



Ethics and Anti-Corruption Commission v Wandugi (Miscellaneous Application E605 of 2025) [2025] KEMC 213 (KLR) (Crim) (16 September 2025) (Ruling)

Neutral citation: [2025] KEMC 213 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
CRIMINAL
MISCELLANEOUS APPLICATION E605 OF 2025
CN ONDIEKI, PM
SEPTEMBER 16, 2025**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPLICANT

AND

FELISTA WANJIRU WANDUGI RESPONDENT

RULING

1. Both the power flexed by the State and the rights and/or freedoms enjoyed by the people, are kept in check by the principle of legality - otherwise known as the principle of limited government - a core tenet of civil liberties and the rule of law. This principle postulates that whereas the State can only flex power to the extent expressly authorised by law, an individual enjoys rights and freedoms to do anything save that which is expressly proscribed by law. This principle, needless to restate, applies to search warrants, the subject of this Ruling.
2. In distinctly defined situations, the law permits a Magistrate's Court, in exercise of its criminal jurisdiction, to issue an ex parte search warrant to officers authorized by the law and Court to conduct searches. In this Ruling, apart from three merit questions up for determination, two fundamental preliminary questions are thirsting for resolution in limine. The first fundamental preliminary question is whether after the ex parte search warrant has already been executed, the warrant is amenable to challenge before a Magistrate's Court. Put differently, does a Magistrate's Court which issued the search warrant ex parte, become functus officio upon issuance and execution thereof?
3. Second, impelled by the nature of issues raised by the Respondent, this Court will further not only pronounce itself on the preliminary question whether this Court is clothed with jurisdiction to determine the specific questions and/or issues raised by the Respondent, but it will also strive to demystify the connected tendency of conflation of the criminal jurisdiction reach of this Court in relation to search warrants on one hand, and the jurisdiction of this Court to determine a claim relating



to violation of human rights limited to Article 25(a) & (b) of *the Constitution* and/or the judicial review jurisdiction of this Court, on the second hand, and the jurisdiction of the High Court to determine a claim relating to violation of human rights generally and/or the judicial review jurisdiction of the High Court, on the third hand, often leading to an avoidable imbroglio in regard to the forum conveniens.

4. Third and finally, this Court will determine the fate of a challenge, like this, which raises a mixed grill of issues some of which fall within the jurisdiction of a Magistrate's Court and others falling beyond the jurisdictional reach of the Magistrate's Court.

Part II: Background

5. Vide a Notice of Motion - Ex Parte - dated 30th April 2025 and filed on even date, the Applicant sought orders of this Court that:
 - i. the Application be certified urgent and heard ex parte in the first instance;
 - ii. a warrant to search be issued to the Applicant's Investigator, Andrew Lekamparish, to have access and/or gain entry and search the Respondent's residential premises situated at Ruiru Murera Jerusalem Kimbo, Ruiru Sub-County, within Kiambu County, and any other premises, and seize documents, sale agreements, transfers, undertakings, jewelry, any electronic devices (including laptops, desktops, computers, hard disks, flash disks, storage devices, safe boxes, mobile phones), any unexplained sum of money and safe boxes, relating to the ongoing investigations and other things that can facilitate conclusion of the ongoing investigation into corrupt conduct or economic crimes; and
 - iii. the said Investigator be granted permission by this Court to cart away the said things and require the Respondent to give access to credentials in relation to such electronic devices or such necessary rights to enable the Investigator to access information therein stored which may be relevant to the investigations;
 - iv. due to the nature and urgency of the of the intended search operation, the warrant be executed at (sic) 6 am – 6 pm;
 - v. due to the nature and urgency of the intended search operation, the need for endorsement of the search warrant by the Court within the local jurisdiction of the Respondent be dispensed with; and
 - vi. there be no orders (sic) as to costs.
6. The Application was predicated on the grounds set out on the face of the Motion and facts deposed in the Supporting Affidavit sworn on 30th April 2025, by the said Investigator.
7. It was averred that the Applicant received a report that between January 2017 and March 2025, a public official named David Mbogo Muthee accumulated unexplained wealth through abuse of office, conflict of interest, embezzlement of public funds and money laundering. It was further averred that during the period, through two proxies, the said official received Kshs. 272,751,022 and Kshs. 237,749,176 suspected to be proceeds of corruption. In this connection, it was averred that the Applicant was undertaking investigations under section 11(1) of the Ethics and Anti-Corruption Act, in respect to the said allegations and in this connection, it was necessary to search the offices, residential and business premises of the Respondent herein, who was suspected to be working in cahoots with the said public official.
8. Upon carefully considering the Application, prayers 1, 2, 4, and 5 were granted. However, having addressed my judicial mind to the Respondent's rights to both silence and refusal to give self-



incriminating evidence - as guaranteed by Article 49(1) (b) & (d) of the Constitution - prayer 3 was declined to the extent that this Court was required to compel the Respondent to provide the electronic gadgets access credentials and granted it only to the extent of the Investigator carting away recoveries contemplated under prayer 1 for further investigations.

9. This Court reiterated the peremptory principle that the intended search shall be conducted with strict observance and respect of the suspect's dignity as guaranteed by Article 28 of the Constitution; and in a manner consistent with the freedom against cruel, inhuman and degrading treatment as guaranteed by Articles 25(a) and 29 (c)(d)(e) & (f) of the Constitution as given effect by the Prevention of Torture Act, Cap 88 of the Laws of Kenya.
10. The Applicant was directed to file a return of investigations, on or before 15th May 2025.

Part III: The Respondent's Case

11. On 15th May 2025, the date appointed for mention of this matter to confirm filing of a return of investigations and for further directions, learned Counsel Mr. Makori and Ms. Agonga instructed by the Respondent, appeared and opposed closure of this file on grounds that the Respondent intended to challenge the search on a three-prong basis:
 - i. Whether the search was conducted in accordance with the law and the orders of this honourable Court dated 2nd May 2025;
 - ii. Whether the Respondent's rights to privacy and protection from self-incrimination were violated; and
 - iii. The remedies available to the Respondent.
12. In relation to the question whether the search was conducted in accordance with the law and the orders of this Court dated 2nd May 2025, it is argued that it was not, on account that the Respondent was forced to surrender log-in electronic gadgets credentials including passwords and that children were subjected to humiliating search without parental consent. Reliance is placed upon Robert Mwangi Mugo v OCS Nyahururu Police Station & 2 others [2022] eKLR; and Jimi Wanjigi & another v Inspector General of Police & 3 others [2019] KEHC 11436 (KLR).
13. Regarding the question whether the Respondent's rights to privacy and protection from self-incrimination were violated, it is answered in the affirmative, arguing that the Applicant published the search in their X handle to paint a picture that she is corrupt and yet she is deemed innocent, contrary to Article 28, 31 and 50(2)(a) of the Constitution.
14. Regarding the remedies available to the Respondent, it is submitted that this Court should: (i) issue a declaration that the search was illegal, unconstitutional and a violation of the Court Ruling dated 2nd May 2025; and (ii) an order of immediate return of the items seized.

Part IV: The Applicant's Case In Response To The Respondent's Challenge

15. In the Supplementary Affidavit sworn on 29th May 2025 by Mr. Andrew Lekamparish, the Investigator, the Applicant took a stance that (i) the ex parte search warrant has already been executed by the Applicant and this challenge is thus overtaken by events and this Court is consequently functus officio; (ii) the orders sought by the Respondent are ambiguous; (iii) that the search was conducted in accordance with the law and the orders of this Court in execution of a search warrant lawfully issued by this Court; (iv) that the Respondent's rights under Articles 28, 29 and 50 of the Constitution were not violated; (v) that section 121 of the CPC does not impose an obligation upon the Applicant



- to demonstrate that the things seized are connected to the offence alleged by the Applicant; (vi) the Applicant is in the process of analyzing the documentation since it is voluminous and in due course, the Applicant may return documents which are not needed to advance the investigations; and (vii) discomfort arising from the search cannot constitute a sufficient ground to set aside the search warrant.
16. In the Applicant's written Submissions dated 3rd July 2025, learned Counsel, Ms. Murugi representing the Applicant proposes five issues for determination as follows:
- (i) whether the inherent jurisdiction of this Court has been properly invoked?
 - (ii) whether the commission acted within its mandate in applying for the warrants?
 - (iii) whether the grant of the search warrant was merited?
 - (iv) whether the rights of the Respondent were violated as a result of the exercise of the commission's mandate in executing the search warrant.
 - (v) whether it is against public interest to set aside the orders.
17. It is argued that the inherent jurisdiction of this Court has been properly invoked, citing sections 118 and 118A of the CPC and that this Court should take caution not to unjustifiably interfere with investigations. Reliance is placed upon *Republic v Kenya Anti-Corruption Commission & 2 others Ex Parte Wildlife Lodges Limited* [2014] eKLR; and *Republic v Chief Magistrate Milimani & another Ex Parte Tusker Mattresses Ltd & 3 others* [2013] eKLR.
18. Concerning the question whether the commission acted within its mandate in applying for the warrants, this is answered in the affirmative citing sections 11, 23, 26, and 55 of ACECA plus Article 79 of *the Constitution*. Reliance is also sought in *Republic v Kenya Anti-Corruption Commission & 2 others Ex Parte Wildlife Lodges Limited* [2014] eKLR.
19. On the question whether the grant of the search warrant was merited, it is also answered in the affirmative, citing sections 118, 118A, 119, 120, and 121 of the CPC. It is contended that the Application had met the threshold of a reasonable suspicion in line with *Gordon Ngatia Muriuki v Director of Prosecutions & 2 others*, Petition No. 207 of 2014 (sic).
20. Regarding the question whether the rights of the Respondent were violated as a result of the exercise of the commission's mandate in executing the search warrant, it is answered in the negative placing reliance in *Busia County Government v Ethics and Anti-Corruption Commission* (sic); *Innocent Momanyi Obiri v EACC & another ACEC Misc. 24 of 2019* (sic); *Timothy Bryant* (sic); *Mape Building and Engineering v AG 7 others* [2016] (sic); *William Baraka Mtengo v Attorney General & 3 others* (2018) eKLR; and *George Onyango Oloo v EACC & another ACEC Misc. Cr App. 20 of 2019* (sic).
21. On whether it is against public interest to set aside the orders, it is answered in the affirmative.

Part V: Questions For Determination

22. Gathering from the Respondent's objection, the response thereto and the rival submissions, five (5) questions have commended themselves for determination as follows:
- i. Whether the Court which issued a search warrant ex parte becomes functus officio upon issuance and execution thereof.
 - ii. Whether this Court is clothed with jurisdiction to determine the particular questions and/or issues raised by the Respondent.



- iii. Whether the search was conducted in accordance with the law and the orders of this Court (dated 2nd May 2025);
- iv. Whether the Respondent's rights to privacy and protection from self-incrimination were violated; and
- v. The remedies available to the Respondent, if any.

Part VI: Analysis Of The Law; Examination Of Facts; Evaluation Of Evidence And Determination

i. Whether the Court which issued a search warrant ex parte becomes functus officio upon issuance and execution thereof

23. In the Supplementary Affidavit sworn on 29th May 2025, by Mr. Andrew Lekamparish, the Investigator, it is deposed that the ex parte search warrant has already been executed by the Applicant and this challenge by the Respondent is thus overtaken by events. This position suggests that after an ex parte search warrant has been executed, it becomes final thereby and not amenable to challenge by the Respondent. In other words, the Applicant's stance suggests that this Court is functus officio and hapless, having been approached by the Respondent too late in the day.
24. On the onset, I must underline that both questions (i) and (ii) relate to the jurisdiction of this Court. Accordingly, both must be settled at the earliest. It is in this connection that it's incumbent upon this Court to determine at the earliest whether a Court becomes functus officio after issuance of ex parte Orders generally (and in this case, a search warrant) and after execution thereof.
25. However, before I finally determine the primary question of the array of jurisdiction of this Court under question (ii), this Court will foremost determine the derivative question whether upon issuance of the search warrant ex parte, this Court became functus officio.
26. Before moving an inch, the question to determine at the earliest is whether this Court is clothed with jurisdiction to determine the issues raised or whether it is functus officio. It will be prudent to consider the array of jurisdiction of this Court in the context of sections 118 and 118A of the CPC (whose collective legal effect is to empower this Court to issue a search warrant ex parte). This Court is of the judicial view that the issue of jurisdiction so central that it cannot be disregarded, since it does not fall under the issues which can be categorized as "undue procedural technicalities" as contemplated under Article 159(2) (d) of *the Constitution*. Jurisdiction is not a mere procedural technicality. It flows from either *the Constitution* or legislation or both. See the Supreme Court decisions in Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR; and In the Matter of Interim Independent Electoral Commission [2011] eKLR.
27. So central and determinative is the question of jurisdiction that a Court cannot turn a blind eye to it even where it is not raised by any party, and it should be settled in limine. In Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR, the Court of Appeal (Karanja, Ouko & Kiage, JJA.) entered the following rendition: "So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on Courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain."
28. And granted that jurisdiction is everything, the Court must inquire into its jurisdiction before Judgement is rendered. Without it, a Court has no power to make one more step and should instead



- down tools in respect of the matter before it, the moment it holds the view that it lacks it. See Owners of Motor Vessel “Lillian S” v Caltex Oil (K) Ltd [1989] KLR 1 (hereinafter “the Owners of Motor Vessel “Lillian S” case”).
29. There is no universally accepted definition of jurisdiction. Broadly speaking, jurisdiction is the authority or power granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. In the context of Kenya, jurisdiction of a Court is the authority or power granted to a Court to admit, consider and determine a legal matter on an area of responsibility defined by *the Constitution* and/or Act of Parliament and more particularly, the power reposed in a Court to interpret and apply the laws contemplated by Article 2 of *the Constitution* of Kenya and those set out under section 3 of the *Judicature Act*. See the locus classicus on this subject namely the Owners of Motor Vessel “Lillian S” case.
 30. It's now an entrenched edict, well-settled I must add, that first, jurisdiction is everything and second, a Court of law can only hear and determine that which is within its domain, as circumscribed by *the Constitution* or Statute or both. The designers of this edict were justified by well-founded fears, chief among them being that authority -except when circumscribed- is inherently corruptive and a Court may fall into the temptation of becoming what Lord Mersey once described in his riveting analogy as “an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be.” See *G & C Kreglinger v New Patagonia Meat & Cold Storage Co. Ltd* (1913).
 31. Article 2(2) of *the Constitution* provides that no person may claim or exercise State authority except as authorized under *the Constitution*. In the foregoing context, Courts and other public bodies should work within the powers expressly conferred by *the Constitution* or statute or both, but not by implication. Power should not be expanded through judicial craft. See *Geoffrey K. Sang v Director of Public Prosecutions & 4 others* [2020] eKLR, per Odunga, J.; *Chogley v The East African Bakery* [1953] 26 KLR 31 at 33 and 34; *Re: Hebtulla Properties Ltd.* [1979] KLR 96; [1976-80] 1 KLR 1195; *Warburton v Loveland* [1831] 2 DOW & CL. (HL) at 489; *Lall v Jeypee Investments Ltd* [1972] EA 512 at 516; *Attorney General v Prince Augustus of Hanover* [1957] AC 436 AT 461; *Republic v Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others* [2004] 2 KLR 530; and *Re Hardial Singh and Others* [1979] KLR 18; [1976-80] 1 KLR 1090.
 32. The most favoured judicial view and now the governing legal principle in this regard, is that a Court - Magistrate in this case - does not become *functus officio* upon issuance of an *ex parte* order. The inherent nature of the order being *ex parte*, dictates that if the Respondent is desirous of being heard for any reasons whatsoever, the Respondent reserves the right *ex debito justitiae*. The general principle is therefore that an *ex parte* order is not a conclusive or final order. In this connection, an *ex parte* is amenable to an order of setting aside by the same Magistrate, if circumstances so dictate. This is so because an *ex-parte* order cannot be challenged before a search is conducted. After the search is conducted, it is contemplated by section 121 of the CPC, that the Respondent is entitled to challenge the search for any reason and the Magistrate who issued the search warrant is entitled to pronounce himself/herself on the dispute. The only determinative factor in the dispute is whether the issues raised fall within the jurisdiction of the Magistrate in relation to search warrants. See *Manfred Walter Schmitt & Another v Republic & Another* [2013] KEHC 5455 (KLR) (hereinafter “the Manfred case”), at paragraph 23, where Majanja, J. (as he then was) expressed the following judicial view: “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. It is for this reason that I have not considered nor commented on the facts set out in the Further Affidavit of Stephen Ligunya sworn on 10th December 2012 which purports to introduce new evidence."

33. See also Ethics & Anti Corruption Commission v Mohammed (Anti-Corruption and Economic Crimes Appeal 10 of 2019) [2023] KEHC 18663 (KLR) (Anti-Corruption and Economic Crimes) (12 May 2023) (Judgment), at paragraphs 24-25, where M. Odero, J. embraced the judicial in the Manfred case.
34. Wherefore this Court concludes that I did not become functus officio after issuance of the search warrant ex parte, on 2nd May 2025.

ii. Whether this Court is clothed with jurisdiction to determine the particular questions and/or issues raised by the Respondent

35. This Court has been approached by the Respondent to exercise its criminal jurisdiction and pronounce itself on the following two primary juridical questions and one secondary question to wit:
 - (i) Whether the search was conducted in accordance with the law and the orders of this Court (dated 2nd May 2025);
 - (ii) Whether the Respondent's rights to privacy and protection from self-incrimination were violated; and
 - (iii) The remedies available to the Respondent, if any.
36. The legal principles which govern jurisdiction as enunciated in Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR; In the Matter of Interim Independent Electoral Commission [2011] eKLR; Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR; Owners of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd [1989] KLR 1; G & C Kreglinger v New Patagonia Meat & Cold Storage Co. Ltd (1913); Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR, per Odunga, J.; Chogley v The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Warburton v Loveland [1831] 2 DOW & CL. (HL) at 489; Lall v Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General v Prince Augustus of Hanover [1957] AC 436 AT 461; Republic v Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530; and Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090, also apply to this question.
37. In such cases, the general principle is that the state can only exercise that which is expressly authorised by law but an individual can do anything except that which is expressly proscribed by law. The onus lies on the shoulders of the state to demonstrate that the seizure was not only expressly authorized by law but also justified in law. See the seminal case in English constitutional law and in particular, limitations of civil liberties to wit, the extent to which the state may exercise seizure powers over private property, namely Entick v Carrington [1765] 95 ER 807 (also reported as (1765) 19 St Tr 1030; [1765] EWHC KB J98). In the Entick case, four King's broke into the home of John Entick, the author of "the Grub Street" and searched all of the rooms before carting away 100 charts and 100 pamphlets, on allegations of sedition. The King's messengers were acting on the authority of any law, but upon a warrant of search issued by Lord Halifax, the newly appointed Secretary of State for the Northern Department. Entick successfully sued on account of trespass and unconstitutional conduct of the messengers. In his



watershed lead Judgment which laid down the principle on limitation on the state's power over private property and the hitherto general principle resident in Article 24 of *the Constitution*, that whereas the state can only exercise that which is expressly authorised by law, an individual can do anything except that which is expressly forbidden by law and that the onus lies on the shoulders of the state to demonstrate that the seizure was not only authorized by law but also justified in law, Lord Camden CJ, had expressed the following judicial view: "This power, so claimed by the Secretary of State, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but himself ... Before I state the question, it will be necessary to describe the power claimed by this warrant in its full extent. If honestly exerted, it is a power to seize that man's papers, who is charged upon oath to be the author or publisher of a seditious libel; if oppressively, it acts against every man, who is so described in the warrant, though he be innocent ... Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books. If it is not to be found there, it is not law. The great end, for which men entered into society, was to secure their property. That is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, etc are all of the description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and see if such a justification can be maintained by the text of the statute law, or by the principle of common law. If no such excuse can be found or produced, the silence of the books is an authority against the Defendant, and the Plaintiff must have judgment. According to this reasoning, it is now incumbent upon the Defendants to show the law, by which this seizure is warranted. If that cannot be done, it is a trespass. Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection: and though the eye cannot by laws of England be guilty of trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none, and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society ... The power of search and confiscation is a fetter on an individual's right to property. Such power must be set out in clear law and it must be for the common good of a just and democratic society." See *Royal Media v Telkom Kenya* [2001] 1 EA 210 (hereinafter "the Royal Media Services case"), per Visram, J. (as he then was), discussed herein below, which adopted the principle in the *Entick* case. See also *Ghani and others v Jones* [1970] 1 QB 693, per Lord Denning MR, as discussed herein below.

38. Accordingly, in the *Manfred* case, at paragraphs 19-20, Majanja, J. (as he then was) expressed the general legal principle that "19. Since searches infringe the right to privacy and the right against arbitrary deprivation of property protected under Article 40, searches must be conducted in terms of legislation which must comply with the provisions of Article 24. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains, which include obtaining information from third parties like banks, of ordinary citizens is one of the features that distinguish a democracy from a police state... 20. Thus the limit to the right to privacy to the extent of providing for the procedure of conducting searches and seizures is set out in sections 118, 119, 120 and 121 of the Criminal Procedure Code. Section 118 of the Criminal Procedure Code which empowers the Court to issue search warrants..."



39. In connection to Article 24 of *the Constitution*, therefore, section 118 of the CPC is the residence of the limitation to this civil liberty and the primary anchor of the power of a Magistrate to issue a search warrant. It provides that “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.” In augmenting section 118 of the CPC, section 118A of the CPC permits an Applicant to approach a Magistrate ex parte. It provides that “An Application for a search warrant under section 118 shall be made ex-parte to a magistrate.” There is therefore no obligation to serve the Application upon the Respondent. See *William Moruri Nyakiba & Another v Chief Magistrate Nairobi & 2 Others* [2006] KEHC 3496 (KLR); *Ethics and Anti-Corruption Commission & Another v Tom Ojienda, SC T/a Prof. Tom Ojienda & Associates Advocates & 2 Others (Petition 30 & 31 Of [2019] (Consolidated))* [2022] KESC 59 (KLR) (7 October 2022) (Judgment), et alia.
40. The power reposed upon a Magistrate’s Court vide section 118 is discretionary. However, a discretionary decision rendered thereunder is amenable to upset by the superior Court if it is found that the discretionary power was abused. See *Abubakar Shariff Abubakar v Attorney General & another* [2014] KEHC 6240 (KLR) (hereinafter “the Abubakar case”), per M. Odero, J.
41. In considering the Application for a search warrant under section 118 of the CPC, the Court must strike a delicate balance between public interest and the freedom of the Respondent, guided by the following principles: (i) First, the Applicant must demonstrate reasonable grounds for believing that an offence has been committed; (ii) Second, the Applicant must demonstrate reasonable grounds for believing that there are things in possession of the Respondent which are either proceeds of crime or implements of crime or material evidence to prove the commission of the alleged offence; (iii) Third, the Applicant must demonstrate reasonable grounds to believe that the person in possession of the proceeds of crime or implements of crime or material evidence to prove the commission of the alleged offence, committed the alleged offence or is implicated in it or is an accessory to it or at any rate his refusal must be unreasonable; (iv) Fourth, the Applicant must demonstrate that there is justification to cart away and detain the things specifically desired or prevent their removal but not any longer than is reasonably necessary to complete investigations or preserve them for evidence; and (v) Fifth, the lawfulness of the conduct of the Applicant must be judged at the time and not by what happens afterwards. See the *Royal Media Services case*; *Ghani and others v Jones* [1970] 1 QB 693, per Lord Denning MR; and *Entick v Carrington* [1765] 95 ER 807 (also reported as (1765) 19 St Tr 1030; [1765] EWHC KB J98), per Lord Camden CJ. In *Ghani and others v Jones* [1970] 1 QB 693, Lord Denning MR, laid down the following guiding principles in considering an Application for a search warrant, which were adopted in the *Royal Media Services case*: “What is the principle underlying these instances? We have to consider, on the one hand, the freedom of the individual. His privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. Honest citizens should help the police and not hinder them in their efforts to track down criminals. Balancing these interests, I should have thought that, in order to justify the taking of an article, when no man has been arrested or charged, these requisites must be satisfied: First: The police officers must have reasonable grounds for believing that a serious offence has been committed – so serious that it is of the first importance that the offenders should be caught and brought to justice. Second: The police officers must have reasonable grounds for believing that the article in question is either the fruit of the



crime or material evidence to prove the commission of the crime. Third: The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime; or is implicated in it, or is accessory to it, or at any rate his refusal must be unreasonable. Fourth: The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigation or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned. Finally: The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards.”

42. Reasonable suspicion must have a basis; some evidence or material to support such a suspicion before it can be called reasonable suspicion. And, it is for the Applicant for the warrant to show reasonable suspicion, on proof upon evidence or by placing material before the Magistrate before the warrant can be issued. Lack of reasonable grounds for believing that an offence has been committed and/or lack of reasonable grounds for believing that there are things in possession of the Respondent which are either proceeds of crime or implements of crime or material evidence to prove the commission of the alleged offence, is sufficient reason to deny the Applicant a search warrant since the thought of issuing warrant to any person to peep into another’s bank account is scaring and a violation of the right to privacy which is protected by *the Constitution* and which must not be infringed except in the clearest of cases that there is necessity and desirability for a person’s account to be investigated. Such infringement of such fundamental right cannot be sanctioned by the Court in the absence of evidence and proof to support the claim of reasonable suspicion. Mere dreams, whimsical vendetta or jealousy will not suffice. See *Charter House Bank Limited and another v Chief Magistrate Nairobi and Others* [2007] 2 EA 101; the *Manfred* case, et alia.
43. The reasonable suspicion must have been underlined by a probable cause. See the *Abubakar* case, et alia.
44. It follows that in the context of the *Manfred* case, at paragraph 23 set out herein above, if the Court which issued the order is persuaded on a balance of probabilities in the inter partes hearing, that there was no reasonable suspicion or probable cause in the first place to justify sustenance of the ex parte search warrant and that the Court was therefore misled into issuing the order, the Court which issued the search warrant can declare it invalid and set it aside.
45. Consequently, a search of the accused’s home without a search warrant is unlawful, unconstitutional, null and void. The and evidence recovered amounts to evidence unlawfully obtained and thus inadmissible. If evidence is based on a search of the accused’s house, a warrant of search must be tendered in evidence. Failure to tender it will render the conviction unlawful. See *Mohanlal R Trivedi v R* [1957] 1 EA 355; *Robert Mwangi Mugo v OCS Nyahururu Police Station & 2 others* [2022] KEHC 2534 (KLR); *Standard Newspaper Ltd & Another v Attorney General & 4 Others* [2013] eKLR; *Rashidi v Republic* [1972] 1 EA 438, et alia.
46. Equally, a search based on an unsigned search warrant is equivalent to a search without a search warrant and thus illegal. See *Rashidi v Republic* [1972] 1 EA 438.
47. In the same breath, if evidence is based on a search of the accused’s house, but the search warrant is not produced in evidence, for want evidence to support that proposition, the Court should invariably hold that the search was conducted without a search warrant and find the evidence (recoveries) inadmissible. See *Mohanlal R Trivedi v R* [1957] 1 EA 355, et alia. In this connection, producing an unsigned search warrant is equivalent to no search warrant produced and the evidence inadmissible. See *Rashidi v Republic* [1972] 1 EA 438.



48. Relatedly, if the premises searched are different from the premises stated in the search warrant, it amounts to an unlawful search and the evidence obtained is unlawful and inadmissible. See *Mohanlal R Trivedi v R* [1957] 1 EA 355, et alia.
49. Equally, proceeding on the principle that there would be no justification whatsoever where, in carrying out a search, the state carts away more than is necessary for the purpose of the search, as enunciated in *Ghani and others v Jones* [1970] 1 QB 693 and adopted in the *Royal Media Services* case, if the things seized are different from the things expressly stated in the search warrant and things, though not expressly stated in the warrant constitute articles which are either involved in, used during or may provide proof of the commission of an offence or may provide proof of the fact that the commission of an offence was planned. Outside this circle, the search amounts to an unlawful search and the evidence obtained is unlawful and inadmissible. See *Chimanlal Rugnath Thakkar v R* [1959] 1 EA 610; *Crazier v Cundey*, 108 ER 49; *Chic Fashions (West Wales) Ltd v Jones* (1968)2 QB 299; *Pringle v Eremner & Stirling* (1867) 5 Macph HC55; the *Abubakar* case, et alia. In the *Abubakar* case for instance, in determining the question whether “the police justified in seizing goods which were not specifically mentioned in the search warrant”, the Court held that “The power to seize is generally limited to articles named in the search warrant, articles which are either involved in, used during or may provide proof of the commission of an offence or may provide proof of the fact that the commission of an offence was planned.” In the *Abubakar* case, the learned Judge approved the judicial view on the exception to things expressly stated in the warrant, as enunciated in *Pringle v Eremner & Stirling* (1867) 5 Macph HC55 as follows: “But supposing that in a search which might have been improper originally, there were matters discovered which showed the complicity of the pursuer in a crime, then I think that the officers, I can hardly say would have been excused by the result of their search.”
50. Also, if the officer searching is different from the one expressly authorized by the Court, the search amounts to an unlawful search and the evidence obtained is unlawful, tortious and inadmissible. See *Chimanlal Rugnath Thakkar v R* [1959] 1 EA 610.
51. However, it is instructive to point out that owing to immediacy, urgency, emergency, propinquity, impossibility or impracticability of securing a search warrant before search or the likely delay of obtaining a search warrant and is likely to imperil the success of the investigation, there are limited exceptions where a police officer is expressly authorized by law to search without a search warrant to wit, searching an arrested person or detaining and searching any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the Penal Code; or any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained or taking from the person arrested any offensive weapons; or where a person in respect of whom a warrant of arrest is in force or who is reasonably suspected of having committed a cognizable offence is in any premises. See sections 25 - 28 of the CPC read with section 60 of the *National Police Service Act*. See *Juma v Republic* [1967] 1 EA 432; *Kamau v Attorney-General* [1975] 1 EA 20; *R. v. Msengi s/o Abdallah* (1952), 1 T.L.R. 107; *Hadley v. Perks* (1866), L.R. 1 Q.B. 444; *R. v. Huku bin Katega*, 1 T.L.R. (R) 16; *R. v. Fisher*, 32 N.S.L.T.R. 23, et alia.
52. A warrant may be issued and executed on any day of the week between the hours of sunrise and sunset, but with the authority of the Court it may be executed at any hour of the day. Section 119 of the CPC states that “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.”



53. The person in charge of the place which is subject of the search warrant is enjoined by law to permit ingress and egress of the officer(s) warranted to search. See section 120 of the CPC.
54. Anything seized should be brought before the Court and may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation. If an appeal is lodged or if a person is committed for trial, the Court may order the things to be further detained for the purpose of the appeal or the trial. However, if no appeal is lodged or no person is committed for trial, the Court shall direct the thing(s) 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. See section 121 of the CPC which provides that “(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.”
55. Article 162 of *the Constitution* enshrines the system of Courts in Kenya. Article 162(4) of *the Constitution* provides that subordinate Courts are the Courts established under article 169 of *the Constitution* or alternatively, those Courts established by Parliament in accordance with Article 169.
56. Article 169 sets out the subordinate Courts referred to in Article 162(4) thereof. In particular, Article 169(1) (a) establishes Magistrates Courts. Unlike superior Courts whose jurisdiction is primarily set out in *the Constitution* and other ancillary jurisdiction found in legislation like the *Judicature Act*, in the case of Magistrates’ Courts, *the Constitution* has donated the power to define the jurisdiction thereof to Parliament Courtesy of Article 169(2) thereof.
57. In line with the command of Article 169(2) of *the Constitution*, Parliament repealed the *Magistrates’ Courts Act*, Cap 10 of the Laws of Kenya in 2015 and re-enacted it as the *Magistrates’ Courts Act*, No. 26 of 2015 (now serialized as Cap 10). In the said re-enacted Act, the Preamble reads thus “AN ACT of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of *the Constitution*; to confer jurisdiction, functions and powers on the Magistrates’ Courts; to provide for the procedure of the Magistrates’ Courts, and for connected purposes”. The pre-amble clearly indicates that the enactment is to actualize among other intentions, the command of *the Constitution* contained in Article 169 (2) of *the Constitution*. It is in line with that command that Parliament housed the jurisdiction of Magistrates’ Courts. Categorically, sections 6, 7, 8, 9 and 10 of the *Magistrates’ Courts Act*, 2015 is dedicated to the jurisdiction of Magistrates. Section 6 provides for the criminal jurisdiction of Magistrates’ Courts; section 7 provides for civil jurisdiction of the said Courts; section 8 provides for claims relating to violation of human rights jurisdiction of the said Courts; section 9 provides jurisdiction on labour, employment, environment and land; and finally, section 10 provides for jurisdiction to punish for contempt of Court.
58. The *Magistrates’ Courts Act*, therefore, recognizes six (6) clusters of jurisdiction of a Magistrate’s Court namely
- (i) criminal jurisdiction;
 - (ii) civil jurisdiction;
 - (ii) jurisdiction to determine a claim relating to violation of human rights under Article 25(a) & (b) of *the Constitution*;
 - (iv) labour and employment;



- (v) environment and land; and
 - (vi) contempt of Court.
59. Further, a Magistrate’s Court is reposed with nine (9) other clusters of jurisdiction namely:
- (i) succession causes under the [Law of Succession Act](#);
 - (ii) County, Municipal and Town offences under the [County Governments Act](#), and [Urban Areas and Cities Act](#);
 - (iii) Traffic cases under the [Traffic Act](#);
 - (iv) children matters under the [Children Act](#);
 - (v) burial disputes under customary law; (vi) marriage, divorce, maintenance and dowry under the [Marriage Act](#);
 - (vii) seduction or pregnancy of an unmarried woman or girl under the Magistrate’s Courts Act read with common law;
 - (viii) enticement of or adultery with a married person under the Magistrate’s Courts Act;
 - (ix) Commissioner of Oaths under the [Oaths and Statutory Declarations Act](#).
60. Little known to a majority of Court users is the fact that a Magistrate’s Court is also reposed with appellate jurisdiction in limited cases. For instance, under section 12 of [Elections Act](#), it is vested with jurisdiction to hear appeals from a registration officer who has refused to register a voter. Also, under sections 19 and 27 of the [Valuation for Rating Act](#), a Magistrate’s Court is vested with jurisdiction to hear and determine an appeal against a decision of a valuation officer.
61. Equally little known is the judicial review jurisdiction of a Magistrate’s Court under section 9(1) of the [Fair Administrative Action Act](#).
62. It should be noted that in regard to the jurisdiction to determine a claim relating to violation of human rights under Article 25(a) & (b) of [the Constitution](#) (on freedom from torture and cruel inhuman or degrading treatment or punishment; or freedom from slavery or servitude) it ought to be presented in the manner envisaged by Article 23(2) of [the Constitution](#) and section 8 of the [Magistrates’ Courts Act](#), invoking [The Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.
63. Until recently – in particular the 7th day of October 2022 - when the Supreme Court of Kenya (hereinafter “SCORK”) pronounced itself that a criminal investigation does not fall within the meaning and purport of an administrative action as defined by section 2 of the [Fair Administrative Action Act](#), it was possible to present a challenge of this nature before to a Magistrate’s Court as a judicial review question under section 9(1) of the [Fair Administrative Action Act](#), of course invoking the procedure provided in The Fair Administrative Action Rules, 2024. See Ethics and Anti-Corruption Commission & another v Ojienda & 2 others (Petition 30 & 31 of 2019 (Consolidated)) [2022] KESC 59 (KLR) (7 October 2022) (Judgment) (hereinafter “the Ojienda case”) which quashed this possibility, at paragraph 58. In answering the question “Whether the Ethics and Anti-Corruption Commission’s investigative and arresting powers could be described as administrative actions?”, the SCORK emphatically held that it is not and resultantly not covered or envisaged by Article 47 of [the Constitution](#) or the [Fair Administrative Action Act](#). In its words, the SCORK pronounced itself as follows: “Does the 1st appellants’ investigative powers fall within the corners of this definition?”



Part IV of the ACECA specifically provides for the 1st appellant's investigative powers. The powers granted therein include powers, privileges and immunities of a Police Officer under section 23(3), to search premises under section 29, to apply for surrender of travel documents under section 31, to arrest persons under section 32 amongst others. Strictly speaking, these powers when exercised cannot be described as "administrative action" within the meaning of article 47. For example, how can "conducting a house search" or "effecting an arrest" be considered as exercising administrative action? On the contrary, these are special powers conferred by a specific legal regime, to be exercised for a special purpose."

64. Gathering from the foregoing, including the holding in the Manfred case and the SCORK holding in the Ojienda case which effectively quashed the possibility of presenting such a question before a Magistrate's Court as a judicial review question, it will be safe to conclude that in relation to searches, a Magistrate's Court is reposed with two (2) clusters of decidedly restrictive jurisdiction. First, criminal jurisdiction to issue a search warrant ex parte and determine limited post-search issues. Second, jurisdiction to determine a claim relating to violation of human rights limited to Article 25(a) & (b) of the Constitution emanating from execution of the search warrant.
65. It will be remiss of this Court if I fail to mention the observable conflation of the criminal jurisdiction reach of this Court in relation to search warrants on one hand, and the jurisdiction of this Court to determine a claim relating to violation of human rights limited to Article 25(a) & (b) of the Constitution and/or the judicial review jurisdiction of this Court, on the second hand, and the jurisdiction of the High Court to determine a claim relating to violation of human rights generally and/or the judicial review jurisdiction of the High Court, on the third hand, often leading to an avoidable imbroglio in regard to the forum conveniens. In this connection, this Court discerns from the Respondent's specific issues and written Submissions, a manifest but inadvertent conflation of the criminal jurisdiction reach of this Court in relation to search warrants on one hand; and the extremely restrictive jurisdiction to determine a claim relating to violation of human rights emanating from Article 25(a) and (b) of the Constitution (on freedom from torture and cruel inhuman or degrading treatment or punishment; or freedom from slavery or servitude) and the decidedly restrictive judicial review jurisdiction of this court on the second hand; and the jurisdiction of the High Court to determine a claim relating to violation of human rights generally and/or the judicial review jurisdiction of the High Court, on the third hand, which conflation has clearly founded a misdirection in regard to the forum conveniens.
66. Gathering from the Magistrates' Courts Act, there is a clear delineation between issues under the purview of section 6 of the Magistrates' Courts Act; issues under the purview of section 8 of the Magistrates' Courts Act and issues under the purview of section 9(1) of the Fair Administrative Action Act. Section 6 of the Magistrates' Courts Act which provides that "A magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by — (a) the Criminal Procedure Code; or (b) any other written law." And section 8 of the Magistrates' Court Act which provides that "(1) Subject to Article 165(3)(b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's Court shall have jurisdiction to hear and determine Applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. (2) The Applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25(a) and (b) of the Constitution. (3) Nothing in this Act may be construed as conferring jurisdiction on a magistrate's Court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights. (4) The Chief Justice shall make Rules for the better exercise of jurisdiction of the magistrate's Courts under this section." Section 9(1) of the Fair Administrative Action Act provides that "(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative



action to the High Court or to a subordinate Court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.” Whereas section 6 confers a magistrate’s Court with criminal jurisdiction, section 8 confers a magistrate’s Court with jurisdiction akin to that of the High Court reposed by Article 165(3)(b) to determine questions of violation of human rights guaranteed by Article 25(a) and (b) of *the Constitution* (on freedom from torture and cruel inhuman or degrading treatment or punishment; or freedom from slavery or servitude). This Article 165(3)(b) power of a Magistrate’s Court - I must remind myself - is decidedly restrictive in many ways than one, but this is a debate for another day. And section 9(1) reposes a magistrate with judicial review jurisdiction on judicial review matters within its jurisdictional reach. However, it must always be recalled that a criminal investigation does not fall within the meaning of an administrative action and such challenges cannot be possibly presented as a judicial review question. See the Ojienda case.

67. In this connection - to put this determination in its proper perspective – it is instructive to underline that the Applicant approached this Court to exercise its criminal jurisdiction and this Court did exercise the criminal jurisdiction and issued the orders summarized above. Likewise, in response to the execution, the Respondent too approached this Court in exercise of its criminal jurisdiction.
68. It’s appropriate therefore to answer the determinant question thus: What is the array of issues that a Magistrate’s Court can determine in respect to search warrants, in exercise of its criminal jurisdiction?
69. This Court must of necessity take a deep dive into the length and breadth of its criminal jurisdiction in regard search warrants. Section 6 of the *Magistrates’ Courts Act* which provides that “A magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by — (a)the Criminal Procedure Code; or (b)any other written law.”
70. In connection to section 6 of the *Magistrates’ Courts Act*, whenever a Court is confronted with a question of jurisdiction in relation to search warrants, the Court should turn to sections 118 and 121 of the CPC. Since section 121 of the CPC is an offshoot of the orders issued by the Court under section 118 of the CPC in exercise of its criminal jurisdiction, I discern section 121 of the CPC to be addressing post-search issues in exercise of the same criminal jurisdiction and in this connection, I decipher therefrom that the criminal jurisdiction of a Magistrate’s Court in relation to a search warrant is restricted to: (i) hearing and determining Applications seeking search warrants as contemplated under section 118 of the CPC; and (ii) hearing and determining post-search issues namely: (a) whether there was any reason which would invalidate the ex parte search warrant including but not limited to whether there was reasonable suspicion or probable cause to justify sustenance of the ex parte search warrant, with a view of either sustaining it or declaring it invalid with the attendant consequence of setting it aside; (b) continued detention of the things seized; (c) restoration of the things seized; (d) preservation of the things seized; and (e) disposition of the things seized, as contemplated under section 121 of the CPC as further construed in the Manfred case.
71. In regard to preservation of the things seized, it has been construed to mean that while the things seized are detained, the beneficiary of the detention order must as a matter of obligation take reasonable care being taken for their preservation. The requirement to take reasonable care is, therefore, mandatory. In this context, if the things are perishable, then preservation will as well mean that the Applicant must take swift steps for their production as exhibits at the earliest and disposal or restoration by securing appropriate directions of the Court. See *Kamau v Attorney-General* [1975] 1 EA 20.
72. In respect to disposition of the things seized, by other way than restoration or preservation, is an exception to restoration or preservation, if for instance the things seized are per se illegal and consequently subject to forfeiture and/or destruction or perishable and thus subject to either production as exhibits and restoration or destruction. See *Kamau v Attorney-General* [1975] 1 EA



20 (hereinafter “the Kamau case”); Ng’ang’a v Republic (DCI Western Region Office); Ng’ang’a (Interested Party) (Criminal Revision E338 of 2024) [2024] KEHC 16436 (KLR) (18 December 2024) (Ruling) (hereinafter “the Ng’ang’a case”); and Republic v Asset Recovery Agency & 2 others Ex parte John Wachira Wahome 2019 KEHC 7883 (KLR) (hereinafter “the Wahome case”), at paragraph 28.

73. The net legal effect of section 121 of the CPC is that it reposes a Magistrate’s Court which issued the orders under section 118 of the CPC, with a supervisory role over the Applicant. See the Wahome case, at paragraphs 28 and 29, where J.N. Onyiego, J. had the following to say about the jurisdiction of the Court in the context of sections 118 and 121 of the CPC: “28. The Ex-parte Applicant’s case is that the continued freezing of the subject bank account is against the law. The above provision emphasizes the earlier fact that once anything is seized, there must be a return to the Court for the thing so seized to be dealt with in accordance with the law. The purpose of this requirement is to inform the Court of the outcome of the search and inspection, and to get direction whether or not the seizure of the subject matter will be maintained. 29. Since the warrants are often granted ex parte due to the nature of the orders, Sections 118 and 121 have a condition of a return to Court, and as Section 121 implies, further detention of the subject items is upon the direction of the Court. It is therefore implied that, the persons so affected would have an opportunity at this stage to challenge the seizure of items. The purpose for laying down the conditions is to ensure that the Court continues to maintain a supervisory role over the police or in this case the 1st Respondent.” See also the Ng’ang’a case, at paragraph 47, where S. Mbungi, J. expressed the same judicial view pronounced in the Wahome case that “Since the warrants are often granted ex parte due to the nature of the orders, Sections 118 and 121 have a condition of a return to Court, and as Section 121 implies, further detention of the subject items is upon the direction of the Court. It is therefore implied that, the persons so affected would have an opportunity at this stage to challenge the seizure of items. The purpose for laying down the conditions is to ensure that the Court continues to maintain a supervisory role over the police.”
74. It follows that limited search warrants – proceeding on the peremptory principle that Courts and other public bodies should restrict themselves to the powers expressly conferred by *the Constitution* or statute or both but never by implication or supposition as enunciated in Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR; In the Matter of Interim Independent Electoral Commission [2011] eKLR; Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR; the Owners of Motor Vessel “Lillian S” case; G & C Kreglinger v New Patagonia Meat & Cold Storage Co. Ltd (1913); Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR; Chogley v The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96, [1976-80] 1 KLR 1195; Warburton v Loveland [1831] 2 DOW & CL. (HL) at 489; Lall v Jeyppee Investments Ltd [1972] EA 512 at 516; Attorney General v Prince Augustus of Hanover [1957] AC 436 AT 461; Republic v Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530; and Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090 – the two-prong criminal jurisdiction of this Court in relation to search warrants, is restricted to:
- (i) hearing and determining Applications seeking search warrants as contemplated under section 118 of the CPC; and
 - (ii) hearing and determining post-search issues namely:
 - (a) whether there was any reason which would invalidate the ex parte search warrant including but not limited to whether there was reasonable suspicion or probable cause to justify sustenance of the ex parte search warrant, with a view of either sustaining it or declaring it invalid with the attendant consequence of setting it aside;
 - (b) continued detention of the things seized;



- (c) restoration of the things seized;
- (d) preservation of the things seized; and
- (e) disposition of the things seized, as contemplated under section 121 of the CPC as further construed in the Manfred case.

75. What then are some of the fulcrums upon which the post-search issues (namely of continued detention or restoration or preservation or disposition of the things seized as contemplated under section 121 of the CPC) turn? In instances where continued detention is questioned and a restoration order is therefore sought, continued detention may be denied and a restoration order issued in circumstances where it was improper and/or unlawful and/or unconstitutional to take away things more than what was necessary for the investigation of commission of the alleged offence. In order to justify continued detention, the things seized should find necessity and justification in the nature of the alleged offence. See the Royal Media Services case, where the Court was confronted with question under search warrants issued under sections 89-92 of the then Kenya Communication Act which has since been amended to Kenya Information and Communication Act but the sections remain the same, and the Visram, J. (as he then was) had this to say: “There would be no justification whatsoever where, in carrying out a search, the Defendant takes away more than is necessary for the purpose of the search. As Lord Denning pointed out in Ghani nothing should be taken away than is necessary in the circumstances.”
76. The holding in the Royal Media Services case followed the judicial view which had earlier been expressed by Lord Denning MR in Ghani and others v Jones [1970] 1 QB 693, where police officers, inquiring into a woman’s disappearance searched, without a warrant the house of her father-in-law. At their request he handed to them documents including the passports of himself, his wife and daughter, the Plaintiffs living in the house. The Plaintiffs who were Pakistanis, later asked for the return of the passports and documents as they wished to visit Pakistan. The police refused to return them. The Plaintiffs brought an action against the Defendant, a senior police officer, for a mandatory order for the delivery up of the passports and documents, an injunction restraining their detention and damages for detainee. On the Plaintiffs’ interlocutory Application, the police gave affidavit evidence of the belief that the woman had been murdered and that they would apprehend those concerned. They said that in the event of charges being preferred some of the documents would be of evidential value and others of potential evidential value. The Defendant said that the Plaintiffs could help the police with inquiries and that if they left the United Kingdom they might not return. No one had been arrested or charged of the murder. Talbot J ordered the return of the documents and passports. The Defendant appealed to the Court of Appeal and his appeal was dismissed. Lord Denning MR with whom Edmund Davies LJ and Sir Gordon Willmer agreed, expressed the following judicial view on what should necessitate things to seize: “It was suggested that a mandatory order should not be made for their return. The case, it was said, should go for trial, and the officers made liable in damages if they are wrong. But I think their affidavits fall so short of any justification for retention that they should be ordered to return them forthwith.”
77. This principle was invoked in Chimanlal Rugnath Thakkar v R [1959] 1 EA 610, where the police went to search for a radio particularized in the search warrant but the police officer seized a totally different radio and thus way more than what was necessary for the purpose of investigations. The search was found unlawful and tortious.
78. Whenever it is argued that the things which were carted away were more than what is necessary for the purpose of investigations, the burden of proof lies on the shoulders of the party so arguing. See the Royal Media Services case, where after considering the evidence placed before the Court, Visram,



J. (as he then was) declined to find so holding as follows: “Dr Kuria argued that the searches in this case were unreasonable as what was taken away was more than necessary in the circumstances which crippled Royal Media’s broadcasting business. That may be so. However, this Court was not assisted to determine what would have been necessary for purposes of the searches in this case. What was taken may well have caused Royal Media to shut down but if it was necessary in the circumstances this Court cannot do anything to help. There was some suggestion that the searches were done with some ulterior motive other than the enforcement of the KCA but there was no material to support this as well.”

79. It bears repeating that this Court has been approached by the Respondent to exercise its criminal jurisdiction. Gleaning from the material placed before this Court by the Respondent, as clear as day from night, the Respondent desires this Court to exercise its criminal jurisdiction in relation to search warrants to determine two primary juridical questions and one secondary question to wit:
- (i) Whether the search was conducted in accordance with the law and the orders of this Court (dated 2nd May 2025);
 - (ii) Whether the Respondent’s rights to privacy and protection from self-incrimination were violated; and
 - (iii) The remedies available to the Respondent, if any.
80. It is beyond peradventure that the two primary juridical issues raised by the Respondent raises very weighty but unfortunately a mixed grill or cocktail of issues substantially in the nature of judicial review and alleged denial, violation or infringement of rights and fundamental freedoms guaranteed by *the Constitution* outside Article 25(a) & (b) of *the Constitution*, and an insignificant number of which raise issues falling within the criminal jurisdiction of this Court.
81. Consequently, on the plane of the Four Corners Rule of interpretation of jurisdiction - having substantially raised the afore-described mixed grill or cocktail of issues - the two primary juridical questions proposed by the Respondent for determination by this Court, do not fall neatly within any of the five subsets of the second cluster of the criminal jurisdiction of this Court in relation to search warrants.
82. Its instructive to underline that whenever a Magistrate’s Court is approached in its criminal jurisdiction in relation to search warrants, the party desiring a resolution of the juridical questions by this Court in exercise of its criminal jurisdiction, the issues raised must avail themselves within the four corners of the limited criminal jurisdiction afore-described. Otherwise, and needless to restate, in instances where the dispute is founded upon a mixed grill or cocktail of issues including issues emanating from Article 25(a) and (b) of *the Constitution* and section 121 of the CPC, some of which fall beyond the said criminal jurisdiction of this Court, then notwithstanding the fact that a Magistrate’s Court has jurisdiction to determine the issues emanating from Article 25(a) and (b) of *the Constitution*, shepherded by Article 165(3) of *the Constitution*, the best suited Court to determine the dispute in exercise of either its judicial review jurisdiction or jurisdiction to determine alleged denial, violation or infringement of rights and fundamental freedoms guaranteed by *the Constitution*, is the High Court, further fortified by the time-tested principle founded on both doctrines of sub judice and forum conveniens, that a Court should always strive to shun a possibility of piece-meal litigation when faced with a cocktail of jurisdictional issues by embracing a path which brings to the table all issues for resolution in one appropriate forum, which in this case, is the High Court.
83. If the Respondent wished them to be resolved within the framework of Article 25(a) & (b) of *the Constitution*, then she must have presented them in the manner prescribed by The Fair Administrative Action Rules, 2024 if they raise judicial review issues; or *The Constitution* of Kenya (Protection of



Rights and Fundamental Freedoms) Practice and Procedure Rules, if they raise questions of denial, violation, infringement or a threat of rights and fundamental freedoms. This requirement was laid to inter alia, ensure that the manner of presentation conforms with the requisite degree of precision as enunciated in *Anarita Karimi Njeru v Republic* [1979] KEHC 30 (KLR).

84. Having reached the conclusion that this Court was invited to exercise its criminal jurisdiction on juridical issues which fall outside the restricted prescribed juridical issues requisite for exercise of its criminal jurisdiction in relation to search warrants, this Court is consequently without jurisdiction to determine the two primary juridical issues raised. I accordingly down my tools.

(iii) Whether the search was conducted in accordance with the law and the orders of this honourable Court dated 2nd May 2025; (v) Whether the Respondent's rights to privacy and protection from self-incrimination were violated; and (v) The remedies available to the Respondent

85. Having answered question (ii) in the negative, and this Court having downed its tools, questions (iii), (iv) and (v) cannot be determined by this Court.

Part VII: Disposition

86. On basis of the foregoing principal reason, the challenge raised by the Respondent is accordingly struck out.
87. The Respondent is at liberty to lodge the dispute at the appropriate forum, of course invoking the appropriate procedure.
88. It is directed that each party will bear their own costs.
89. This file is marked as closed.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT THE MILIMANI ANTI-CORRUPTION COURT THIS 16TH DAY OF SEPTEMBER, 2025.

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

In the presence of:

The Respondent

Advocate for the Applicant: Ms. Murugi

Advocate for the Respondent: Mr. Makori

Court Assistant: Ms. Mutave

