



REPUBLIC OF KENYA



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**Kidero v Attorney General & 6 others (Civil Appeal 413 of 2018)
[2024] KECA 1192 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1192 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 413 OF 2018
DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA
SEPTEMBER 20, 2024**

BETWEEN

DR. EVANS ODHIAMBO KIDERO APPELLANT

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 3RD RESPONDENT

NATIONAL POLICE SERVICE 4TH RESPONDENT

THE CHIEF MAGISTRATE, MAKADARA LAW COURTS 5TH RESPONDENT

OKIYA OMTATAH OKOITI 6TH RESPONDENT

NYAKINA WYCLIFE GISEBE 7TH RESPONDENT

(Being an Appeal from the Judgment of the High Court at Nairobi (Odunga, Mwita & Mativo, JJ.) delivered on 3rd June, 2018 in H.C. Petition No. 109 of 2016 Consolidated with ACEC Petition No. 8 of 2017 (formerly Petition No. 78 of 2016))

JUDGMENT

1. There were two (2) petitions before the Constitutional and Human Rights Division of the High Court of Kenya at Nairobi. In Petition No. 78 of 2016 (amended) Dr. Evans Odhiambo Kidero (the appellant) petitioned that Court against the Ethics and Anti-Corruption Commission (1st respondent), Director of Public Prosecutions (2nd respondent), The Chief Magistrate, Makadara Law Courts (3rd respondent) and Hon. Attorney General (4th respondent). The appellant prayed for the following orders:



- a. A declaration that Section 23 of the Anti- corruption and Economic Crimes Act is unconstitutional as it contravenes the provisions of Articles 79, 244 and 245 of the Constitution.
- b. A declaration that under the Constitution of Kenya, 2010, the 1st Respondent’s mandate is limited to enforcing the provisions of Chapter Six of the Constitution and does not extend to investigating offences other than those specified under Chapter Six of the Constitution of Kenya, 2010.
- c. A declaration that the 1st Respondent acted outside its constitutional mandate in purporting to undertake investigations on the Petitioner herein and in applying to the 3rd Respondent to obtain warrants in the Chief Magistrates Court at Makadara in Misc Crim. Application Nos. 113, 114, 115 and 116 of 2016, Ethics and Anti-Corruption Commission vs Evans Odhiambo Kidero & 2 Others.
- d. A declaration that the warrants to investigate account Nos. Standard Chartered Bank AC No. 0150160208600; 0100160208600; USD AC No. 8700560208600 and Sterling Pound Ac No. 2851260208600; Commercial Bank USD AC No. 6722130028 as well as Evans Kidero Foundation Family Bank AC No. 046000018545 all dated 24th February and given to Dennis Joseck Mare in Makadara Chief Magistrate Miscellaneous Criminal Case Nos. 113, 114, 115 and 116 of 2016: Ethics and Anti-Corruption Commission versus Evans Odhiambo Kidero & 2 Others, breached the Petitioner’s rights and fundamental freedoms under the provisions of Articles 31, 40, 47(1) & (2), 48 and 50(1) of the Constitution of Kenya, 2010 hence void for all intents and purposes.
- e. This Honourable Court be pleased to issue an Order of Certiorari to remove into the Honourable Court and quash warrants to investigate account Nos. Standard Chartered Bank AC No. 0150160208600; 0100160208600; USD AC No. 8700560208600 and Sterling Pound Ac No. 2851260208600; Commercial Bank USD AC No. 6722130028 as well as Evans Kidero Foundation Family Bank AC No. 046000018545 all dated 24th February and given to Dennis Joseck Mare in Makadara Chief Magistrate Miscellaneous Criminal Case Nos. 113, 114, 115 and 116 of 2016: Ethics and Anti-Corruption Commission vs Evans Odhiambo Kidero & 2 Others.
- f. This Honourable Court be pleased to issue an Order of Judicial Review by way of an order of prohibition directed to the Ethics and Anti- Corruption Commission neither by itself, agents and or associates from obtaining any warrant or Order from any Court against or lifting copies of account opening documents, statements, cheques, deposit slips, telegraphic money transfers, client instructions, bankers books and or any other information in respect of Account Numbers Standard Chartered Bank AC No. 0150160208600; 0100160208600; USD AC No. 8700560208600 and Sterling Pound Ac No. 2851260208600; Commercial Bank USD AC No. 6722130028 as well as Evans Kidero Foundation Family Bank AC No. 046000018545 or any other account held by the Petitioner without giving the Petitioner Notice and due process as protected and decreed by Articles 47, 48 and 50(1) of the Constitution and Sections 23-28 of the Anti- Corruption and Economic Crimes Act, 2003.
- g. Exemplary damages against the 1st Respondent herein.
- h. Costs of and incidental to this Petition; and
- i. Any other order that this Honourable court deems fit and just to grant in the circumstances.”



2. In Petition No. 109 of 2016 Okiya Omtatah Okoiti (6th respondent) and Nyakina Wycliffe Gisebe (7th respondent) petitioned that Court against the Attorney General (1st respondent here), Director of Public Prosecutions (2nd respondent), Ethics and Anti-Corruption Commission (3rd respondent) and National Police Service (4th respondent) where the following prayers were sought:

“Your Petitioner therefore humbly Prays for:

73. The Honourable Court be pleased to determine the following Questions:

- a) Whether under the Constitution the enforcement of criminal law is the exclusive mandate of the National Police Service and the DPP.
- b) Whether the mandate given to the EACC in Article 79 as read with 252 to ensure compliance with, and enforcement of, the provisions of Chapter Six empowers the Commission to enforce criminal law, including conducting criminal investigations.
- c) Whether Parliament violated Article 93(2) of the Constitution by enacting Sections 23, 24, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56B, 56C, 72, and 73 of the Anti-corruption and Economic Crimes Act (Cap 65 - Revised Edition 2014 [2012]), and Subsections 11(d) & (k) of the Ethics and Anti-Corruption Commission Act 2011.
- d) Whether Sections 23, 24, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56B, 56C, 72, and 73 of the Anti-corruption and Economic Crimes Act (Cap 65 - Revised Edition 2014 [2012]), and Subsections 11(d) & (k) of the Ethics and Anti-Corruption Commission Act 2011 are unconstitutional and, therefore, null and void and of no purpose in law.
- e) Whether the EACC should hand over to the Directorate of Criminal Investigations all matters of criminal law enforcement, including criminal investigations, which it is handling.
- f) Whether the EACC should hand over to the National Police Service the assets it has established for conducting criminal investigations.
- g) Whether the National Police Service should reclaim its exclusive mandate of investigating all crime.”

3. The petitions were consolidated and heard by a bench of 3 Judges and were dismissed in a judgment delivered on 8th June, 2018. The appellant on the one hand and the 6th and 7th respondents on the other filed separate notices of appeals against the whole judgment and decree, but the substantive appeal was filed by the appellant in a Memorandum of Appeal drawn for him by his lawyers, Ms Ochieng, Onyango, Kibet & Ohaga Advocates, where 21 grounds of appeal are set out. The appellant says that the Judges erred in law and fact in failing to appreciate the nature and petitions before them and issues raised, particularly as per a ruling in Petitions No. 109 of 2016 – whether under the Constitution the enforcement of criminal law is the exclusive mandate of the National Police Service; whether the mandate given to Ethics and Anti-Corruption Commission (EACC) in Article



79 as read with Article 252 of the Constitution to ensure compliance with, and enforcement of the provisions of Chapter 6 of the Constitution empowers EACC to enforce criminal law, including conducting criminal investigations; whether Parliament violated Article 93(2) of the Constitution by enacting sections 23, 24, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56B, 56C, 72 and 73 of the Anti- Corruption and Economic Crimes Act (ACECA) and subsections 11(d) and (k) of the EACC Act; whether those sections are unconstitutional and null and void and of no effect; whether the National Police Service (NPC) should reclaim its exclusive mandate of investigating all crime and enforcing criminal law; that the Judges erred in law in failing to appreciate the constitutional structure and relationship between EACC established under Article 79 of the Constitution and the NPC established under Article 244 of the Constitution; that the Judges erred in law in failing to appreciate the constitutional architecture and mandates of the EACC and NPC as relates to the fight against corruption in Kenya; that the Judges erred in law in failing to appreciate that Chapter Six of the Constitution envisaged the establishment of the EACC under Article 79 to enforce the provisions of Chapter 6 of the Constitution on leadership and integrity and failed to appreciate the constitutional vis a vis the statutory mandates of both EACC and NPC under the Constitution, EACC Act, 2011, ACECA, 2003 and NPC Act, 2011. Further, that the Judges erred in elevating additional statutory functions of the EACC under EACC Act as read with ACECA outside its constitutional mandate under Article 79 in breach of an express provision under Article 244(b) mandating NPC to undertake investigations and prevent corruption in Kenya; that the Judges erred in law in finding that the impugned provisions of EACC Act, 2011 and ACECA have constitutional underpinning and challenging them amounts to challenging Article 252 (1)(d) of the Constitution; that the Judges erred in law in finding inconsistency between the powers donated to EACC under ACECA and the provisions of Article 79 as read with Article 252 of the Constitution; that the Judges erred in law in finding that Parliament acted within its powers when it enacted the ACECA; that the Judges erred in law and abdicated their constitutional mandate in determining whether investigation constitute an administrative action; that the Judges should have found that investigations by EACC constitute administrative action as defined under the Fair Administrative Action Act, 2015. The appellant states at grounds 13-17 (inclusive) of Memorandum of Appeal:

- “13. That the learned Judges of the Superior Court erred in law in deferring the process of obtaining Warrants to Investigate solely to the provisions of the Criminal Procedure Code without complying with the provisions of the Constitution of Kenya 2010 and the Fair Administrative Action Act, 2015.
14. That the learned Judges of the Superior Court erred in law in finding that the EACC had the right to move the Court ex parte under Section 118A of the-Criminal Procedure Code without complying with the provisions of Articles 47, 48 and 50 of the Constitution of Kenya 2010 and the Fair Administrative Action Act, 2015.
15. That the learned Judges of the Superior Court erred in law in invoking Article 24(1) of the Constitution of Kenya as the justification for moving the Court ex parte and non-compliance with the provisions of Articles 47, 48 and 50 of the Constitution of Kenya 2010 and the Fair Administrative Action Act, 2015.
16. That the learned Judges of the Superior Court erred in law in giving the EACC and indeed any police officer or an investigator a freehand to move the Court at will ex parte to obtain warrants without considering the nature of the evidence and material sought to be obtained through the warrants.
17. That the learned Judges of the Superior Court erred in law in giving the EACC and indeed any police officer or investigator a freehand to move the Court at will ex parte to obtain warrants



without first utilizing the other constitutional and statutory safeguards and mechanisms for obtaining the said evidence under the ACECA without moving the Court to obtain the warrants.”

4. The appellant further complains in his Memorandum of Appeal that it was wrong for the Judges to find that he had not proved breach of his rights to property, fair administrative action and the right to be heard under Articles 40, 47 and 50 of the Constitution; that the Judges erred by limiting his right of access to justice under Articles 22 and 28 of the Constitution and to file a petition alleging breach of those rights; that the Judges erred by holding that the appellant should have moved the Court which issued the search warrants ex parte to have the same set aside instead of transforming his grievance into a constitutional issue and, finally, that the Judges erred in dismissing his petition. It is proposed that the appeal be allowed, the judgment in the consolidated petition be set aside, that the amended petition be allowed and that the appellant be awarded costs.
5. When the appeal came up for hearing before us on 6th May, 2024 the appellant was represented by learned counsel Mr. Ouma holding brief for Mr. Ochieng Oduol; learned counsel Mr. Bitta appeared for the 1st, 4th and 5th respondents; Senior Counsel Mr. Fred Ngatia with Miss Ngethe appeared for the 3rd respondent, while learned counsel Mr. Omondi appeared for the 2nd respondent. Mr. Okiya Omtatah (6th respondent) appeared in person. All parties apart from the 6th and 7th respondent had filed written submissions, which we have perused and considered. We have also considered the oral highlights of those submissions and by Mr. Omtatah.
6. In view of the position we have taken in this appeal, we need not go into a detailed analysis of the various cases made out by the parties before the High Court and before us at the hearing of this appeal.
7. In Supreme Court of Kenya Petition Nos. 30 and 31 of 2019 (consolidated), the appellants were Ethics and Anti-Corruption Commission and Director of Public Prosecution against Tom Ojienda, SC TA Prof. Tom Ojienda & Associates, Advocates, the Chief Magistrate Kibera Law Courts and The Law Society of Kenya. This was an appeal from a judgment of this Court delivered on 28th June, 2019 in Civil Appeal No. 109 of 2016. In that consolidated petition the appellants stated that EACC had obtained warrants to investigate and inspect the 1st respondent’s (Tom Ojienda) bank accounts ex-parte. The 1st respondent contended that the warrants had been obtained and enforced secretly without notice and the court held, inter alia, that EACC’s investigative powers could not be described as administrative actions. The court further held that EACC applied different sets of laws and strategies. Regarding the investigations, the court held that it all depended on what was at stake, the nature of the evidence required and the urgency with which the evidence had to be acquired. The court further held that EACC did not have to always give prior notice to those it intended to investigate before commencing an investigation.
8. The facts of the case subject of this appeal were briefly that the 3rd respondent obtained ex-parte a warrant to investigate bank accounts of the appellant, action that prompted the appellant to move the Human Rights and Constitutional Division of the High Court where he challenged powers of the EACC as we have seen in the grounds of appeal.
9. The facts of the petition before the Supreme Court were not dissimilar as, there, the respondent had challenged the EACC action where it (EACC) had obtained search warrants against Tom Ojienda.
10. Of the complaints raised by Tom Ojienda in that petition and as an answer to the complaints and issues raised by the appellant in the appeal, this is what the Supreme Court stated as summarized in the said judgment as holdings 5-19 (inclusive):



5. “The definition of an administrative action under section 2 of the FAA Act did not provide an accurate picture of the meaning of an administrative action. It simply addressed the elemental aspects of the phenomenon before describing its nature. On the face of it therefore, any power, function, and duty exercised by authorities or quasi-judicial tribunals constituted an administrative action. Likewise, any act, omission or decision of any person that affected the legal rights or interests of any person to whom such action related constituted an administrative action. Such definition, without more, would bring within the ambit of an administrative action just about anything done or any exercise of power by an authority or quasi-judicial tribunal.
6. Article 47 of the Constitution provided that Parliament was to enact legislation to give effect to the rights in clause (1) and that legislation should promote efficient administration. By stipulating that the legislation so contemplated had to among other things, promote efficient administration, the Constitution left no doubt that an administrative action was not just any action or omission, or any exercise of power or authority, but one that related to the management of affairs of an institution, organization, or agency. That explained why such action was described as “administrative” as opposed to any other action.
7. Part IV of the ACECA specifically provided for the EACC’s investigative powers. The powers granted therein included 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, those powers when exercised could not be described as administrative actions within the meaning of article 47 of the Constitution.
8. There was no basis for holding that the 1st respondent’s rights were violated for failure to observe the requirements of article 47 of the Constitution. In the absence of proof of violation of his rights, the impugned warrants ought not to have been quashed based on that claim.
9. Under section 26 of the ACECA, the EACC was required to issue a notice in writing where the Secretary to the EACC (the Secretary) was satisfied that it could assist or expedite an investigation. The language in section 26 was permissive rather than mandatory. It all depended on whether the Secretary was satisfied that the furnishing of information regarding specified property could assist or expedite an investigation. That explained why the person reasonably suspected of corruption was the one required through a notice in writing to furnish the requisite information relating to the property or properties specified in the notice.
10. If the Secretary was not satisfied that such notice would assist or expedite an investigation, then he/she did not have to issue it. The Secretary could very well be of the opinion that such notice, instead of assisting or expediting an investigation, could actually jeopardize or delay it. Such notice, if necessary, would be issued during an ongoing and not before an investigation. Before the conclusion that certain information was required, preliminary investigative processes had to have been undertaken.
11. Under section 27 of the ACECA, the EACC had two options, either, it could move directly and obtain an ex-parte order from court against an associate of a person suspected of corruption, requiring such associate to produce certain documents or information, or it could with notice in writing require the associate to produce the specified information. Where the EACC opted for the court process, no notice was required to be issued to the associate. Only where it chose to get the information directly from the associate was the EACC required to issue the notice in writing. The language of the statute was permissive rather than mandatory.



12. Under section 28 of the ACECA, the EACC could with notice in writing to the affected parties seek a court order requiring the production of specified records in the possession of any person whether or not suspected of corruption. The notice could be issued to any person, and not just one suspected of corruption. It could be reasonably assumed that in such a situation, the notice was to be issued before the commencement of an investigation. The section stated that such specified records could be required for an investigation, hence what was envisaged was a process of investigation that was yet to commence. That explained the fact that the notice was not confined to persons suspected of corruption but extended to any others that the EACC believed had such records.
13. Under section 28 of the ACECA, the EACC could issue notice directly to a person suspected of corruption or economic crimes, requiring him to produce the specified property as opposed to specified records. The property was so required for inspection. In the instant case, it could be reasonably assumed that such notice could be issued by the EACC during an ongoing investigation. Section 28 was however silent as to whether in that regard, the issuance of notice by the EACC was also dependent on the opinion of the Secretary.
14. Section 23(4) of the ACECA conferred upon the Secretary and investigators under the Act, powers, privileges and immunities of a police officer in so far as the same were not inconsistent with the provisions of the Act or any other law. Therefore, the Secretary and investigators were given police powers, which they could exercise in the course of their duties under the relevant provisions of other applicable laws. Such laws included the Police Act, the Criminal Procedure Code (CPC), the Evidence Act, among others. The EACC was not limited to the provisions of the ACECA, in carrying out its investigative mandate. Where the provisions of the ACECA were unambiguous, the EACC's first resort had to be to that enabling statute.
15. The EACC had a wide and critical mandate under the Constitution and the law to combat corruption and economic crime in the society. In executing that mandate, the EACC assumed different postures depending on the nature of the specific function it was carrying out. Thus, the EACC could assume a non-confrontational and largely facilitative role when for example, it was educating the public on the nature and vices of corruption, or conducting research into the nature of corruption, or when undertaking a systems' review of a specific agency with a view to sealing corruption loopholes.
16. The EACC could assume a law enforcement posture, when conducting investigations into suspected corrupt conduct, effecting arrests of corruption suspects, disrupting corruption networks and through the Office of the Director of Public Prosecutions, arraigning suspects before courts of law. The EACC could assume an intelligence-gathering posture, when for example it was tracing the proceeds of crime (asset tracing) with a view to recovering the same.
17. The EACC would apply different sets of laws and strategies. Regarding investigations, it all depended on what was at stake, the nature of the evidence required and the urgency with which the evidence had to be acquired. It could not be said that the EACC had to always give prior notice to those it intended to investigate before commencing an investigation.
18. Sections 26, 27 and 28 of the ACECA set out very specific circumstances in which the EACC could issue notice. If the conditions so specified obtained, then the EACC could issue notice in writing to the affected parties. If the EACC was carrying out a police operation or an intelligence gathering or asset tracing exercise, it could not be required to issue a prior mandatory notice to the intended targets. In such a situation, the provisions of section 23 of the ACECA, the Evidence Act, the CPC, and any other enabling legislation came into play. At



all times, whatever the nature of the investigations the EACC could be undertaking, it had to do so within the confines of the Constitution and the law.

19. The court could not state with certainty that the EACC ought to have moved to court under section 26 of the ACECA because there was no information on record showing that the Secretary had formed an opinion that the information sought was to aid or expedite the ongoing investigation. Neither could the court state that the 1st appellant ought to have moved to court under section 27 of the ACECA since it was not investigating the 1st respondent as an associate of a person suspected of corruption or economic crime. The EACC ought not to have moved to court under section 28 of the ACECA, which was confined to notices requiring the production of records or property as the case could be because in that instance, the investigations had already commenced.”
11. Article 163(7) Constitution of Kenya, 2010 declares:

“All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.”
12. It will therefore be seen that the Supreme Court has answered all the complaints raised by the appellant in the Memorandum of Appeal. The complaints have no merit. Consequently, this appeal is dismissed. In view of the issues raised by the appellant, which relate to interpretation of the Constitution and other laws, we order that each party meet its own costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

