



Ethics and Anti-Corruption Commission v Kandie (Miscellaneous Application E1389 of 2025) [2026] KEMC 16 (KLR) (13 February 2026) (Ruling)

Neutral citation: [2026] KEMC 16 (KLR)

**REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)
MISCELLANEOUS APPLICATION E1389 OF 2025
CN ONDIEKI, SPM
FEBRUARY 13, 2026**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPLICANT

AND

PHILEMON KIPROP KANDIE 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 exercise 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. Under decidedly defined circumstances, 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.
3. In this Ruling - impelled by the nature of issue framed by the Respondent and the grounds averred in support thereof – besides the only merit question for determination, one fundamental preliminary question on jurisdiction has to be determined in limine.
4. Further and in connection to the preliminary question - in the context of questions/issues connected to search warrants - this Court finds it imperative to address conflation of the criminal jurisdiction reach of this Court in relation to search warrants on one hand; the limited 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, which conflation often finds enmeshment in regard to the forum conveniens.

Part Ii: Background

5. Vide a Notice of Motion - Ex Parte - dated 2nd October 2025 and filed on even date, the Applicant primarily sought orders of this Court that:
 - i. a search warrant be issued to the Applicant's Investigator, Margaret Wambeti, to have access and/or gain entry and search the Respondent's offices, business premises and residential premise situated at Phenom Park Estate Zaiwa Court House No. 17, Langata within Nairobi County and any other office, business and residential premises wherever they are situated within the Republic of Kenya, 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
 - ii. 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.
6. This Application was predicated on the grounds set out on the face of the Motion and facts which were deposed in the Supporting Affidavit sworn on 2nd October 2025, by the said Investigator.
7. It was averred that vide Inquiry File Number EACC/AT/INQ/52/2025, the Applicant was undertaking investigations under section 11(1) of the Ethics and Anti-Corruption Act, in respect to allegations of conflict of interest against the former Director General of Kenya Rural Roads Authority (KURRA) who was also the former Regional Manager of Kenya National Highways Authority (KENHA) through a company associated to him which traded with KURRA and KENHA during subsistence of his employment between 2021 and 2025, and that the said company was paid Kshs. 163,754,542, between Financial Years 2015/2016 and 2024/2025. It was claimed that the Respondent was complicit to the award of tenders to the said company associated to him.
8. 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*; 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; and in strict observance of section 121 of the Criminal Procedure Code (so that the seized things may be detained until either conclusion of the case; or until conclusion of the investigation; or until further directions of the Court, whichever is applicable to the unique circumstances, reasonable care being taken for their preservation).
9. The Applicant was directed to file a return of investigations, on or before 16th October 2025.

Part Iii: The Respondent's Case

10. On 16th October 2025, the date appointed for mention of this matter to confirm filing of a return of investigations and for further directions, learned Counsel Mr. Wena instructed by the Respondent, appeared and opposed closure of this file on grounds that the Respondent intended to challenge the search on basis the Applicant seized personal effects including title deeds and motor vehicle log-books.



11. In the spirit of alternative mechanisms of dispute resolution commanded by Article 159(2)(c) of *the Constitution*, this Court granted parties an opportunity lasting 14 days to explore possibilities of using ADR to resolve the dispute.
12. On 30th October 2025, the negotiations having returned an unavailing result, an obligation to proceed to the next logical step arose. And so, the Respondent was directed to file a formal application and serve upon the Applicant.
13. Vide a Notice of Motion dated 5th November 2025 and filed on 6th November 2025, the Respondent primarily sought orders of this Court that EACC do release to the Respondent all the original certificates of title, title deeds and motor vehicle log-books seized from the Respondent's home on 3rd October 2025 as indicated in the inventory of seized items and be at liberty to retain copies thereof for purposes of investigations.
14. This Application was predicated on the grounds set out on the face of the Motion and facts which were deposed in the Supporting Affidavit sworn on 5th November 2025, by the Respondent.
15. It was averred that the continued detention of the said original documents violates the Respondent's right to property, contrary to Article 40 of *the Constitution* and that investigations can be carried out using copies thereof.
16. In the Respondent's written Submissions dated 15th December 2025 and filed on even date, learned Counsel Mr. Wena, instructed by P.W. Wena & Company Advocates representing the Respondent, submits that in *Royal Media v Telkom Kenya* [2001]1 EA, the Court laid down the guiding principles on the issue of search warrants and observed that there must be a balancing act between the freedom of an individual and the rights over his possessions on the one hand and the other interests of society at large in finding out wrong doers and repressing crime and that one of the principles espoused by the Court is that the police must not keep the article or prevent its removal for any longer than is reasonably necessary to complete the Investigation or preserve it for evidence. In this regard, it is argued that if a copy will suffice, it should be made and the original returned.
17. For the Respondent, it is submitted that the original documents sought to be released were seized on 3rd October 2025, more than two (2) months ago and that the period of two (2) months is sufficient for the Applicant to complete investigations and make a determination on whether or not to arraign the Respondent in Court for any offence. It is contended that whereas it is desirable for the Applicant to seize documents for purposes of conducting investigations, the length of time to detain the documents cannot be open ended and that it is to be reasonably expected that the Investigations will be done in a timeous fashion. It is argued that the Applicant's Replying Affidavit does not state the time frame within which the investigations will be completed and it is unreasonable and oppressive for the Applicant to be allowed to retain the seized documents for an indefinite period of time.
18. Finally, the Respondent submits that copies of the documents sought to be released are sufficient for the purposes of carrying out investigations and prays that the Court grants the Orders sought.

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

19. The application was opposed vide EACC's Replying Affidavit sworn by Anderson Weru on 14th November 2025.
20. In the Applicant's written Submissions dated 8th December 2025 and filed on even date, learned Counsel Ms. Kiigi, instructed by EACC, proposed three questions for determination as follows:



- i. Whether the Applicant's execution of the search, seizure, and retention of original documents is lawful;
 - ii. Whether the retention of the original documents violates the Respondent's right to property under Article 40 of *the Constitution*; and
 - iii. Whether it is in the public interest for the Applicant to retain the original documents seized during the search.
21. Concerning the first question proposed by the Applicant, whether the Applicant's execution of the search, seizure, and retention of original documents is lawful, it is submitted that the EACC's legal mandate is to investigate corruption and economic crimes, derived from the provisions of Article 79 of *the Constitution*, section 23 of the *Anti-Corruption and Economic Crimes Act*, 2003, (hereinafter 'ACECA'), and section 13 (2) (c) of the *Ethics and Anti-Corruption Commission Act* (hereinafter 'EACC Act'). It is submitted that under Part IV of the ACECA, 2003 and section 11(1)(d) of the EACC Act, 2011, the Applicant is mandated to investigate any matter on suspicion of corruption, economic crime or irregularity on the part of a public officer and make recommendations to the Director of Public Prosecutions for the Prosecution of the culprits or take any other remedial measures as provided in the statute or any law. It is further submitted that under section 11(1)(j) of the EACC Act, the Applicant is also mandated to undertake investigations to establish the extent of liability for the loss of, damage to public property, and in appropriate cases, to institute civil proceedings against any person for recovery/restitution of such 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. Besides, it is submitted that section 23 of the ACECA, grants the Applicant the statutory mandate to conduct investigations, including powers to apply for and execute search warrants and to seize and retain evidence reasonably suspected to be connected to corruption or economic crimes.
 22. For the Applicant, it is submitted that the Applicant received a report that the Respondent had a conflict of interest with his former employer and had traded and received payments from his former employer through a company that was associated to the Respondent and that the Applicant commenced investigations into the said allegations and pursuant to its mandate under section 23 of the ACECA applied for the warrants to search the Respondent's residence wherefrom various documents were retrieved. It is submitted that the warrants obtained herein were obtained pursuant to the provisions of Section 118, 118A, 119, 120 and 121 (1) of the Criminal Procedure Code Cap 75 (hereinafter 'CPC'); Section 23 and 29 of the ACECA.
 23. It is submitted that the application for warrants met the threshold set down by law, and the Court issued the warrants on being satisfied that the Commission had established a reasonable basis in accordance with the law as held in the case of Gordon Ngatia Muriuki vs Director of Prosecutions & 2 others Petition No. 207 of 2014.
 24. It is submitted further that upon seizure, section 121 of the CPC authorizes retention of the items pending conclusion of investigations and that section 29 of the ACECA further empowers the Commission to seize and preserve documents relevant to investigations into corruption and economic crimes. In this connection, it is submitted that pursuant to the aforesaid provisions, the Applicant executed the search warrants and conducted the search of the residences, offices, and business premises of the Respondent vide Milimani Miscellaneous Criminal Application No. 1389 of 2025, wherefrom various documents were retrieved and that upon execution of the search warrants, the Applicant recovered the relevant documents, including original certificates of title, title deeds, and motor vehicle logbooks, electronic gadgets, and other property from the premises of the Respondent, which relate to the investigation herein. In further connection to this, it is submitted that in accordance with the



requirement under section 121 (1) of the CPC, the Applicant filed an affidavit dated 7th October 2025 indicating that the documents and items collected referred to in the inventories annexed to the Replying Affidavit of Anderson Weru as annexure “AW2” included original certificates of title, title deeds, and motor vehicle logbooks, were necessary for the conclusion of ongoing investigations, and requested that the Applicant be allowed to retain them.

25. Learned Counsel submits that warrants/Court orders for searches are investigative tools that are aimed at assisting investigative agencies in conducting their investigations and are a lawful tool provided by law and that the purpose of the seizure of items is to aid in investigations, placing reliance upon *Samson Mumo Mutinda v Inspector General National Police Service & 4 others* [2014] eKLR.
26. Learned Counsel thus concludes that the original documents seized during the subject search have been retained pursuant to the returns filed to this Court and are meant to aid in the investigations and further, that the Applicant acted within its mandate and the law in executing the search warrant, seizure and retention of the original documents. In this connection, a thesis is advanced that since the Respondent’s case is not that the Applicant did not meet the threshold for grant of the order/warrant for search but that their right to property is being violated by the non-release of their original documents, the legality of the warrants is not in question.
27. Regarding the second question proposed by the Applicant, whether the retention of the original documents violates the Respondent’s right to property under Article 40 of *the Constitution*, it is submitted that the original documents seized — certificates of title, title deeds, motor vehicle logbooks — are exhibits and crucial evidentiary material related directly to ongoing investigations into alleged offences relating to corruption, conflict of interest, unlawful acquisition of public property, and unexplained wealth contrary to the ACECA. It is submitted that the Respondent alleges that the Applicant is infringing on their right to property under Article 40 of *the Constitution* by retaining their original certificates of title, title deeds, and motor vehicle logbooks. In this context, it is argued that while Article 40 of *the Constitution* guarantees the right to property, the same Article at sub-article (6) expressly excludes protection of property that has been unlawfully acquired and that the retention of the said documents does not amount to a deprivation of property but is a lawful restriction necessary for investigations. It is contended that the search warrants to investigate the Respondent’s residence and the seizure of the Respondent’s original documents do not violate their right to property under Article 40 of *the Constitution* and that the right to property is not one of the non-derogable rights under Article 25 of *the Constitution* and can be limited within the provisions of Article 24 of *the Constitution*. It is argued that the Respondent’s right to property is subject to reasonable and proportionate limitation under Article 24(1) of *the Constitution*, particularly where it is necessary for the administration of justice, prevention of crime, and protection of public interest. It is argued that the limitation meets all the statutory criteria under Article 24 as follows:
 - i. The right to Property under Article 40 of *the Constitution* is not absolute, especially where issues of unlawful acquisition arise;
 - ii. The purpose is to preserve evidence, prevent tampering, and ensure the effectiveness of investigations into corruption—an offence that poses grave danger to the economy, public resources, and rule of law;
 - iii. The limitation is minimal, temporary, and does not deprive the Respondent of ownership or use of their property;
 - iv. The public has a collective right to effective investigation and prosecution of corruption, and protection of public resources; and



- v. Releasing the original documents poses a serious risk of interference with evidence, making retention the least restrictive means.
28. It is argued that the Applicant has therefore satisfied the constitutional threshold under Article 24, and the temporary retention of original ownership documents is both reasonable and proportionate within the meaning of Article 24(1)(d) and (e) of *the Constitution* of Kenya.
29. Further, it is submitted that release of the original documents at this stage would prejudice ongoing investigations, create a real risk of concealment, transfer, or alteration of ownership, and undermine the preservation of potential evidence for prosecution. It is further argued that the documents and items collected relate to investigations herein, and the Applicant filed an inventory dated 7th October 2025 and marked “AW2” in the Replying Affidavit pursuant to section 121 (1) of the CPC, which requires reasonable care be taken for its preservation and that the Respondent has not raised any concerns as to the ability of the Commission to take reasonable care of the items ceased. It is further contended that the Respondent has failed to show any real or irreparable prejudice that they will suffer if the original documents remain in the custody of the Applicant and that the Respondent has not demonstrated any exceptional circumstances nor any prejudice warranting the release of original documents.
30. Finally, it is argued that the prayer that the original certificates of title, title deeds, and motor vehicle logbooks, ought to be returned and copies of the same retained are misconceived, misleading and lack backing of the law and that the Respondent’s right to property has not been violated.
31. Turning to the third question proposed by the Applicant, whether it is in the Public Interest for the Applicant to retain the original documents seized during the search, it is submitted that *the Constitution* recognizes that public interest may justify reasonable limitations on individual rights and that corruption and economic crimes undermine national development, equality, and justice. It is argued that there is a strong public interest in allowing the Applicant to carry out its investigations without undue interference, particularly in matters involving unlawful acquisition of public property and conflict of interest under the ACECA and therefore, allowing premature release of crucial evidentiary material would defeat ongoing investigations and erode public confidence in the administration of justice. Further, it is contended that releasing the documents at this stage would prejudice the ongoing investigations, compromise potential prosecutions, and defeat the purpose for which the warrant was issued and that the Applicant’s continued retention of the original certificates of title, title deeds and motor vehicle logbooks, is proportionate, temporary, procedurally fair, strictly for the duration necessary to conclude investigations and necessary to safeguard evidence and ensure accountability. It is finally contended that public interest undoubtedly outweighs the Respondent’s personal inconvenience. The Applicant’s retention of documents is temporary, lawful, and serves the public good.
32. The Applicant thus urges this Court to find that the application is without merit and dismiss it with costs.

Part V: Questions For Determination

33. Gathering from the Respondent’s Application and the grounds averred in support thereof, the response thereto by the Applicant, the questions proposed by both parties for determination and the rival submissions, two (2) questions have commended themselves for determination as follows:
- i. Whether this Court is clothed with jurisdiction to determine the specific juridical question and/or issue as raised and framed by the Respondent.



- ii. Whether the continued detention of the original certificates of title, title deeds and motor vehicle log-books seized from the Respondent's home on 3rd October 2025 - as captured in EACC's inventory of seized items - violates the Respondent's right to property, contrary to Article 40 of *the Constitution*.

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

i. Whether this Court is clothed with jurisdiction to determine the specific juridical question and/or issue as raised and framed by the Respondent

34. This Court has been approached by the Respondent to exercise its criminal jurisdiction in pronouncing itself on the only primary question/issue raised and framed by the Respondent to wit: Whether the continued detention of the original certificates of title, title deeds and motor vehicle log-books seized from the Respondent's home on 3rd October 2025 - as captured in EACC's inventory of seized items - violates the Respondent's right to property, contrary to Article 40 of *the Constitution*.
35. Although none of the parties raised the question of jurisdiction of this Court, it's now a settled principle of judicial practice and law that unlike a question of fact over which parties are the true custodians, a Court of law being a guardian of the law, cannot turn a blind eye to a question of law inevitably emerging from the facts and evidence presented by the parties in case committed to the Court for determination. See et alia, the Supreme Court of Kenya holding in Lemanken Aramat vs. Harun Meitamei Lempaka & 2 others [2014] eKLR. In this connection, it is now a settled principle that before a Court embarks on determining the matter on merit, the first preliminary duty of the Court - even in circumstances where parties are in concurrence that the Court is clothed with jurisdiction - is to independently inquire into its jurisdiction as a matter of priority. See the SCORK rendition in Wetangula & another v Kombo & 5 others (Petition 12 of 2014) [2015] KESC 12 (KLR) (17 March 2015) (Judgment) at paragraph 83 where the Court pronounced itself thus: "It is apparent that all parties agree that this Court has jurisdiction to determine this appeal. That, however, does not dispose of the preliminary duty that falls on every Court, before delving into the disputed questions: to ascertain that it, indeed, has the jurisdiction to entertain the matter. Although the dispute-resolution mandate, by the terms of *the Constitution* (Articles 1(3) and 159) falls to the Judiciary, its due discharge requires the proper ascertainment of jurisdictional competence, before any segment of the Judiciary enters upon its task."
36. The legal principles which govern jurisdiction as enunciated in Samuel Kamau Macharia vs. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR; In the Matter of Interim Independent Electoral Commission [2011] eKLR; Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 others [2013] eKLR; Owners of Motor Vessel "Lillian S" vs. Caltex Oil (K) Ltd [1989] KLR 1; G & C Kreglinger vs. New Patagonia Meat & Cold Storage Co. Ltd (1913); Geoffrey K. Sang vs. Director of Public Prosecutions & 4 others [2020] eKLR, per Odunga, J.; Chogley vs. 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 vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461; Republic vs. 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 vs. 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 appellant’s 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 three (3) clusters of decidedly restrictive jurisdiction.
- i. First, criminal jurisdiction to issue a search warrant *ex parte* and determine limited post-search issues.
 - ii. Second, criminal jurisdiction to determine limited post-search disputes/issues.
 - iii. Third, limited jurisdiction to determine a claim relating to violation of human rights restricted 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; 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, which conflation invariably leads to avoidable enmeshment in regard to the forum *conveniens* in regard to certain questions/issues connected to search warrants. In this connection, this Court discerns from the Respondent's specific question/issue a manifest but inadvertent conflation of the criminal jurisdiction purview 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) plus 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' Courts 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 scope of the issues and/or disputes which a Magistrate's Court can properly so 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 two-prong as follows:
- i. hearing and determining Applications seeking search warrants as contemplated under section 118 of the CPC; and
 - ii. hearing and determining post-search disputes and/or 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 to 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 vs. Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR; *In the Matter of Interim Independent Electoral Commission* [2011] eKLR; *Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 others* [2013] eKLR; the Owners of Motor Vessel “Lillian S” case; *G & C Kreglinger vs. New Patagonia Meat & Cold Storage Co. Ltd* (1913); *Geoffrey K. Sang vs. Director of Public Prosecutions & 4 others* [2020] eKLR; *Chogley vs. 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 vs. Loveland* [1831] 2 DOW & CL. (HL) at 489; *Lall vs. Jeypee Investments Ltd* [1972] EA 512 at 516; *Attorney General vs. Prince Augustus of Hanover* [1957] AC 436 AT 461; *Republic vs. 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 the disputes and/or issues outlined under paragraph 68 above.
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 Respondent's Application, the primary juridical question submitted for determination by this Court is whether the continued detention of the original certificates of title, title deeds and motor vehicle log-books seized from the Respondent's home on 3rd October 2025 - as captured in EACC's inventory of seized items - violates the Respondent's right to property, contrary to Article 40 of *the Constitution*. As clear as day from night, the Respondent desires this Court to exercise its criminal jurisdiction in relation to search warrants to determine what has been clearly crafted by the Respondent as a constitutional question.
80. It is beyond peradventure that the said primary juridical question submitted by the Respondent raises a very weighty constitutional question on alleged denial, violation or infringement of rights and fundamental freedoms guaranteed by *the Constitution* outside Article 25(a) & (b) of *the Constitution* over which this Court enjoys jurisdiction.
81. Needless to underline, whenever a Magistrate's Court is approached in its criminal jurisdiction in relation to search warrants, the party desiring a resolution of any juridical question, it must avail itself within the four corners of the limited constitutional or criminal jurisdiction afore-described. Otherwise, and needless to restate, in instances where a constitutional question is outside Article 25(a) and (b) of *the Constitution* is raised, shepherded by Article 165(3) of *the Constitution*, the best suited Court to determine the dispute in exercise of its jurisdiction to determine alleged denial, violation or infringement of rights and fundamental freedoms guaranteed by *the Constitution*, is the High Court of Kenya.
82. Having reached the conclusion that this Court was invited to exercise its criminal jurisdiction on a juridical question which falls outside the restricted prescribed jurisdictional purview of this Court, this Court is consequently without jurisdiction to determine the said primary question raised and framed by the Respondent (as set out under Question ii of the Questions for determination). I accordingly down my tools.

(ii) Whether the continued detention of the original certificates of title, title deeds and motor vehicle log-books seized from the Respondent's home on 3rd October 2025 - as captured in EACC's inventory of seized items - violates the Respondent's right to property, contrary to Article 40 of *the Constitution*

83. Having answered question (i) in the negative, and this Court having downed its tools, question (ii) is rendered moot.

Part VII: Disposition

84. On basis of the foregoing principal reason, the challenge raised by the Respondent is accordingly struck out.
85. The Respondent is at liberty to lodge the dispute at the appropriate forum.

PARAGRAPH 86.

It is directed that each party will bear their own costs.

87. This file is marked as closed.

VIRTUALLY DELIVERED, SIGNED AND DATED AT THE MILIMANI ANTI-CORRUPTION COURT THIS 13TH DAY OF FEBRUARY 2026

.....



C.N. ONDIEKI

SENIOR PRINCIPAL MAGISTRATE

In the presence of:

The Respondent

Advocate for the Applicant: Ms. Kiigi

Advocate for the Respondent: No Appearance

Court Assistant: Ms. Mutave

