



Ethics and Anti-Corruption Commission v County Government of Kitui (Civil Appeal 385 of 2019) [2025] KECA 311 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 311 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 385 OF 2019
F TUIYOTT, P NYAMWEYA & FA OCHIENG, JJA
FEBRUARY 21, 2025**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPELLANT

AND

THE COUNTY GOVERNMENT OF KITUI RESPONDENT

((Being an appeal against the Judgment and Decree of the High Court of Kenya at Machakos (G. V. Odunga, J.) delivered on 30th day of May 2019 in Petition No. 3 of 2019))

JUDGMENT

1. In this appeal we discuss, amongst other issues, the nature and scope of the advisory role of The Ethics and Anti-Corruption Commission (EACC) under section 11(g) of The Ethics and Anti-Corruption Commission Act, 2011(the Act).
2. The facts leading to this appeal are substantially common ground.
3. Kitui is a vast county with a landmass of 30,570 square kilometres.

This makes it the sixth largest county in Kenya. At the request of livestock farmers and traders within the county made on 18th November 2017 at a public participation forum, it was resolved that the County Government would purchase trucks to ease movement of livestock to markets. A new county government that had come into office in August 2017 had prioritized this program in its manifesto and had to align it to the budget. The County Government of Kitui (the respondent) thereafter commenced the process of procuring the livestock trucks.
4. At the High Court proceedings, from which this appeal emanates, the County Government asserted that under section 135(1)(2) of the [Public Finance Management Act](#) (PFM Act), a County Government is allowed to spend 10% of the total budget in programs that had not been budgeted for. The expenditure on vehicles would cost Kshs.59,750,000.00 which was said to be way less than 10%



- of the total annual budget Kshs.11 billion. It being so, the County Assembly approved the second supplementary budget estimates on 22nd February 2018, allowing the County Government to utilise the funds for programs including purchase of the trucks.
5. The next phase was the procurement process with the County Government opting to use a prequalified list of suppliers by the National Government through the Supply Branch as allowed by the provisions of section 56(1) of the Public Procurement Assets Disposal Act of 2015. Five companies were invited to bid. Two responded and after a technical and financial evaluation process, Thika Motor Dealers was found to be the most responsive bidder and issued with an LPO on 7th February 2018.
 6. So soon thereafter, the County Government received a letter dated 9th February 2018 from the Regional Manager of the Lower Eastern Regional Office of EACC directing it to provide documents relating to the transaction of the trucks. In that letter, EACC also directed that payments for the trucks be suspended and all payment documents be submitted to it. The County complied and on 21st March, 6th April and 12th June 2018, the County Government requested EACC for an update on the progress made in the investigations.
 7. By a letter dated 18th June 2018, EACC responded allowing the County Government to continue with the procurement and make payment for the five trucks “as long as it was done in conformity with the relevant provisions of the law”. In a subsequent letter dated 15th November 2018, the Regional Manager asked for documents related to delivery and payment of the trucks. This prompted a telephone conversation between the Regional Manager and the Governor. The County Government asserted that it then became apparent that EACC was alluding to the fact that the procurement was done without an approved budget. The next day, on 16th November 2018, the County Government replied stating that the trucks had not been delivered and no payment had been made.
 8. The County Government complained that despite this, EACC did not clear the petitioner to make payment and it was with no clear guidance on how to proceed. In a petition dated 26th February 2019 brought in Machakos HCC Petition No 3 of 2019 against EACC, the Government averred that it risked court litigation over the procurement of the trucks, having issued a Local Purchase Order in respect to acquisition of the five trucks. So as to resolve the matter the County Government engaged counsel to follow up the matter on 10th December 2018. EACC responded and requested for further documents which had already been supplied to them early. This was, again, done on 1st February 2019 but EACC was unresponsive.
 9. The County Government asserted that EACC had failed in its mandate to exercise its investigative powers in a manner that protects public funds and facilitates the effective delivery of services of both levels of government; to advise, on its own initiative, any person on a matter within its functions; and to monitor the practices and procedures of public bodies, to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practice.
 10. In its petition, the County Government sought the following prayers:
 - “i. A Declaration that the County Government of Kitui, in the acquisition of the five trucks to support livestock farmers and traders in Kitui County, has complied with Chapter 12 of *the Constitution* of Kenya, 2010; the *Public Finance Management Act*, No. 18 of 2012; and the *Public Procurement and Asset Disposal Act*, No. 33 of 2015; and the relevant regulations;



- ii. A Declaration that where County Governments seek guidance on procurement, the EACC has a duty to furnish the requested guidance within a reasonable time as not to impede the procurement process;
 - ii. A Declaration on the nature and extent of the exercise of the investigative powers of the Ethics and Anti-Corruption Commission (EACC) in respect of county governments and their procurement of goods and services;
 - ii. A Declaration that the investigative powers of the Ethics and Anti-Corruption Commission (EACC) in respect of county governments and their procurement of goods and services should not impede the procurement process;
 - ii. THAT a mandatory injunction does issue estopping the Ethics and Anti-Corruption Commission (EACC) from preferring any charges relating to the acquisition of the five trucks to support livestock farmers and traders in Kitui County;
 - ii. That an order of certiorari does issue quashing the decision by the EACC to halt payment being made by the Petitioner over the acquisition of the five trucks to support livestock farmers and traders in Kitui County;
 - iii. Any other order this Honourable Court deems fit and just in the circumstances including an order for compensation as a result of the actions of the Respondent.”
11. EACC is an independent commission contemplated by Article 79 of *the Constitution* and established by section 3 of the *Ethics and Anti-Corruption Commission Act*. Its mandate and functions are set out by sections 3 and 11 of the Act. In response to the petition, was an affidavit sworn by Gideon Rukaria on 19th March 2019. At the material time, he was a forensic investigator at EACC.
 12. He stated that EACC was investigating a veracity of allegations received about the procurement of the trucks and when the County Government wrote to the Commission that it be allowed to make payments for the delivery of the trucks, the commission advised the Government that any payments it makes must be in conformity with relevant provisions of the law relating to management of public funds.
 13. EACC states this about its mandate and the matter at hand: It has powers to recommend charges to the Office of the Director of Public Prosecution if it found that an offence had been committed in the procurement of trucks; issuing orders to block the Commission would be blocking it from executing its mandate; and investigations were at an advanced stage and it should be allowed to carry out that mandate.
 14. The trial court was urged not to be transformed into a trial court in a matter of a criminal nature; not to muzzle the work of other organs established by and under *the Constitution*; and that it is in the interest of the public to have complaints lodged and investigated and if sufficient evidence is gathered, to recommend to the DPP for prosecution of the alleged act of corruption.
 15. Finally, it was the case of EACC that the petition lacked clarity and specificity on how the petitioner’s right had been violated.
 16. After reviewing the factual position as presented in the affidavits before it, the trial court (Odunga, J. as he then was) made the following salient findings:



- i. In so far as it undertakes functions that affects the legal rights and interest of others, EACC is in a position of an administrator.
 - ii. The right to fair administrative action which encompasses expeditious and efficiency in decision making is now a constitutional right.
 - iii. The functions of EACC are not restricted to situations where the body concerned act unlawfully but it is also tasked with detecting and preventing crimes before they take place and in so doing give such directions as are geared towards the prevention of corruption practices.
 - iv. Where a person is under obligation to furnish information to another, either by *the Constitution* or statute, he cannot go round the edict by purporting to furnish it on a “without prejudice” basis.
 - v. In carrying out the investigating mandate and more so where the action affect the services to Kenyans, EACC ought to proceed speedily.
 - vi. Connected, the commission ought not, by omission of duty, cripple public service under the guise of investigations.
 - vii. The commission’s failure to complete the investigations in more than one year regarding the decision by a county government to render services to its people, considering that they life cycle of the executive in the counties is 5 years, is prima facie unreasonable.
17. Having made those findings, the Court declared and ordered as follows:
- “i) A Declaration that where County Governments seek guidance on procurement, the EACC has a duty to furnish the requested guidance within a reasonable time so as not to impede the procurement process.
 - ii. A Declaration that the investigative powers of the Ethics and Anti-Corruption Commission (EACC) in respect of county governments and their procurement of goods and services should not impede the procurement process.
 - iii. That an injunction does issue restraining the Ethics and Anti-Corruption Commission (EACC) from preferring any charges relating to the acquisition of the five trucks to support livestock farmers and traders in Kitui County until it renders its opinion on the petitioner’s intention to acquire the said trucks.
 - ii. That an order compelling the Respondent to render its opinion as regards the petitioner’s intention to acquire the said trucks as regards the steps taken by the petitioner in that regard to date; the said opinion to be rendered within 30 days from the date of delivery of this judgement.
 - ii. In event of the failure by the Respondent to comply with above, an order of certiorari shall issue quashing the decision by the EACC to halt payment being made by the Petitioner over the acquisition of the five trucks to support livestock farmers and traders in Kitui County.”
18. This appeal, a challenge to that decision, was agitated around the following three issues: -
- i. Whether the EACC is under an obligation to render a legal opinion in the course of investigations.



- ii. Are investigations undertaken by EACC administrative action, and connected to that must they be concluded within a specific timeline?
 - iii. Whether the petition has been brought in good faith.
19. The role of the Court in a first appeal is to re-evaluate the evidence afresh, a retrial, and to draw our own conclusion. On this occasion, as trial proceeded by way of affidavit evidence, we are at par with trial court in so far as there was no live evidence and therefore no demeanour watch of the witnesses.
 20. EACC argues that it is under no obligation to render a legal opinion in the course of investigation and elaborates as follows. It has mandate to undertake investigation of any acts of corruption or violation of code of ethics or other matter prescribed under the ACECA and therefore when it received the complaint alleging the County Government of Kitui was in breach of procurement laws and regulations leading to the award of restricted tender on 2nd February 2018, it opened investigations for the same and cites Article 79 and 252(1)(a) of *the Constitution*, the *Anti-Corruption and Economic Crimes Act*, 2003 and the Ethics, Anti-Corruption Commission Act, 2011 and the *Leadership and Integrity Act* No. 19 of 2012 as the relevant provisions mandating it to do so. EACC submits that the allegations received and investigated are issues relating to corruption and economic crimes in respect to procurement of public goods and investigations of this nature seek to investigate compliance with the law in implementation of procurement process by a public entity, an inquiry which falls under the mandate of the EACC particularly under section 45(2)(b) of the ACECA and provisions of the *Public Procurement and Asset Disposal Act* 2015 and the *Public Finance Management Act* No. 18 of 2012. EACC therefore contends that it enforces compliance with the law by carrying out investigations and does not provide legal opinions in the course of investigations and thus should the County Government have required advice, it should have sought the advice on how to carry out procurement of the said trucks from the designated legal advisers of the Government that is, the AG, County Attorney or the Public Procurement Regulatory Authority.
 21. On this limb of appeal, EACC argues, further, that the order made by the trial Court compelling it to render an opinion on the procurement was not appropriate in the circumstances since it did not serve to redress any of the County Government's rights that may have been violated and which in, any event, were not set out with precision (see *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR).
 22. On the issue of whether the EACC is under obligation to render a legal opinion in the course of the investigation, the County Government counters that under section 11(1)(g) and (i) of the Act, the EACC was required to advise, on its own initiative, any person on any matter within its functions and to monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices. This therefore mandates the EACC to render opinions on such procedures to ensure their full compliance with the law. The County Government thus posits it is non sequitur fallacy for the EACC to concede having advised on suspension of the payment for the procurement of the trucks by the County Government yet refuse to advise on the remedial measures that are to be complied with merely because there exists the AG, County Attorney and PPA. EACC is accused of obfuscating the issue relating to the problem of preserving its investigative mandate if it were to be mandated to issue legal opinions in the pendency of investigations, however the superior court, it is asserted by the County Government, did not give a blanket order that the EACC is under duty to render legal opinions amid investigations, rather, conscious of the EACC's mandate under sections 11 (1)(g) and (i) of the EACC Act, and taking into account the time critical nature of the procurement processes and the prospect of delay where the EACC's advice is sought and withheld, the court pronounced that the EACC would be duty bound to render its advice within reasonable time.



23. The establishment of the Ethics and Anti-Corruption is contemplated in Article 79 of *the Constitution* as follows:

“79. Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.”

24. Section 11 of the EACC Act sets out a raft of functions of the Commission as:

“ 11. Additional functions of the Commission

1. In addition to the functions of the Commission under Article 252 and Chapter Six of *the Constitution*, the Commission shall—
 - a. in relation to State officers,—
 - i. develop and promote standards and best practices in integrity and anti-corruption;
 - ii. develop a code of ethics;
 - b. work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;
 - c. receive complaints on the breach of the code of ethics by public officers;
 - d. investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of *the Constitution*;
 - e. recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
 - f. oversee the enforcement of codes of ethics prescribed for public officers;
 - g. advise, on its own initiative, any person on any matter within its functions;
 - h. raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes (Cap. 65) as to confidentiality;



- (i) subject to Article 31 of *the Constitution*, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and
- (j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.”

25. A key function of the Commission is to receive complaints on breach of the Code of Ethics of Public Officers and to investigate and recommend to the DPP the prosecution of any act of corruption, bribery or economic crimes or violation of Code of Ethics.
26. As it was empowered to do, EACC commenced investigations into the propriety of trucks procurement process and after some back and forth, on 18th June 2018, EACC wrote as follows to the County Government:

“Without prejudice”

18th June, 2018

EACC.MCKS/6/15/2/(58)

County Executive Committee Member Trade, Cooperatives and Investment

Box 58-90200 Kitui

Dear Sir,

Re: follow-up on truck issue

Your letter dated 12th June, 2018 addressed to the Chief Executive Officer, Ethics and Anti-corruption Commission (EACC) refers.

This is to inform you that the investigations touching on the matter above are still on going, and are about to be concluded.

We have noted the desire by the County to complete the procurement process and we wish to advise that whatever payments the County intends to make, the same should be made in conformity with relevant provisions of the law relating to the management of public funds.

Yours faithfully, Susan Kinyeki (Mrs.)

For: Secretary/chief Executive Officer”

27. Two things stand out about the letter. First it was a communication on a “without prejudice” basis. Second, and important as well, while saying nothing as to whether or not the Commission had exonerated the County Government about the procurement process, EACC simply advises that whatever payments the County Government intended to make should be made in conformity with



relevant provisions of the law relating to the management of public funds. Was this letter an abdication of the advisory function given to the Commission?

28. From the language of the statutory provision setting out its mandate, EACC is empowered, on its own initiative, to advise any person on a matter within its functions. The use of the words 'on its own initiative' must count for something. We do not think, and so hold, that EACC was under an obligation to render a legal opinion in favour of the County Government or anyone it is investigating. Under this specific mandate, EACC is given the discretion and prerogative on when, to whom and how to advise. To reach a different result could lead to an absurdity because EACC will otherwise have to be bound by whatever opinion it were to render to a suspect even when where such opinion was made on misapprehension of facts at a stage of investigation or on the basis of incomplete or suppressed facts. This would be inimical to public good that corruption must be investigated and those found responsible duly prosecuted. In addition, it would be a far too burdensome responsibility to expect EACC to render a legal opinion to every person it investigates.
29. Further, in advising the County Government to act in conformity with the law, EACC did not obstruct the completion of the procurement process. The decision as to whether or not to make a payment was left entirely to the discretion and judgment of the County Government whom were expected to comply with the law, even in the absence of specific advice from EACC. We are unable to agree with the trial judge that EACC held back or handicapped the County Government from discharging its mandate.
30. We turn to the second issue. It is contended by EACC that the learned judge, in holding that the investigations are an administrative action, went contrary to the Supreme Court decision in 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) which held that the EACC's powers to investigate cannot be described as administrative action within the meaning of Article 47 of *the Constitution* and are in fact special powers conferred by a specific legal regime to be exercised for specific purpose. Thus if investigations were to be considered administrative action to be concluded within a particular timeline, it would amount to interference with the independence of the EACC which may impact the quality of the investigations by affecting the careful consideration of the evidence.
31. The County Government retorts that in suspending payments and indefinitely halting the procurement process under the guise of investigation, EACC was executing administrative actions. The County Government suggests that the EACC misread the Supreme Court Decision in Prof. Tom Ojienda (supra) in that the court was dealing with the EACC's investigative powers under Part VI of the ACECA while the powers under consideration here were those section 11 of the EACC Act. Thus, there is no contradiction in finding that some of the powers by the EACC amount to administrative actions as rightly noted by the superior court.
32. This vexed issue is answered, by and large, by the decision of the Supreme Court in Prof Tom Ojienda(supra) In a synopsis, the facts of that case as summarized by the Apex Court were that:

“A complaint had been lodged before the 1st appellant, the Ethics and Anti-Corruption Commission (EACC), alleging Kshs. 280 million had been fictitiously paid into the 1st respondent's advocate-client bank account. Based on that allegation, the EACC obtained warrants ex-parte to investigate and inspect the bank account. Aggrieved, the 1st respondent filed a constitutional petition contending that the warrants had been issued ex- parte and had been obtained and enforced secretly without notice.



The 1st respondent urged that the EACC's actions amounted to an infringement of his right to privacy, property, fair administrative action, and fair hearing and contradicted sections 28(1, (2), (3), and

- (7) of the *Anti-Corruption and Economic Crimes Act* (ACECA), which required the EACC to issue a notice informing him of its intended application and allowing him to be heard before a court could legitimately issue any warrants.

The High Court held, among others, that the warrants to investigate the bank account breached the 1st respondent's rights and fundamental freedoms under the provisions of articles 47(1), 47(2), and 50(1) of *the Constitution*, hence void for all intents and purposes. Aggrieved, the appellants lodged appeals at the Court of Appeal, while the 1st respondent also filed a cross-appeal against part of the judgment. The Court of Appeal upheld the High Court decision and dismissed both the appeals and cross-appeal for lack of merit. The appellants were further aggrieved and thus filed the instant appeal."

33. Addressing the issue whether investigations by EACC constitute an administrative action within the meaning of Article 47 of *the Constitution*, the Apex Court held:

" 58. 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."

34. We hold the view that the Apex Court has authoritatively spoken that investigative powers of EACC cannot be described as administrative action within the meaning of Article 47. Yet, we have no doubt in our minds that some of the canons of fair administrative action which include efficiency, lawfulness, reasonableness and procedural fairness applies in certain aspects of the investigative functions of the Commission without making the investigative powers an Article 47 administrative action. If, when and how these principles or tenets apply, will differ from case to case and are context based.

35. The investigations at hand were in respect to the County Government's mandate of delivery of devolved services to the people and it is expected that such investigations be carried out expeditiously and efficiently. This is because they have an impact in the delivery of services to the public. The following view of the trial court cannot therefore be faulted.

"...in carrying out its mandate, particularly where the investigation in questions is in respect of an action that affects services to Kenyans the Respondent ought to proceed speedily."

36. Whether an investigation has been carried out expeditiously and or efficiently will depend on many factors including the complexity of the investigations, the scope of the investigations, the number of witnesses to be interrogated, the availability of those witnesses and even on cooperation of potential



witnesses and suspects. The list can go on and on. Each case must turn on its own circumstances. It is not to be resolved by mathematics or actuarial analysis. See for instance the High Court decision of Thuita Mwangi, Anthony Mwaniki Muchiri & Allan Waweru Mburu v Ethics & Anti-Corruption Commission, Director of Public Prosecutions, Attorney General & Chief Magistrate's Court Nairobi [2013] KEHC 1689 (KLR) the court, dealing with the question whether there was inordinate delay in investigating and bringing criminal charges, placed reliance on this court's decision in Julius Kamau Mbugua v Republic, Criminal Appeal 50 of 2008 [2010] eKLR and held as follows:-

- “94. The right to trial without unreasonable delay is one of the components of a fair trial under Article 50. After considering the international jurisprudence on the right to a trial within a reasonable time, the Court of Appeal in Julius Kamau Mbugua v Republic, Criminal Appeal 50 of 2008 [2010] eKLR summarized the principles on the right to a trial within a reasonable time *inter alia* as follows;
- i. The trial within a reasonable time guarantee is part of international human rights law and although the right may not be textually in identical terms in some countries the right is qualitatively identical.
 - ii. The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.
 - iii. The general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.
 - iv. There is no international norm of “reasonableness”. The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.
 - v. The standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable.
 - vi. The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland and it is not designed to avoid trials on the merits.
95. What is clear from the decision is that what constitutes ‘unreasonable delay’ is not a matter capable of mathematical definition but one dependent on the facts and circumstances of the particular case. In the present matter, it is common ground that the transaction subject of the criminal matter took place in the year 2009. It is also common ground that the charges were taken to court on the 28th February 2013. The question is, can this be termed as unreasonable delay and hence a violation to the right to fair trial under Article 50.



95. What is not in dispute is that the matter at hand is complex and involved investigations within and outside jurisdiction. The petitioner's bear the burden of proving that there has been unreasonable delay in charging them to the extent that a fair trial is impaired. I find and hold that they have not satisfied the, "relatively high threshold has to be crossed before the delay can be categorized as unreasonable" propounded in the Julius Kamau Mbugua Case (Supra)."

37. In similar tone, is the High Court decision in *Chepkoiit vs Ethics and Anti-Corruption Commission & Another* [2024] KEHC 10389 (KLR), where the court, in dealing with a question of whether there was inordinate delay by the EACC in concluding an investigation into an economic crime, placed reliance on the Supreme Court decision in *Jirongo v Soy Developers Ltd & 9 others* [2021] KESC 32 (KLR) and held as follows:-

"55. As a starting point, there is no constitutional or statutory limit that defines the time a criminal investigation should take. The common law doctrine of *nullum tempus occurit regi* (no time runs against the King) may thus be said to apply in regard to investigative powers for criminal offences.

56. Judicial precepts that have considered the effect of delay mainly focus from the time the formal charge is laid before the Court and consider it on the basis of a fair trial under Article 50. A case in point is *Jirongo vs Soy Developers Ltd & 9 others* (supra) where the Supreme Court stated:

"56. The question of delay with respect to the lodging of criminal prosecutions has been addressed by our courts in several matters. The leading persuasive decisions on the subject are the High Court cases of *Githunguri v Republic* (1986) KLR 1 and *Republic v Attorney General & another ex parte Ng'eny* (2001) KLR 612 which both Superior Courts relied on.

57. In *Githunguri v Republic* (supra), the court stated as follows:

"In this instance the delay is said to have been nine years, six years and four years. The court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil! It is too long, too much of delay. The Attorney-General is not bound to tell the court the reason but it would have made us knowledgeable if told. We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become



available thereafter, it can in no way be said that the hearing of the case by the court will be within a reasonable time as required by section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General...”

57. The Supreme Court went on to hold thus:

“It is in the above regard trite that there is no limitation of time to institute and prosecute criminal offences but as stated in Githunguri, where the delay has the effect of denying a suspect the legal tools to mount a credible defence, then the High Court is properly mandated by *the Constitution* to step in and stop the intended prosecution.”

58. The Court assesses the effect of unreasonable delay from the point of securing a fair trial of the accused and this can only come after the charge is formally laid. It would be speculative in my view to stop an investigation because not every investigation will yield a charge before the Court. The Court cannot purport to monitor the timelines of an investigation such as this with multi-dimensional aspects.

59. This Court also notes that this investigation involves a serious economic crime which is attracting a colossal amount of money and the facts are complex extending to other jurisdictions. The Court opines that it would not be in public interest to terminate this kind of investigation prematurely and should thus be allowed to proceed to its ultimate end.”

38. A person alleging that an investigation is slow bears the onus of showing that, given the nature of the particular investigation, the investigating body could have been more expeditious and speedy in commencing and concluding an investigation. Sometimes the delay can be so extensive that the length of delay itself is overt and sufficient proof of inordinate delay. There is then a second requirement informed by the public policy objective that it is in the interest of the public that crime is investigated and perpetrators of crime brought to book. This rings true in crimes involving corruption and other economic crimes in a country such as ours where corruption is perverse and endemic. This second limb is that a person who seeks to halt a criminal investigation on account of delay must, in addition, demonstrate that the speed of the investigations is prejudicial to him or her. The two facets strike a balance so that public interest does not overawe the private rights of the suspect and vice versa.

39. Prejudice could be in many forms. It could be that the delay in closing an investigation compromises the ability of the suspect to mount a defence when eventually charged or the psychological stress and harm that a long drawn investigation may cause to a suspect or the reputational cost that may result from a long unresolved investigation or the disruption of the life of a suspect who is forced to endure, attend and pay attention to an unending investigation. One can think of other forms of prejudice.

40. Here, it is common ground that; EACC first raised a concern regarding the procurement process on 9th February 2018; on 18th June 2018, EACC confirmed that investigations were ongoing but allowed



the procurement to proceed as long as it was done in conformity with the relevant provisions; and as at the date of the petition (26th February 2018), the investigation was still not complete. In its petition, the County Government pleaded that the speed of the investigation ‘led to a delay in the service that was to be delivered to the livestock farmers and traders who are waiting for these trucks to facilitate service delivery’.

41. The County government had set out the following chronology of events as demonstration of EACC’s tardiness in the matter; documents requested by EACC regarding the investigation were supplied on 9th February 2018; on 13th February 2018, EACC requested to record statements of officers who took part in the tender, a request promptly complied with by the County Government; on 21st March 2018, and again on 6th April 2018, the County Government wrote to EACC inquiring about the status on the investigations; on 4th June 2018, EACC asked for further documents which, again, were promptly delivered; on 18th June 2018 EACC issued the “without prejudice” letter stating that the County Government could proceed with the procurement process; on 15th November, 2018 EACC requested for the documents for delivery and payment; on 23rd January 2019, EACC requested for further documents which were resupplied by 1st February 2019. On its part, EACC, save for saying that the investigations were at an advanced stage, did not explain why it was not more agile or show that, in the context of the investigations, there was no delay.
42. There was sufficient evidence, we hold, for the learned trial judge to draw the conclusion that investigations which took more than one year touching on a decision by a County Government to render services to its people considering that the life cycle of the executive of the County Government is 5 years was prima facie unreasonable. Still, and as alluded to earlier, the County Government needed to demonstrate that the delay prejudiced it in some way. On this the County Government’s only grievance was that it could not conclude the procurement process because of the ongoing investigations. However, this grievance falters in the face of the facts. On our earlier analysis, contrary to what the County Government asserts, just 4 months into the investigations, EACC categorically gave the green light that the Government could proceed with the process as long as the process complied with the law. This did not curtail the County Government from acting further on the process. A government confident that it was on the right side of the law would have simply concluded the procurement. It did not need nudging, approval or endorsement by EACC.
43. We take the view, and so hold, that while EACC could have acted more expeditiously and efficiently, its conduct did not handicap, impede or prejudice the County Government’s functions and there could be no reason to stop the investigations or insulate the suspects from ever been charged, if reasonable cause arose.
44. Having reached that conclusion, the third issue is moot and need not detain us at all.
45. Ultimately, the appeal very substantially succeeds with the result that:
 - i. Save that we uphold the declaration that the investigative powers of the Ethics and Anti-Corruption Commission (EACC) in respect of county governments and their procurement of goods and services should not impede the procurement process, the judgment and decree issued in Machakos on 30th May 2019 in Petition No. 3 of 2019 is hereby set aside.
 - ii. Save to the extent stated in (i) above, Machakos High Court Petition No. 3 of 2019 is dismissed.
 - iii. Given the nature of this litigation, each party shall bear its own costs herein and in the High Court proceedings.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2025.



F. TUIYOTT

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar

