 79** of the Constitution with a mandate to ensure compliance with the provisions of **Chapter Six** of the Constitution on Leadership and Integrity.
- b. The dispute in this matter concerns the Commission’s powers of search and seizure. The petitioner contends that the execution of warrants of search and seizure issued by the Court violates the Constitution. In the amended petition dated 17<sup>th</sup> May 2014, the petitioner seeks the following main reliefs;
- c. *A Declaration that the raid and seizure conducted by officers of the respondent on the petitioner’s offices was done in violation of the Constitution of Kenya and was therefore an illegality.*
- d. *A Declaration that the raid conducted by officers of the Respondent on the petitioner’s offices infringed on the fundamental rights and freedoms of the petitioner as contained in Articles 31, 35(1)(b) and 40(2) of the Constitution.*
- e. *A Declaration that the raid conducted by officers of the Respondent on the offices of the petitioner was laced with mala fide, was conducted to intimidate the County Government of Meru and as such violated the petitioner’s fundamental rights and freedoms contained in Article 73(2) of the Constitution.*
- f. *A Declaration that the Respondent acted ultra vires and violated Article 79 of the Constitution of Kenya by seizing the Petitioner’s original documents on 20<sup>th</sup> March 2014 without notice and detaining the same without allowing the petitioner to make copies therefrom and without preferring any criminal charges against the Petitioner’s offices.*
- g. *A declaration that the seizure of the Petitioner’s documents on 20<sup>th</sup> March 2014 and failing to tender the same before court since is a clear and flagrant disregard of the law and the Constitution.*
- h. *A declaration that the respondent violated Article 27(1) of the Constitution of Kenya by applying double standards in their investigations to wit formally requesting for documents to assist with investigations from other public entities but opting to seize documents from the petitioner.*

- i. A declaration that the Respondent is bound by national values and principles of Governance enumerated in Article 10 of the Constitution of Kenya inter alia adhere to the rule of law, non-discrimination and transparency in its operations.
- j. A declaration that the respondent as a public body is bound by the provisions of Article 73(2)(d) and 75(2)(a) of the Constitution in subjecting its officers to disciplinary action and that a mandatory order to issue compelling the Respondent to investigate the action of Japhet Baithalu Alaine.
- k. An order of mandamus does issue and hereby issues directed at the Respondent's to discharge its statutory mandate under the provisions of Section 11 of the Ethics and Anti-corruption Commission Act to address the petitioner's complaints and take disciplinary action against one Japhet Alaine Baithalu.
- l. An order does issue and hereby issues to the Respondent to return to the petitioner with immediate effect, all original files and documents illegally and unprocedurally seized from their possession on account of the so stated raid and seizures.
- m. A permanent injunction does issue and hereby issues restraining the respondents jointly and severally from harassment and intimidation of the Petitioner herein.
- n. A prohibition does issue and hereby issues to restrain the respondents jointly and severally from using any evidence obtained from illegal and unprocedural raids and seizures from being used in any way against the petitioner.
- o. An order of Certiorari does issue and hereby issues to quash any proceedings, findings and/or investigations purportedly performed or conducted by the Respondent using the illegally seized documents.
- p. Any other relief that this Honourable Court may deem just and appropriate to safeguard the fundamental rights and freedoms of the Petitioner and the Citizens of the County of Meru.

### **Facts and background**

3. The basic facts surrounding the dispute are set out in affidavits sworn by the respective parties. The parties' depositions contain facts and extensive legal arguments, opinion and statements made on advice of counsel. The inclusion of arguments and legal propositions is not only a breach of the procedural rules governing affidavits but also tends to muddy the real issues in the controversy. **Order 19 rule 3(1)** of the **Civil Procedure Act** provides, "*Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.*" Legal arguments and propositions are better left for submissions (See ***Meme v Republic* [2004] 1 KLR 645**).
4. The petitioner's case is supported by the affidavit of Julius Kimathi, the County Secretary, sworn on 16<sup>th</sup> April 2014. He depones that various dates, that is on 16<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup> March and 15<sup>th</sup> April 2014, officers from the Commission raided the County Headquarters without prior notice and took possession and carried away all original documents from the procurement department. He depones that the County was never informed of the intended raid in writing, whether any documents were required for purposes of carrying out investigations or whether any corrupt charges had been preferred against either the petitioner or any of its officers. He further states that the respondent never disclosed the place or department to be searched, the documents seized or the purpose of the seizure.
5. The County Secretary deponed to the fact that he believed that the raid on its offices was politically instigated by an official of the Commission who was an ardent supporter of the Governor's rival during the last election. He believes that the raid on the County offices was a witch hunt by a political rival.
6. The petitioner's case is also supported by an affidavit was sworn on 16<sup>th</sup> April 2014 by Julius Kang'ote M'abuaba, a retired Chief of Muthara Location, Meru County. He depones that he is known to the County Governor, Hon. Peter Munya and Japheth Baithalu Alaine, an employee of the Commission. He states that Mr Baithalu and the Governor "*have never seen eye to eye and have had political difference ever since Hon. Munya entered politics ...*" He depones that Baithalu vigorously campaigned for Hon. Munya's rival during the last election and that he believes that Baithalu used his influence to instigate the Commission's operation, a view shared by other

- residents of the County.
7. Newton Njeru, the County Director for procurement, has also sworn an affidavit. He confirms that the Commission's officers came to the County's offices between 20<sup>th</sup> March and 15<sup>th</sup> April 2014 in commando style and entered the County offices and demanded audience with the County Director of Procurement with strict instructions that he could not leave. His efforts to find the basis for the warrants and to seek a demand were met with threats of force. He also states that was threatened with force when he tried to insist that copies of the documents be maintained. He depones that the operations of the Procurement Department have now ground to a halt. He avers that he is yet to receive summons in relation to the seized documents and that no prosecution has been preferred against any officer of the County.
  8. The respondent's position is set out in the affidavit of Ali Guyo Galgalo, an investigator with the Commission, sworn on 25<sup>th</sup> April 2014. He states that the Commission received information from an informer alleging that some members of the Meru County Assembly had registered Construction Companies to irregularly obtain contracts from the County government for the financial year 2013-2014. It also alleged that some of the companies had received payments without having offered services.
  9. After carrying out preliminary investigations into the matter, he applied for search warrants on 19<sup>th</sup> March 2014 in ***Nyeri Chief Magistrates Misc. Criminal Application Nos. 46 and 48*** which authorised any investigator appointed by the Commission to enter and search the offices of the County Secretary, Supply Chain Manager and the County Works Officer and seize and take possession of the documents.
  10. Upon receiving the warrants Galgalo visited the County Secretary's office on 20<sup>th</sup> April 2014 and informed him that he had been authorised by the court to obtain documents related to the investigation. He states that the County Secretary authorised his officer to provide the documents needed after the County Legal Officer has satisfied himself of the legality of the search warrants. An inventory of the documents was prepared and signed by the petitioners and respondent's officers.
  11. The Commission's officers returned on 27<sup>th</sup> March to collect some documents from the County Principal Account's Controller. On the same day Galgalo visited the County Secretary office where the County Secretary suddenly accused him of pursuing a political agenda and that the County Government would not give them any further documents. The officers were then taken to the County Governor's office where they were informed by the Governor that no more documents would be forthcoming from the County.
  12. Japheth Alaine Baithalu, a forensic investigator with the Commission, has also sworn an affidavit, in response to the allegations made against him by Julius Kimathi and Julis Kang'ote M'Abuaba. He admitted that he knew both of them but denied that he had any relationship with them or had interacted with them professionally. He denied having any political difference with the Hon. Munya. He also denied having any relationship with Hon. Munya's rival or having been involved in the campaign as alleged. He denied having instigated the operation that led to the search and seizure of documents from the petitioner.
  13. In a further replying affidavit sworn on 17<sup>th</sup> May 2014, Julius Kimathi depones that Commission did not effectively respond to the petitioner's concerns about the complaint made against Japheth Alaine Baithalu. He states that he did not at any time receive a search warrant as the officer to authorised to receive official documents on the County's behalf. He also denies having received any request for information in accordance. He laments that the County is being treated unfairly as there are instances where other institutions have been asked to co-operate with the Commission while the County has not been afforded such an opportunity. Mr Kimathi also contends that the Commission has failed to return documents that are not part of the investigation and this had the effect of interfering with the discharge of the County's statutory duties.

### **Preliminary Issue**

14. The power of the Commission under the Constitution and statute to investigate and prosecute corruption is not in dispute. It is also not in dispute that in the exercise of its powers, the Commission is bound by the Constitution and the powers donated by the statutes supporting its

- establishment and function. The dispute between the parties is whether the Commission exercised its powers in accordance with the Constitution and the statute. Before I deal with the core issues in dispute, I will dispose of a preliminary issue.
15. The petitioner has invoked the provisions of **Article 22** of the Constitution to enforce the provisions of **Articles 31, 35, 40** and **47** of the Constitution which protect the right to privacy, the freedom of information, the right to property and the right to fair administrative action which it alleges have been violated by the Commission. **Article 20(2)** which is on the application of Bill of Rights provides that “ *Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedoms.*” This therefore begs the question whether a County Government is a person and whether it has fundamental rights and freedoms capable of being protected.
  16. A County government is recognised as part of the State organs that exercise the sovereign power of the people under **Articles 1 (4), 6** and **176** of the Constitution. Under **Article 260** of the Constitution, “ ‘State’, when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution” while the term person, “includes a company, association or other body of persons whether incorporated or unincorporated.” Under **Article 21** of the Constitution, the obligations regarding the implementation of fundamental rights and freedoms are cast on the State and every State organ. **Article 22** of the Constitution, which has been invoked by the Petitioner, grants every “person” the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringes or is threatened.
  17. The provisions I have cited above show that there is a clear distinction between a person and a County government which is a State organ vis-à-vis the rights and obligations under the Bill of Rights. I am doubtful, that the County government *qua* County government can lodge a claim under **Article 22** of the Constitution against another State organ to enforce fundamental rights and freedoms as the County government is not a person for purposes of the Constitution and more particularly the Bill of Rights. I therefore find and hold that the petitioner cannot agitate a claim for violation of fundamental rights and freedoms against the Commission. I therefore decline to grant prayer (b) of the amended petition.
  18. The matter at hand implicates the power of the Commission and whether its exercise was in accordance with the Constitution and various statutes. Under **Article 10** of the Constitution, the rule of law is one of the national values and principles of governance. The principle of rule of law dictates that every act of the State and State organs must be justified and must find its locus in law and it is the duty of the Court to adjudicate upon and decide on the legality of the act in the event there is a dispute. Other values like integrity, transparency, accountability and good governance are infused in this task of adjudication.
  19. I am satisfied that the High Court has jurisdiction to determine this matter. It is a dispute between two State organs, a Commission and a County government regarding the extent of the powers of the Commission in enforcing warrants of search and seizure. Apart from the original and unlimited civil and criminal jurisdiction of the High Court, under **Article 165(3)(d)** of the Constitution, the High Court has —

*(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

*(i) the question whether any law is inconsistent with or in contravention of this Constitution;*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

*(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

*(iv) a question relating to conflict of laws under Article 191;*

20. What I have stated does not mean that fundamental rights and freedoms of the person do not have application to this matter. **Article 19** of the Constitution is clear that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social economic and cultural policies. The application and enforcement of laws must always take into account that the fundamental rights and freedoms cannot be ignored.
21. It is against this background that I shall determine whether the Commission's action were in accordance with the Constitution and the law.

## **Determination**

### **Whether Search warrant obtained in accordance with the law**

22. The petitioner's case is set out in **Part D** of the Amended Petition dated 17<sup>th</sup> May 2014. It prosecuted within the matrix of the national values and principles of governance set out in **Article 10** of the Constitution. Mr Omogeni, S.C., emphasised that the County's case was about fundamental principles of rule of law and that every action by State or any State organ must be backed by or justified by law in light of the principles of equality, non-discrimination, transparency and accountability. He urged the Court to consider the case in light of the principles governing the public service in **Article 232** of the Constitution.
23. The petitioner submits that the powers and authority of the Commission and its officers are prescribed in the **Anti-Corruption and Economic Crimes Act, 2013** ("ACECA"), the **Ethics and Anti-Corruption Commission Act, 2011** and the **Leadership and Integrity Act, 2012** and it is critical for the rule of law that the Commission and its officers abide by the terms of these statutes.
24. The foundation of the petitioner's case is that the Commission violated **Part IV** of **ACECA** dealing with investigations. The petitioner relies on **sections 23, 27, 28 and 29** of **ACECA** to demonstrate that the Constitution and the law were violated. Before I proceed to outline the arguments, I will set out the relevant parts of the statute.
25. **Section 23** outlines the powers of investigators under the **Act**. It provides as follows;

*23(1) The Director or a person authorized by the Director may conduct an investigation on behalf of the Commission.*

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

*(3) For the purposes of an investigation, the Director and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Director 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 Director and an investigator as if reference in those provisions to a police officer included reference to the Director or an investigator.*

26. **Section 26** provides empowers the Director to call for a statement of property acquired by a person reasonably suspected of corruption or economic crimes.

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

*(a) enumerating the suspected person's property and the times at which it was acquired; and*

*(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.*

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

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

**27. Section 27** empowers the Commission to seek certain information relating to information of an associate of a suspected person. It states;

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

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

*(3) The Commission may by notice in writing require any person to provide, within a reasonable time specified in the notice, any information or documents in the person's possession that relate to a person suspected of corruption or economic crime.*

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

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

**28. Section 28** deals with requests of records and property in possession of any person. It provides as follows;

*27. (1) The Commission may apply, with notice to affected parties, to the court for an order to —*

*(a) require a person, whether or not suspected of corruption or economic crime, to produce specified records in his possession that may be required for an investigation; and*

*(b) require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not.*

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

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

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

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

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

(a) to reduce the record to hard copy and produce it; and

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

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

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

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

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

29. **Section 29** of the **Act** deal with search of premises and it provides as follows;

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.

30. Mr Omogeni, S.C., submitted that the Commission failed to follow the provisions of the **ACECA** governing investigations. He submitted that under **section 27** of the **Act**, the Commission must issue a notice if it requires information from a person. That failure to comply with such a notice invites severe penal consequences in **section 27(4)** of the **Act**. Counsel concluded that Commission violated the provisions of the act by failing to seek information and records from the County and officers in the first instance.

31. The petitioner further submits that the Commission could only apply for warrants of search and seizure under **section 29(1)** of the **Act** where the person who is required to produce the document or thing has not produced the document or thing pursuant to the notice issued under the provisions of the **Act**. Hence, the petitioner argues, that the Commission could not lawfully apply for warrants of search and seizure without giving the County and its officers the opportunity to respond to a notice issued under **section 27(3)** of the **Act**. The petitioner case is that under **section**

- 28(1)** of the *Act*, the Commission was required to notify the County and its officers of its intention to apply to court for warrants of search and seizure and by failing to notify the petitioner of its intention to apply for warrant of search and seizure.
32. Mr Omogeni, S.C., submitted the provisions of **section 118** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* (“the *CPC*”) could not be invoked by the Commission as they are inconsistent with the provisions of **Part IV** of *ACECA* by reason of **section 23(4)** which required notice be given to persons from whom information is sought. He argued that an application for search and seizure under **section 118** of the *CPC* does not require the Commission to issue a notice requesting for information from the suspect or notification. Counsel urged that the Commission could not have recourse to **section 118** of the *CPC* to avoid the provisions of *ACECA* that require notice to be issued in this respect. It is the petitioner’s case must be set aside on that ground.
33. The petitioner submits that failing to comply with the provisions of the law, the Commission violated the Constitution and its values particularly the rule of law. The petitioner also contends that **Article 31** of the Constitution protecting the rights of privacy was also violated.
34. The Commission, on its part, denies that it violated the provisions of *ACECA* in applying for warrants of search and seizure under **section 118** of the *CPC*. The Commission submits that it cannot be held liable for executing lawful court orders. In the circumstances, the Commission contends that the search and seizure of the property of the Commission was not arbitrary contrary to **Article 40** of the Constitution which protects property. The Commission add that the petitioner cannot be heard to argue that its constitutional right to property has been violated as there is no right to property in public documents.
35. Mr Waudo, counsel for the Commission, submitted that the right to privacy protected under the **Article 31** of Constitution is not absolute and does not fall within the non-derogable rights under **Article 25** of the Constitution. That the right may be limited and qualified in accordance with **Article 24(1)** of the Constitution hence the Commission cannot be liable for executing lawful court orders. Counsel referred to the case of *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and Another Nairobi HC Misc. 54 of 2006 (Unreported)*, where the Court held that, “*where the said search is authorised by law or if such search is required in the interest of defence, public safety, public order, public morality .... the promotion of the rights or freedoms of other persons ... or enforcement or execution of a judgment ..*”
36. The Commission position is that its action was in accordance with **sections 118, 119, 120** and **121** of the *CPC*. These provisions of the *CPC* provide as follows;

*118. Where it is proved on oath to a Court or a Magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the Court or a Magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a Court having jurisdiction to be dealt with according to law.*

*119. A search warrant may be issued on any day (including Sunday), and may be executed on any day (including Sunday) between the hours of sunrise and sunset, but the court may, by the warrant, authorize the police officer or other person to whom it is addressed to execute it at any hour.*

*120. (1) Whenever a building or other place liable to search is closed, a person residing in or being in charge of the building or place shall, on demand of the police officer or other person executing the search warrant and on production of the warrant, allow him free ingress thereto and egress therefrom and afford all reasonable facilities for a search therein.*

*(2) police officer or other person executing the search warrant may proceed in the manner prescribed by section 22 or section 23.*

(3) Where a person in or about the building or place is reasonably suspected of concealing about his person an article for which search should be made, that person may be searched.

(4) If that person is a woman the provisions of section 27 shall be observed.

121.(1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

(2) If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.

(3) If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise.

37. The Commission submits that it obtained the relevant documentation from the County government pursuant to search warrants obtained from the Court which any authorised investigator appointed by the Commission to enter and search of the officers of the County to seize and take possession of documents relevant to the investigation.
38. The Commission urged that judicially authorised warrants are executed for and on behalf of the court. It is returnable to the court when executed and the person executing the warrant is required to file an inventory in court of the items seized and justify why it needs to retain custody of the items. Mr Waudo submitted that the petitioner has not demonstrated that the Commission acted otherwise than in accordance with the provisions of the **CPC**.
39. Mr Waudo submitted that in the event the petitioner was aggrieved by the issuance of the warrants, the petitioner had right to apply to the High Court for an order of revision under **section 362** of the **CPC** which empowers the High Court to call and examine records of the subordinate court to satisfy itself of the legality or propriety of any order recorded or passed.
40. The Commission rebuffed the petitioner's argument that the Commission should have first requested for information prior to seeking search warrants for the court. Mr Waudo submitted that this argument was dismissed in **Royal Media Services v Director of Public Prosecutions Nairobi HC Misc. 43 of 2013 [2013]eKLR** and **James Humphrey Oswago v Ethics and Anti-corruption Commission Nairobi Petition No. 409 of 2013 [2014]eKLR** where the Court held that prior demand is not a condition precedent for an application under **section 118** of the **CPC**.
41. In my view whether there is contravention of the **ACECA** must be determined by reading the Act as a whole in light of its objects. According to **Halsbury's Laws of England, 4<sup>th</sup> edition, Butterworths 1995, Vol 44(1)**, Para 1484; "It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act..."
42. The object of **ACECA** flows from the fact that corruption and economic crimes harm the nation and it is therefore imperative that the State takes action fight this vice. The obligation of the State to fight corruption is also anchored in **Chapter 6** of the Constitution governing **Leadership and Integrity**. The County government is not exempted from the provisions of **Chapter 6** or immune from investigations conducted by the Commission. The Commission must however act within the law.
43. **Section 23** of **ACECA** provides for the powers of investigations and a person appointed by the Director under those provisions of the **Act** has the powers of a police officer in addition to the powers provided under the **Act**. Such powers derive from other laws like the **Criminal Procedure Code**, the **Evidence Act** and the **National Police Service Act**. The only limitation to these powers is that the powers under those Acts must not be inconsistent with the powers under **ACECA** and that they must be carried out in manner consistent with the Constitution, its principles and values.
44. **Section 27** of **ACECA** upon which the petitioner anchors its case permits the Commission to seek

- certain information. This information is very specific and it relates to, “*whether the property was acquired by purchase, gift, inheritance, or in some other manner and what consideration, if any, was given for the property.*” **Section 27** cannot be read in isolation, it is a consequence of **section 26** which permits the Commission, in the course of an investigation, to require a statement of a suspect’s property if he or she is reasonably suspected of corruption. Where such a notice is given to the suspect and it is not complied with then penal consequences follow. **Section 27** allows the Commission to broaden the net of investigation. The Commission applies to court, with notice to the party, under **section 27** to seek the information from an “*associate of the suspected person.*” Under **section 28** of the *Act*, the Commission is empowered to apply to the court for orders seeking specific records from any person, whether or not suspected of corruption.
45. The first issue is whether the petitioner as a County government is a “*person*” within the meaning of the *ACECA*. Since the *Act* does not define a person, we are left to fall back on **section 2** of the *Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)* which defines a person as, “*includes a company or association or body of persons, corporate or incorporate.*” While I do not think a County government, being a creation of the Constitution, is a person within the meaning of the *Act*, it is a person *sui generis* and may be liable under the *Act* if the context permits.
46. The **sections 26** and **27** of *ACECA* refer to person reasonably suspected of corruption and economic crimes. In these circumstances, the County Government being incapable of committing offences defined under the *Act* cannot be a person reasonably suspected of corruption or economic crimes. I therefore hold that **sections 26** and **27** of *ACECA* are not relevant to the inquiry under question. Likewise **section 28** of the *ACECA* by reference to specific persons whether or not suspected of corruption and economic crimes is inapplicable.
47. Since the Commission is investigating alleged criminal activity within the County Government of Meru, the provisions of **section 118** of the *CPC* are applicable. These provisions, in so far as they apply to these investigations at hand, are not inconsistent with **sections 26, 27** and **28** of *ACECA* which as I have ruled are not applicable to these circumstances. I would add the provisions of **sections 26, 27** and **28** of *ACECA* are only applicable to investigation of specific named persons who are reasonably suspected of committing corruption and economic crimes. The petitioner is not a person reasonably suspected of any offence and no one had been identified as falling within those provisions of a suspect.
48. Another reason why the petitioner’s case is untenable is that **sections 26, 27** and **28** of *ACECA* relate to inquiry about specific property acquired by the person suspected of corruption or economic crimes and how it was acquired. The investigation in Meru County relates to tendering and other practices which may yield suspects, it is an investigation into property acquired by the persons contemplated in these provisions. It is those specific persons who may be suspects that are entitled to the protections afforded by the statute. It is when person are reasonably suspected that the Director may decide to invoke **sections 26, 27** and **28** of the *Act* to call for their personal information relating to the class of property referred to.
49. **Section 26(1)** of *ACECA* commences with the words, “*If, in the course of investigation into any offence, the Director is satisfied that it could assist or expedite such investigation.....*” These words are in a sense the preambular to **sections 26, 27** and **28** of the *Act*. They point to the fact these sections are not the exclusive means of carrying out an investigation under *ACECA*. They mean that the Commission has powers to carry out investigations into any offence using means provided not only in the *Act* but in other statutes like the *CPC*, the *Evidence Act* and the *National Police Service Act*. It is only when there is need to obtain specific information from a person reasonably suspected of corruption or any other person under **section 28** of that *Act* that these sections apply. It follows that recourse to other provisions of law is not excluded in the circumstances.
50. The net result of my finding is that the action by the Commission is that since **sections 26, 27** and **28** of *ACECA* are not applicable, the subject of the petition is governed by **section 118, 119, 120** and **121** of the *CPC*. Under the *CPC* it is not necessary to notify the party against who the warrant is being sought before moving the court. To hold otherwise would undermine the very purpose of the *ex-parte* warrant that is to prevent deliberate destruction of documents or evidence. I agree with the decision of Mumbi Ngugi J., in *James Humphrey Oswago v Ethics and Anti-Corruption Authority (Supra)* in this respect. I therefore reject prayers (a), (d) and (f) of the amended

petition.

### **Whether enforcement of warrants undermines County government**

51. The Commission is the constitutional and statutory body which is charged with the responsibility of implementing the provisions of **Chapter 6** of the Constitution. The provisions of **Chapter 6** are intended to foster probity and integrity in all State organs and no State organ is immune from its provisions. The Commission has full powers to execute its mandate to deal with corruption within County government in accordance with the law. I have not been shown any law that immunizes the County government from the provisions of **ACECA**.
52. As the warrants were executed under **section 118** of the **CPC**, the items seized are under the jurisdiction of the Court which issued the warrants, the petitioner is entitled to apply to the subordinate court for appropriate relief including making copies of the necessary documents which would enable it comply with its Statutory reporting duties.
53. The petitioner has impugned the process in which the warrants were obtained and indeed contested the warrants themselves. As these were issued through a judicial process, I am hesitant to express my views on the same in the absence of the full record before me. Ordinarily where the subordinate court has issued warrants ex-parte, it retains jurisdiction over the matter and may on application by the party aggrieved discharge, vary or set aside the warrants. In the ordinary course, the High Court may, on application or *suo moto*, exercise its revision jurisdiction under **section 362** of the **CPC** where it will call for the record and examine the legality or propriety of the proceedings. In the case of **Manfred Walter Schmitt & Another v Republic & Another Nairobi HC Criminal Revision 569 & 2326 of 2012 [2013]eKLR**, I stated as follows, “[23] *As an ex-parte order for search and seizure cannot be challenged before it is conducted, the party affected is entitled to challenge the action afterwards and the court is entitled to declare the warrant invalid. In my view, the affected party may make an application before the court that issued the warrant or in a case such as this apply for revision of the order. The Court’s duty in such a case is to assess independently and objectively the evidence present at the time the warrant was issued and determine whether there were reasonable grounds placed before the court to establish the applicant’s entitlement to an order of search and seizure. This inquiry is to be conducted on the basis of the facts as presented before the court at the time the application was made.....*”
54. I have held that the subordinate court had jurisdiction to issue warrants under **section 118** of the **CPC** upon an application by the Commission. The court did have reasons for issuing the warrants and in the absence of the court record; I am reluctant to intervene in what is within the jurisdiction of that court. The County is at liberty to move the subordinate court for appropriate orders. I therefore dismiss prayers (e) and (j) of the amended petition.

### **Misconduct of Commission Staff**

55. The petitioner has raised complaints of misconduct against Japheth Alaine Baithalu. Under **section 21** of the **Ethics and Anti-corruption Commission Act**, the staff of the Commission are bound by the Code of Ethics in the **Third Schedule** to the Act. All staff are under the supervisions of the Commission as provided by **section 11(6) (d)** and **(c)** of the Act which empowers the Commissioners to, “(d) *deal with reports, complaints of abuse of power; impropriety and other forms of misconduct on the part of the commission or its staff,* “ and “(e) *deal with reports of conduct amounting to maladministration, including but not limited to delay in the conduct of investigations and unreasonable invasion of privacy by the Commission or its staff.*”
56. The Commission retains primary responsibility over the conduct and discipline of its staff in accordance with **ACECA** and the values and principles of the public service under **Article 232** of the Constitution. Reports or complaints about staff misconduct ought to be reported to the Commissioners in the first instance. In the petitioner’s founding affidavits there nothing to show that the conduct of Japheth Alaine Baithalu had been brought to the notice of the Commission by way of a formal complaint. The only evidence of a complaint having been lodged that respect is a letter dated 13<sup>th</sup> May 2014 from the Commission acknowledging a letter from the firm of Okong’o Omogeni Advocates on the subject of “*Unethical Conduct of Mr Japheth Alaine Baithalu ....*”

written on 6<sup>th</sup> May 2014. It is annexed to the further replying affidavit of Julius Kimathi sworn on 17<sup>th</sup> May 2014.

57. By the time of filing the petition, the petitioner had not lodged a complaint against Mr Baithalu. In the letter dated 6<sup>th</sup> May 2014, the Commission pointed out to the petitioner's advocate that it could not proceed further to deal with the complaint as the court is seized of the matter. In the circumstances I cannot grant prayers (h) and (i) of the amended petition as the Commission has not failed to exercise duty towards investigating the complaint. In view of the fact that the Commission will consider the petitioner's complaint in the future, I reject any invitation to delve into the accusation against Mr Baithalu.

### **Conclusions**

58. Before I conclude, I would like to briefly touch on prayers (l) and (m) of the amended petition that deal with the effect of the evidence collected. It is premature at this stage to deal with illegally obtained evidence before such a finding has been made. In the event any person were to face a criminal trial, they are entitled to rely on the exclusionary rule under **Article 50(2)(4)** of the Constitution to exclude evidence obtained as a result of violation of the right to privacy or any other right including the fact that the documents seized illegally.

59. In summary, my findings on the case brought by the petitioner are as follows;

- a. The County government is not a 'person' who can petition the High Court for violation of its fundamental rights and freedoms under **Article 22** of the Constitution by another State organ.
- b. Notwithstanding the finding in (a), the Court has the duty satisfy itself of the legality of the action of the Commission in respect of the County. This is a matter within the jurisdiction of the High Court to inquire under **Article 165(3)(d)** of the Constitution.
- c. The provisions of **sections 26, 27 and 28** of the ***Ethics and Anti-corruption Act*** are not applicable to the facts and circumstances of this case as the County government is not a person reasonably suspected of corruption or economic crimes or an associate of such person or a person contemplated by the said provisions.
- d. In line with its duty to investigate corruption, the Commission was entitled to apply for warrants of search and seizure under **section 118** of the ***Criminal Procedure Act*** and as result of the execution, the material collected from the petitioner is now the subject of the subordinate court that issued the warrants. The County government is entitled to move the subordinate court to vary, discharge or deal with the material under its custody as it deems fit.
- e. Any complaint against an officer or employee of the Commission must be lodged before the Commission in the first instance. The petitioner has not shown that the Commission has failed to exercise its mandate hence an order of mandamus cannot issue against the Commission directing it to deal with the complaint against it member of staff.

### **Disposition**

60. The petition is therefore dismissed. As both parties are State organs, each party shall bear its costs.

61. I thank the counsel for their arguments and if I did not cite all the authorities quoted, it is not because they were not useful.

**SIGNED BY**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 9<sup>th</sup> JUNE 2014.**

**MUMBI NGUGI**

**JUDGE**

Mr Omogeni, S.C., instructed by Okongo Omogeni and Company Advocates for the petitioner.

Mr Waudu, Advocate, instructed by the Ethics and Anti-Corruption Commission for the respondent.