



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC. NO. 218 OF 2013**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**- VERSUS-**

**BONIFACE KATANA KILAVERI..... 1ST DEFENDANT**

**COMMISSIONER OF LANDS ..... 2ND DEFENDANT**

**RULING**

[1] The applicant in this suit prays for the following orders

(a) *The Ethics & Anti-corruption commission as a commission*

*established under Article 79 of the Constitution, with powers of a commission under Chapter Fifteen of the constitution, has no locus standi pursuant to those provisions to institute any proceedings including the present suit, against the 1st defendant herein.*

[b] *Consequent upon (a) above, a declaration that the present suit by the plaintiff against the 1st defendant is a nullity for lack of locus standi on the part of the plaintiff to institute the same against the 1st defendant/applicant.*

(c) *The suit as well as the Notice o Motion filed herein all of which are dated and filed in Court on the 27th September, 2013, insofar as the same relate to and touch on the 1st defendant/applicant be struck out.*

(d) *Alternatively, and without prejudice to the preceding prayers, a declaration that this court has no jurisdiction to determine any issues pertaining to matters arising from Chapter Six of*

*The Constitution insofar as the same relate to and affect persons/individuals who are not either state officer or public officer within the meaning ascribed to those offices by Article 260 of the The Constitution.*

(e) *An order/declaration that the true and correct application of section 11 (1) (k) of the The Ethics and Anti corruption Commission Act 2011 is the the same can only be applicable to persons who under Chapter Six of The Constitution qualify the test of being State or Public Officers and therefore the same does not give the Plaintiff herein any extra mandate so as to include the 1st Defendant/applicant in that*

category.

(f) Accordingly, for lack of locus standi on the part of the plaintiff, and lack of jurisdiction on the court; all proceedings in this suit against the 1st defendant are a nullity.

[2] Mr. Mbuti Learned Counsel for the applicant in support of the application argued that the plaintiff has no locus standi to institute the suit against the defendant. He argued that Article 79 sets out the powers of the plaintiff. He stated that the plaintiff's powers are all investigative and not prosecutorial. He contended that the Commission is established for compliance with Chapter 6 of the Constitution and persons affected by the same are State Officers under Article 260. He averred that this is fortified by Article 20 of the Constitution which allows effective administration action of Chapter 6. He stated that the defendant is not a state officer and cannot be prosecuted by the plaintiff. He further argued that the present KACC Act refers to Chapter 6 of the Constitution and that after investigation KACC is mandated to refer the case to the director of Public Prosecutions, he stated that the boundaries are set. He referred to Duport Steel Ltd and Others v Sirs and others [1980] 1 ALL ER 529 and Samuel Kamau Macharia the Official Receiver Madhupaper International Ltd (in liquidation) v Kenya Commercial Bank Ltd, Kenya Commercial Finance Co. Ltd, Kenya National Capital Corporation Ltd 2012 eKLR in his assertion that the court cannot expand the confines of jurisdiction. That the Constitution has established the powers of KACC and that parliament cannot expand the same and that the court should give a clear and unambiguous interpretation of the Constitution.

He argued that the subject matter relates to Block XLB III 145/146. That those properties are registered in his clients name. That a company called African Marine claims that the land belongs to it. To prove that assertion the applicant annexed a caveat emptor placed on the Daily Nation Newspaper of 18th June 2013. He argued that this is a dispute of two individuals and therefore the same does not fall under Chapter 6 of the Constitution and that KACC has no locus standi to come in between the two private individuals. That the plaintiff cannot invoke this court's jurisdiction. He prayed that the present application be allowed and the plaintiff's application be struck out.

[3] Mr. Mola Learned Counsel for the respondent started by addressing the court on the mandate and locus standi of EACC. He said that the EACC is established under Article 79 of the Constitution which shall be an article for compliance and enforcement of Chapter 15. He said that parliament enacted Act No. 22 of 2011 to operationalize the EACC. He stated that Sec. 11 of EACC Act has additional functions and of relevance is the institution and conduct of proceedings in court for the purposes of recovering and protecting public property. He argued that this is clearly provided under Sec. 11(k) He stated that, that function was not challenged by the applicant. He averred that what was challenged by the applicant was the constitutionality of that proviso. He stated that every Act of Parliament is constitutional unless it is otherwise proved. Mr. Mola argued that the applicant is assuming that what parliament did is wrong. The Counsel gave the history of the commission, that the authority was created in 1987, wound up in 2000 following a High Court ruling. That the death of KACC was followed by Anti Corruption Police Unit which operated under CID until 2003 when parliament enacted the Anti corruption and Economic Crimes Act No. 3 of 2003. This is the Act that came up with the Kenya Anti Corruption Commission and described its powers. A new Commission was created that is the Ethics and Economic Crimes Act which has saving and transitional provisions under Sec. 33B. Most of the powers were saved and enhanced under Sec 11 (k)

The Counsel stated that to argue that KACC is for leadership and integrity matters only is to misunderstand the Act and that one needs to look at the over all picture and objects of the Act. He argued that the Constitution must be given a liberal purposeful interpretation.

[4] On locus standi, the respondent averred that this suit is brought on behalf of the public being land that was lost through corruption. It stated that it had proved that this land belonged to Kenya Ports Authority and that whoever is on the land is there on lease from Kenya Ports Authority. The respondent argued that the person who complains about locus standi must show a grave overwhelming injustice to himself if the litigating party was allowed to litigate. Further that there was grave injustice shown here. The respondent relied on the case of El-Busaidy v Commissioner of Lands and 2 others Mombasa Civil Case No. 613 of

2001 which stated that the Attorney General cannot be said to all the time protect Public Property and that there is a wide mandate in public spirited litigation. Mr. Eredi State Counsel for the Attorney General concurred with the sentiments of Mr. Mola for the respondent and had nothing useful to add.

[5] Does the plaintiff have locus standi in this case?

The Ethics and Anti corruption Commission was established under Article 79 of the Constitution. Article 80 allows Parliament to enact legislation. The pertinent sections provide

(a) *establishing procedures and mechanisms for effective administration of this Chapter*

(b) ...

(c) ...

(d) *making any other provision necessary for ensuring the promotion of the principles of leadership and integrity referred to in this Chapter and the enforcement of this Chapter. (underlining mine)*

Article 252 (1) of the Constitution states

*"Each commission and each holder of an independent office*

(a) ...

(b) ...

(c) ...

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

The powers to prosecute are provided for in legislation to wit the Ethics and Anti-corruption Act No. 22 of 2011 on Section 11 (k)

*"institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures."*

Those powers are allowed by the Constitution under Article 252 (1) (d). It is therefore not true to say that the Ethics and Anti-corruption Commission has no locus standi.

[6] Having held that the commission has properly filed this suit pursuant to Article 79,80 and 252 (i) (d) the issue of jurisdiction and whether or not the parties are State Officers falls on the wayside. In any case, if the contention of the applicant is that a Land and Environment Court is different from the High Court and that therefore, it cannot handle matters under Chapter Six ( and which is not the issue here) This issue has been dealt with in Malindi High Court Criminal Appeal No. 141 of 2009 Samson Matende v Republic. In that case a two judge high court bench has held that the powers of these courts are the same. I am not aware of any decision to the contrary.

[6] It has not been denied that the land herein belongs to Kenya Ports Authority. That Kenya Ports Authority has leased the land to African Marine, Kenya Ports Authority is a public body and hold the suit land for public. It is this land that is held for public that the plaintiff wants to have returned to the owner Kenya Ports Authority for public good. The Constitution is a living document, it must be read liberally and must be given a purposeful interpretation. The Acts of Parliament enacted under it must be read together with it. I agree with counsel for the respondent that the applicant seems to have a problem with the

Ethics and Anti Corruption Act 2011 Sect. 11(k). If the contention is that the provisions of the said section is unconstitutional then the proper procedure is not to raise the issue through a notice of motion but to file a reference to the Constitutional Court for the issue of constitutionality of that particular section to be determined.

[7} In the meantime I find that this application is without merit and the same is dismissed with costs.

**Dated and delivered in open court at Mombasa this 5th day of**

**June, 2014.**

**S. MUKUNYA**

**JUDGE**

**5.6.2014**

In the presence of:

Mr. Kagucia Advocate for the plaintiff/respondent

Mr. Mbuti Advocate for the defendant/applicant

Mr. Eredi Advocate for the second respondent