



**Ethics & Anti-Corruption Commission v Busia County Government (Civil Appeal 14 of 2017) [2025] KECA 622 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KECA 622 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 14 OF 2017  
W KARANJA, FA OCHIENG, GV ODUNGA, AO MUCHELULE & WK KORIR, JJA  
APRIL 4, 2025**

**BETWEEN  
THE ETHICS & ANTI-CORRUPTION COMMISSION ..... APPELLANT  
AND  
BUSIA COUNTY GOVERNMENT ..... RESPONDENT**

*(Being an appeal from the Judgement and Decree of the High Court at Nairobi (J. L Onguto, J.) delivered on 7th September 2016 in High Court Petition No. 382 of 2015)*

**JUDGMENT**

1. This appeal arises from the judgement of the High Court, Nairobi (Onguto, J) delivered on 7<sup>th</sup> September 2016 in Petition No. 382 of 2015 which was delivered on 7<sup>th</sup> September 2016.
2. The background of the said petition was that on 4<sup>th</sup> September 2015, officers of the Ethics and Anti-Corruption Commission (EACC), the appellant herein, (also referred to as the Nai Civil Appeal No 14 of 2017 Page 1 of 38 Commission), accompanied by security personnel raided the offices of the respondent and, purportedly, without explaining the purpose proceeded to cart away documents and equipment. It later turned out that the EACC was executing search warrants earlier on obtained by the EACC before the Chief Magistrates Court at Busia. The warrants had been obtained without notice on 3<sup>rd</sup> September 2015 after, according to the EACC, it received intelligence reports that one Sospeter O. Odeke, the then Governor of the respondent, had allegedly colluded with senior officials of the respondent to defraud the respondent. Although named as the respondent in the proceedings before the Chief Magistrate, the said Governor was never served with the court process either before or even after the warrants were issued. The warrants were however directed at him and were to be executed at either his office, residence or business premises. The respondent's offices also happened to house the official offices of Sospeter O. Odeke in his capacity as the Governor of the respondent county. The respondent lamented that the raid led to a dysfunction of most of its operations which were halted with the seizure and detention of crucial documents and equipment including computers.



3. Alongside the petition, the respondent filed an application for conservatory orders on 10<sup>th</sup> September 2015 and pursuant thereto, ex parte mandatory orders were issued on 11<sup>th</sup> September 2015 directing the release of three specific equipment by the EACC.
4. The respondent's case was: that the EACC acted in violation of *the Constitution* and in particular Article 47 which demands fair administrative action; that in conducting the raid on the respondent's offices and carting away items, fettered the lawful functions of the respondent to provide services to the county residents contrary to the provisions of Articles 1(4)(b) and 249 of *the Constitution*; that the EACC was improperly constituted as at the time it conducted the investigative raid as there were no commissioners in office contrary to Articles 250, 251 and 252 of *the Constitution*; and that the respondent abused its investigatory powers in confiscating public documents, information and equipment with the purpose of halting the operations of the respondent.
5. The respondent's case, as expounded before the trial court, was: that the EACC violated Article 47 of *the Constitution* and that the investigations had been pegged on unfounded claims with the intention of embarrassing the respondent's governor as was evident from the affidavit in support of the application for the warrants; that, on the authority of the cases of Geothermal Development Co. Ltd v Attorney General & 3 Others [2013] eKLR, and Joseph Mbalu Mutava v Attorney General & Another [2014] eKLR, prior to any adverse action being taken there was need for a notice to be given to the person to be adversely affected; that section 5 of the *Fair Administrative Action Act* 2015 ("the FAA Act") had a clear laid down procedure where a public notice was necessary, amongst other requirements, yet the procedure was never followed; that the EACC's actions of impounding documents and equipment had effectively fettered the lawful functions of the respondent contrary to the aspirations of and the express provisions of Article 249 of *the Constitution*; and that as the EACC was not properly constituted as provided for under sections 3 & 4 of the Ethics and Anti-Corruption Act 2011, it could not lawfully perform or be deemed to lawfully perform its duties.
6. In opposition to the petition, the EACC relied on the replying affidavit of Cecily Mumbi sworn on 4<sup>th</sup> December 2015 in which it was averred: that the EACC has powers to investigate complaints made by any person or on its own initiative; that its investigations were based on intelligence reports; that the search warrants were obtained in good faith and in exercise of its constitutional mandate; and that it was properly constituted.
7. Submitting on its case, the EACC contended: that section 13 of the EACC Act as read with Article 252(1) of *the Constitution* donate various powers to the EACC including the power to investigate incidents of corruption or violation of codes of ethics; that the petition was premature since if the respondent was dissatisfied with the search warrants it could have moved the High Court under section 362 of the *Criminal Procedure Code* or in the alternative the same magistrate's court that issued the orders to have them set aside; that, on the authority of the case of James Humphrey Oswago v The Ethics & Anti- Corruption Commission NBI HCCP No. 409 of 2013, there had been no violation of the respondent's rights under Article 47 of *the Constitution* as the application for search warrants could be made ex parte; and that the respondent had failed to tender any evidence to prove or establish the alleged fetter of its operations.
8. In his judgement the learned Judge identified the following issues for determination: whether the EACC, at the time it obtained the search warrants and subsequently raided the respondent's premises, was lawfully and constitutionally constituted; secondly, whether the EACC violated the respondent's rights enshrined under Article 47 of *the Constitution*; and thirdly, whether the EACC exceeded its investigatory powers and fettered the functions and operations of the respondent.



9. As regards the composition of the EACC, the learned Judge found that at the time the EACC undertook a raid on the respondent's premises, there were no members of the EACC in office; that, as was held in the case of *Michael Sistu Mwaura Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others* [2016] eKLR, in the absence of the commissioners, the secretariat on its own motion could not and cannot purport to execute and perform the core functions of the EACC; that in those circumstances, no lacuna arises in the fight against corruption since the Director of Public Prosecutions is properly enjoined under Article 157(4) of *the Constitution* to direct the investigation of any criminal conduct and crimes under the Anti Corruption and Economic Crimes Act (ACECA) or EACC Act or under any other law enacted pursuant to Chapter 6 of *the Constitution*; that since Article 157 of *the Constitution* does not make any distinction as to the crimes the Director of Public Prosecutions may urge or direct the national police service to investigate, nothing under the law restrains the Director of Public Prosecutions from directing or assisting (in the words of section 5(3) of the *Office of the Director of Public Prosecutions Act*) the EACC in undertaking its investigatory role in the absence of commissioners of the EACC; that the essence is to ensure that the independence of the EACC survives or appears to survive past the vacation of office by commissioners or in the absence of any commissioners, just the same way the EACC survives as an entity under Article 253(a) of *the Constitution*; that while the absence of the commissioners did not render the EACC extinct by virtue of its juristic corporate features, in so far as its core functions of investigating economic crimes and recommending the prosecution of offenders was concerned, it had to be dormant until properly reconstituted or assisted through the Director of Public Prosecutions; and that the EACC, in the circumstances, had no powers, in the absence of the commissioners, to initiate investigations of its own motion or any other person's motion, save as may be directed by the Director of Public Prosecutions.
10. On the issue of whether the EACC exceeded its investigatory powers, the learned Judge, while finding that in light of his finding above, the determination of the issue was rendered unnecessary, nevertheless found that the powers were not exceeded. According to the learned Judge, the EACC is enjoined under section 11(1)(d) of the Ethics and Anti-Corruption Commission Act to conduct investigations and make appropriate recommendations to the Director of Public Prosecutions for consideration; that based on sections 23(4) and 29 of the ACECA, the EACC could, by applying the provisions of both the ACECA and the *Criminal Procedure Code*, push further any investigations it had started by seeking the court's help through the use of legislation which clearly defined the power to search and seize with a view to achieving the compelling public objective of ensuring that crime is investigated. He found that the EACC prompted the court under section 118 of the *Criminal Procedure Code* for a search and seizure warrants hence, in storming the respondent's offices, the EACC did not exceed its role as well as the precincts of the warrants. In his view, the interference with the privacy and property of the respondent was authorized by the Chief Magistrates' court that approved and granted the warrants after finding reasonable grounds to do so for purposes of preparatory investigations. Since the extent of the warrants was clearly defined and the warrants also identified the premises to be searched and conferred authority upon the EACC officers to seize documents and items, the EACC could not be faulted for executing the warrants the way it did.
11. On the contention that the EACC violated the respondent's Article 47 rights, the learned Judge found: that the EACC was exercising a statutory mandate when it moved the court under section 118 of the *Criminal Procedure Code* under which an investigator may move the court without notice so long as the investigator has solid and reasonable grounds to stand on; that Article 47 of *the Constitution* is not absolute and is limited by the statutory framework of the *Criminal Procedure Code* and justifiably so with clear criteria that the court must be satisfied on oath that there are reasonable and solid grounds for the warrants to be issued; that the preparatory investigations being undertaken in the circumstances



- of this case were not judicial or quasi-judicial in nature to warrant the application of Article 47 of *the Constitution*; and that the respondent's rights under Article 47 of *the Constitution* were not violated.
12. The learned Judge added: that the mere fact that investigations occasionally inconvenience the party being investigated does not mean that an investigation must be faulted and vacated on that basis unless it is shown to the court that the investigators are simply being unreasonable especially where they have to seize items or documents; that public policy would indeed favour inconvenience being occasioned if it is with a view to fighting off crime; that the circumstances of each case must be viewed *sui generis*; that in the instant case, the investigators were not unreasonable to deserve condemnation; and that the actions of the EACC did not fetter the respondent's operations.
  13. In conclusion, the learned Judge, while taking notice that the EACC was, at the time of his decision, properly constituted, held that nothing barred the EACC from commencing the investigation a fresh, although the previous investigations could not bind the Director of Public Prosecutions. However, as all the items seized and demanded back had already been returned, there was no need for any mandatory restorative orders. He, however, declared that the seizure of the information, documents and equipment from the respondent's offices on or about 2<sup>nd</sup> September 2015 was unconstitutional and illegal in so far as the same was undertaken by a body then lacking the constitutional capacity to undertake such investigation.
  14. Dissatisfied with the said decision, the appellant is before us challenging the decision on the grounds that the learned Judge erred in law and in fact: in holding that the EACC was essentially established to assist only in the promotion of Chapter Six of *the Constitution*; in holding that in the absence of the commissioners, the secretariat on its own could not and cannot purport to execute and perform the core functions of the EACC; in finding that the Director of Public Prosecutions is properly enjoined under Article 157(4) of *the Constitution* to direct the investigation of any criminal conduct and crimes under the ACECA or EACC Act or under any other law enacted pursuant to Chapter Six of *the Constitution*; in holding that nothing under the law restrains the Director of Public Prosecutions from directing or assisting the EACC in undertaking its investigatory role in the absence of commissioners of the EACC, and further that Article 157 of *the Constitution* does not make any distinction as to the crimes the Director of Public Prosecutions may urge or direct the National Police Service to investigate; when on one hand he emphasizes the independence of the EACC, yet on the other hand, holds that the Director of Public Prosecutions, another independent office, has the legal mandate to interfere with the core functions of the EACC; in holding that in the absence of the commissioners, the EACC had to be dormant until properly reconstituted or assisted through the Director of Public Prosecutions; and in holding, on one hand, that the respondent's rights were not violated and that the EACC did not exceed its investigatory powers and fetter the respondent's operations and functions, yet on the other hand, proceeding to oblige the respondent with costs.
  15. We heard the appeal on the Court's virtual platform on 10<sup>th</sup> December 2024 when learned counsel, Ms Judith Shamalla, appeared for the appellant. There was no representation for the respondent despite due service of the hearing notice. The respondents had, however, filed written submissions. Ms Shamalla condensed the appeal into two grounds namely: whether in the absence of the Commissioners, the Commission can carry day to day work; and, secondly, whether the Director of Public Prosecutions can direct the EACC to carry out investigations pursuant to Article 157(10) of the Constituion.
  16. It was submitted on behalf of the appellant: that this Court in determining the appeal should be guided by the pronouncement in the case of *Ndiritu Gachagua v Thuo Mathenge & 2 Others* [2013] eKLR in which the Court applied the principles of constitutional interpretation; that the EACC does not only assist in the promotion of Chapter 6 of *the Constitution*, but rather has the primary



constitutional mandate to ensure compliance with, and enforcement of, the provisions of Chapter Six of *the Constitution*; that pursuant to section 11 of the EACC Act, the EACC is assigned more powers in addition to the functions assigned under Article 252 of *the Constitution*; that the finding of the learned Judge that until properly constituted or assisted through the Director of Public Prosecution, the EACC had to be dormant, flies in the face of Article 259(1) of *the Constitution*; that the absence of the Commissioners does not in any way hinder the functions of the EACC and that its daily activities and functions including investigations, under section 11(6)(e) of the EACC Act, are to be performed by the staff of the Commission, under the stewardship of the secretary; that the functions of the Commissioners are distinctively outlined in section 11(6) of the EACC Act; that the functions of the Commission, the Commissioners, the Secretary and the Staff of the EACC are clear and distinct, but which are to be read harmoniously to achieve the purpose and objective of the Commission under Article 249 of *the Constitution* as read with Article 79 thereof; that the Commissioners neither conduct nor coordinate investigations; that the learned Judge contradicted himself by finding that the EACC had no powers to investigate on one hand while finding that it could conduct preparatory investigations on the other hand; that under section 11(3) of the EACC Act, the EACC has the discretion to co-opt other agencies in the prevention and investigation of corruption hence indicative of the Commission's sole discretion in co-opting other state organs in the discharge of its mandate; that by holding that the DPP could direct the EACC in undertaking its investigatory role, the learned Judge's decision contravened Article 249(2)(b) of *the Constitution*; that since the investigations were commenced in the interest of the public, the learned Judge erred in awarding costs against the EACC.

17. It was noted that neither the petition nor the affidavits were signed and, on that ground, it was submitted that the petition ought not to have been allowed.
18. On behalf of the respondent, it was submitted: that the appellant has not laid any basis to warrant interference with and setting aside the orders issued by the trial Judge; that the learned Judge did not expressly or by implication in his judgement state that the EACC was only established to promote Chapter Six of *the Constitution*; that the appellant's submission that the trial court's findings had the net effect of limiting or restricting the role of the EACC in promotion of the Chapter Six values is factually erroneous and legally untenable; that the repository of the Commission's powers is the Commission and not the Secretariat or the Secretary to the Commission because the Secretary to the Commission is an office created under Article 250(12) of *the Constitution* as read with section 16(1) of the EACC Act and is appointed by the Commission with the approval of the National Assembly; that the effect of section 16(6) of the said Act is that the Secretary is responsible to the Commission in the discharge of his functions and duties and, therefore, in the absence of the Commissioners, the law does not permit the Secretary to carry out those functions since the Secretary and the secretariat he heads have not been clothed with any investigative or recommendatory functions by the governing law; that one of the core functions of the Commission is to conduct investigations on its own initiative or on a complaint by any person which function is undertaken by the Commissioners with the help of the secretariat; that, based on the case of Michael Sistu Mwaura Kamau v Ethics and Anti-corruption Commission & 4 Others [2017] eKLR, if the Commissioners are not in the office, it would mean that the business of the Commission as contemplated in section 11(1)(d) of the EACC Act cannot be undertaken; that the EACC being an investigative agency pursuant to section 11(1) of the EACC Act, at the completion of its investigations, it recommends to the Director of Public Prosecution to commence prosecution in accordance with section 11(1) of the EACC Act and section 35(1) of the Anti- Corruption and Economic Crimes Act (ACECA); that the power to institute criminal proceedings being discretionary, pursuant to Article 157(10) of *the Constitution*, it is not subject to direction or control by any authority hence the fight against corruption is not an exclusive responsibility of the EACC; that the two constitutional bodies are expected to work symbiotically to



ensure that realisation and compliance with Chapter Six of *the Constitution* is achieved; that since costs follow the event, in light of the declaration that the action of the appellant in seizing documents and equipment from the respondent's offices was unconstitutional, the court did not err in penalising the appellant in costs hence this Court should uphold the order on costs; that, on the basis of the holding in *Twaher Abdulkarim Mohamed v Independent Electoral & Boundaries Commission (IEBC) & 2 Others* [2014] eKLR, the issue of the petition not being signed is not a ground in the memorandum of Appeal and was not an issue for determination before the trial court hence ought not to be urged.

19. We have considered the material placed before us. This Court's mandate on a first appeal as set out in rule 31(1)(a) of the Rules of this Court is to reappraise the evidence and draw our own conclusions. In determining this first appeal from the decision of the trial court, we are alive to our mandate as espoused in the case of *Ng'ati Farmers' Co-operative Society Ltd v Ledidi & 15 Others* [2009] KLR 331 that:

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

20. A similar view was expressed in *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where this Court held that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

21. This mandate was reiterated in the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

22. While the hearing before the trial court was on the basis of affidavit evidence as opposed to a viva voce hearing, the principles applicable to a first appeal apply with equal force save that the usual benefit that accrues to the trial court based on the advantage of hearing and seeing the witness, does not apply. In other words, since evidence can either be oral or on affidavit, the duty largely remains the same.

23. While we appreciate that we may, in appropriate cases, reverse or affirm the findings of the trial court, we are alive to, and adopt the position in *Peters v Sunday Post Limited* [1958] EA 424, in which the predecessor of this Court stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there



is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

24. It is clear that this appeal is, substantially, focussed on the findings by the learned Judge: that in the absence of the commissioners, the secretariat on its own motion could not and cannot purport to execute and perform the core functions of the EACC; that since Article 157 of *the Constitution* does not make any distinction as to the crimes the Director of Public Prosecutions may urge or direct the national police service to investigate, nothing under the law restrains the Director of Public Prosecutions from directing or assisting the EACC in undertaking its investigatory role in the absence of commissioners of the EACC; that while the absence of the commissioners did not render the EACC extinct by virtue of its juristic corporate features, in so far as its core functions of investigating economic crimes and recommending the prosecution of offenders was concerned, it had to be dormant until properly reconstituted or assisted through the Director of Public Prosecutions; and that the EACC, in the circumstances, had no powers, in the absence of the commissioners, to initiate investigations of its own motion or any other person’s motion, save for any directions issued by the Director of Public Prosecutions.
25. We agree with the respondent that nowhere in his decision did the learned Judge hold that the EACC was only established to promote Chapter Six of *the Constitution*.
26. We are aware that subsequent to the institution of this appeal, this Court delivered its decision in *Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others* [supra]. In that case, the investigatory powers of the EACC similarly were being challenged on the same grounds as in this matter, that the Commission, being not properly constituted, could not undertake its core mandate. This Court returned the verdict in the following terms:

“On the first issue in this appeal, we are unable to agree with EACC’s contention that the secretariat on its own can investigate and make recommendations to the DPP in the absence of commissioners. Firstly, section 2 of the EACC Act defines ‘commission’ to mean the EACC as established under section 3 of the EACC Act. Section 3 of the EACC Act then establishes the EACC whose composition is provided for under section 4. Under that section, the composition of the EACC shall consist of a chairperson and four other members appointed in accordance with the provisions of the Act. This provision is in line with Article 250(1) of *the Constitution*, which provides that each of the constitutional commissions shall consist of at least three but not more than nine members. As regards the secretary, Article 250(12) of *the Constitution* requires each commission to have a secretary who it appoints and is the chief executive officer. Similarly, section 16 of the EACC Act has mandated the EACC to appoint, with the approval of the National Assembly, a suitably qualified person to serve as its secretary. Under section 16(7) of the Act, the secretary is the chief executive officer of the EACC, the accounting officer, and is responsible for carrying out the decisions of the EACC, the day-to-day administration and management of the affairs of the EACC, supervision of the employees and perform such other duties as may be assigned by the EACC. Accordingly, we take the view that the secretary is an employee of the EACC. He or she is appointed by the commissioners and as correctly held by the High Court, is not on the same level as the commissioners.”

27. Whereas it is true that the EACC carries out its investigative mandate through its secretariat and staff, the ultimate decision on whether or not to make recommendations to the Director of Public



Prosecutions to prosecute must remain with the Commissioners. Appreciating this, this Court in *Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others* (supra) held that:

“...the functions of investigating and making recommendations to the DPP belong corporately to EACC and not to the secretary or the secretariat alone. The investigations and the recommendation to the DPP must be authorised and sanctioned by the commissioners who are required to exercise oversight over the secretariat and overall, to give strategic direction to EACC in the performance of its actions under the Act. That is the position notwithstanding section 23 of ACECA, which empowers the secretary or a person authorized by the secretary to conduct investigations on behalf of EACC. A proper reading of ACECA together with the EACC Act cannot justify the conclusion that officers to whom specific powers of the EACC have been delegated can purport to bypass the EACC commissioners who are ultimately responsible and accountable to Kenyans for the proper discharge of EACC’s constitutional and statutory duty.”

28. We associate ourselves with the determination of the Court in the said case that:

“To our mind this provision [section 35 of ACECA] makes it abundantly clear that upon the conclusion of the investigations, even if undertaken by the secretary or the investigator, it is the EACC, meaning the commissioners, who are expected to report to the DPP on the results of the investigations and make appropriate recommendation. We do not see anything in the law that empowers the secretary to bypass the commissioners and report or make recommendations directly to the DPP. Section 16(7) (f)(i) and (iv) of the EACC Act which makes it the responsibility of the secretary to carry out or execute the decisions of the EACC and to perform such other duties as the EACC may assign him is also consistent with the view that we have taken.”

29. The Secretary and the Secretariat, indubitably, are answerable to the Commission in its investigatory tasks. There was a good reason for this. A situation where the Secretary and the Secretariat bypass the Commission, when properly constituted or not is not contemplated by either *the Constitution* or the enactments establishing the EACC. While a situation where the Commission is unable to function creates a serious lacuna and is an indictment on those tasked with ensuring the Commission’s operations are not interfered with, leapfrogging the Commission by the Secretary or the Secretariat is not an option.

30. It was submitted before us that the learned Judge erred in finding that until properly constituted or assisted through the Director of Public Prosecution, the EACC had to be dormant, flies in the face of Article 259(1) of *the Constitution*. Section 5(3) of the *Office of the Director of Public Prosecutions Act* provides that:

Without prejudice to other provisions of this Act or any other law in force, the Director may assign an officer subordinate to him to assist or guide in the investigation of a crime and every investigative Agency shall give effect to that direction.

31. The law is clear that the Director of Public Prosecution has the power to assign an officer subordinate to him to assist or guide in the investigation of a crime. The drafters of that provision were very selective in their words. They did not use the word “direct” but instead used the words “assist” and guide. The learned Judge cannot be faulted for using the very words employed in the law.

32. It is noted that the EACC is, by dint of Article 252 read together with section 11(1) of the EACC Act, an investigative agency. Upon completion of its investigations, it makes recommendations to the



Director of Public Prosecution to commence prosecution in accordance with section 11(1)(b) of the EACC Act and section 35(l) of the ACECA. However, such recommendations are not necessarily binding since the Director of Public Prosecution, in determining whether or not to prosecute is guided by Article 157(11) of *the Constitution* which provides that:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

33. Therefore, whereas the EACC may recommend prosecution, the Director of Public Prosecutions if he has reasonable grounds to believe that the prosecution may, for example, not be in the public interest decline to prosecute based on the recommendations.
34. Therefore, whereas the Director of Public Prosecution may, through a subordinate officer, assist or guide any investigative agency in carrying out its mandate, when it comes to constitutional commissions such as the appellant, it cannot direct them on how to undertake their constitutional mandate. On the other hand, the investigative agencies cannot direct the Director of Public Prosecutions on how to carry out its constitutional mandate. In our view, the relationship between the constitutional commissions and holders of independent offices, being symbiotic and complementary, it is of paramount importance that the EACC and the Office of the Director of Public Prosecutions, just like any other constitutional commissions or independent offices, work harmoniously in order to achieve their respective mandates and objectives. The independence given to them is meant to be used for the public good and is not to be abused. Turf wars between the Commissions ought not to be countenanced. Similarly, it is not contemplated by *the Constitution* that there be a lacuna in the fight against corruption owing to the lack of Commissioners of the EACC.
35. We, however, do not agree with the learned Judge's position that the absence of the Commissioners may not impede the war against corruption. There was a good reason why the EACC was established outside the normal criminal investigation mechanisms. In our view, this was an indication of the seriousness with which Kenyans view corruption as a scourge in our society. Any action or inaction that renders the Commission sterile must be viewed as an attempt to claw back on the strides being made to nip corruption in the bud. This Court must deprecate a situation where, due to inaction on the part of those mandated with the responsibility of ensuring that the war against corruption is sustained, fail to do so by placing roadblocks on the operations of the EACC, whether deliberately or otherwise. Fortunately, we were informed by Ms Shamalla that there is now, in place, legal mechanisms through which the Commissioners vacate office in staggered phases so that the vacation of office by Commissioners does not, at any given time, give rise to a lacuna in the operations of the EACC.
36. The appellant's submission that the petition was not signed, as rightly pointed out by the respondent, was not one of the grounds of appeal and was not raised before the trial court. This Court has in the past decried the practice of parties raising, for the first time on appeal, grounds which were not raised before the trial court. In *The predecessor to this Court in Alwi Abdulrehman Saggaf v Abed Ali Algeredi* [1961] EA 767 held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

“The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a



Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.”

37. In *Stallion Insurance Company Limited v Ignazzio Messina & C S.P.A* [2007] eKLR, this Court expressed itself as follows:

“It is common ground in this appeal that the issue intended to be raised did not form any ground stated in the memorandum of appeal and did not arise before the superior court. Indeed for a period of eight years it did not form part of the appellant’s case. There are good reasons for the existence of the rule and some of them appear in the authorities cited before us by Mr. Karori. Apart from considerations of fairness, delay and prejudice that may be occasioned, the predecessor of this Court in the *Alwi A. Saggaf Case* (Supra) agreed with Lord Birkenhead L.C. in *North Staffordshire Railways Co. v Edge* [1920] A.C. 254 at p. 263, on the guiding principle, when he stated:

‘The appellate system in this country is conducted in relation to certain well- known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the arguments it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case, is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.’

“The Privy Council also, in an appeal emanating from the supreme court of Kenya, *The United Marketing Company Case* (Supra), held: -

- (ii) their Lordships would not depart from their practice of refusing to allow a point not taken in the courts below to be argued unless they were satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated, would support the new plea; even if the facts were beyond dispute and no further investigation of facts were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the courts below, accordingly;
- (iii) their Lordships would not, even if the question were a bare question of law, entertain the submission that the respondent’s claim was to be defeated by reason of his breach of a condition in his contract of insurance. *North Staffordshire Railway Company v Edge*, [1920] A.C. 254, applied.’

“We are of the further view that the appellant’s case as put and argued before the superior court was specific. The intention to alter it at this appellate stage would be grossly prejudicial to the respondent and it ought not to be allowed.



The persuasive speech of Sir Raymond Evershed M.R. in United Dominion Trust Case (Supra) may illustrate the point: -

‘I rest my conclusion perhaps most strongly on this consideration, that the judgment, extracts from which I have read, seems to me to be in no way whatever related to it. Indeed, it seems to me to have proceeded on a basis which was absolutely inconsistent with the way in which counsel for the plaintiff now puts his case. As a matter of principle, the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party consents, cannot be allowed in this court to raise a new point of law not raised below. After all, the county court is intended to serve litigants of relatively small means. It is not in accordance with the public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay the costs not only below, but in this court.’

“The same approach appears to obtain in India where, in a case where the new issue of law was raised for the first time on appeal eighteen months after the lower court’s decision, the court stated: -

‘Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representative must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation.’

We have said enough, we think, to underscore our reluctance to accede to the arguments sought to be put forth by the appellant in this matter and we reject that attempt.”

38. We are mindful of this Court’s observation in Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR that:

“Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first- instance determinations without the benefit of the input of the court from which the appeal arises...Due to these fundamental concerns, the Courts have developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v Ahn, (ca 42/1981) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant’s case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court.”



39. Rule 107(a) of the Rules of this Court provides that:

“no party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 95 or rule 96.”

40. The appellant did not seek this Court’s leave to argue the ground faulting the petition for lack of signature and that ground cannot be raised.

41. As to whether the appellant ought to have been penalised in costs, the Supreme Court, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR held that:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special

circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

42. While we agree that costs follow the event and that the award of costs being an exercise of judicial discretion ought not to be interfered with, in this case we are satisfied that, by not considering the fact that this was a public interest litigation, and there being no allegation that the litigation was geared towards conferring a personal benefit on any of the parties, we are entitled to interfere. As was held by Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A had this to say:

“The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

43. Having considered the issues in this appeal, save for the order penalising the appellants in costs, which we hereby set aside, we, otherwise find no merit in this appeal which we hereby dismiss with no order as to costs.

44. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL, 2025.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**



**F. OCHIENG**

.....

**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

**W. KORIR**

.....

**JUDGE OF APPEAL**

**G.v ODUNGA**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

