IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & KANTAI, JJ.A)

CIVIL APPEAL NO. 109 OF 2016

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

AND

PROF. TOM OJIENDA, SC T/A

PROF. TOM OJIENDA ASSOCIATES ADVOCATES.....1ST RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION..2ND RESPONDENT

CHIEF MAGISTRATE, KIBERA LAW COURTS.....3RD RESPONDENT

LAW SOCIETY OF KENYA.....4TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Lenaola, J.) dated 5th February, 2016

in

Petition No. 122 of 2015)

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JUDGMENT OF THE COURT

On 18th March 2015 the Chief Magistrate, Kibera Law Courts (3rd respondent) issued warrants to the Ethics and Anti-Corruption Commission (EACC) to investigate Professor Tom Ojienda who was trading as Prof. Tom Ojienda & Associates Advocates' (Ojienda) advocate-client bank account No. [particulars withheld] held at Standard Chartered Bank, Nakuru Branch. This was pursuant to EACC's Notice of Motion Application dated 6th March, 2015 and filed before that Court under **CMC Misc Application No.168** of **2015**. The application which sought, inter alia, a warrant to be issued for purposes of investigating and inspecting Ojienda's bank records, alleged that Kshs 280,000,000.00 was paid into Ojienda's account advocate-client account by Mumias Sugar Company Ltd for legal services he allegedly had not rendered.

A Senior Advocate indubitably aware of his rights, Ojienda filed a Petition under a certificate of urgency on 1st April 2015, which was later amended and filed on 10th April 2015, complaining that EACC surreptitiously and without notice to him obtained warrants to investigate his bank account. That was not only an abuse of the public power entrusted to EACC but also violated his right to privacy, property, fair administrative action and fair hearing as stipulated under **Articles 31**, **40**, **47**, and **50** of the Constitution, respectively.

It was Ojienda's contention that he was lawfully admitted into the panel of advocates of Mumias Sugar Company Ltd (the Company) among other firms of advocates since 2011; that he had always executed instructions received from the Company meticulously, diligently and with distinction; as a result he was entitled to all the legal fees charged therefor. He affirmed that to be the case in all his dealings with the Company and for that reason, EACC had no basis seeking for the warrants under **Kibera CMC Misc Application No.168 of 2015**.

Ojienda further opined that payment of his legal fees by the Company was protected by privilege of advocates as provided for in **section 134** and **section 137** and buttressed in **section 13(1)** of the **Evidence Act**. Moreover, the aforementioned **section 134 (1)** states that the privilege can only be waived upon express instructions from a client. But since EACC had not demonstrated such waiver was accorded, it had no

justifiable reason to breach privilege.

Not only was the issuance of warrants a violation of Ojienda's privilege but also a violation of **sections 28(1)**, **28(2)**, **28(3)** and **28(7)** of the **Anti-Corruption and Economic Crimes Act** (ACECA) which placed an obligation on EACC to first have issued a written notice to Ojienda of their intended application to the 3rd respondent for an order to access and investigate his bank records. This would have afforded him a fair chance to be heard by the 3rd respondent before a determination was made concerning the issuance of the warrants. The aforementioned omission by EACC was *ultra vires* and in violation of Ojienda's rights under **Article 47(1)** and **47(2)** of the Constitution. Furthermore, since the payments were covered by privilege, **section 28(10)** and **27 (5)** of **ACECA** divests EACC of any locus to demand that Ojienda or the Company disclose to them any information concerning the payment of the legal fees.

Ojienda's violated rights also included his right to privacy as contemplated in **Article 31** of the Constitution. This was occasioned by the investigation of his advocate-client bank account by EACC without his consent or any legal basis. Similarly, it was contended that the 3rd respondent aided in this violation by the issuance of the impugned warrants which resulted in a violation of its mandate as enshrined in **Article 159(2)** of the Constitution. The warrants were issued without according Ojienda a right to be heard and this further violated his right under **Article 50(1)** of the Constitution. As a result, Ojienda's right to enjoy the use of his bank account was limited which additionally violated his right to property under **Article 40(1)** of the Constitution.

Finally, it was urged that EACC lacked any locus to investigate the alleged irregular payment of legal fees since civil in nature and the same could be determined by the Advocates Disciplinary Tribunal or the Advocates Complaints Commission; **section 60A** of the **Advocates Act** empowers the Advocates' Disciplinary Tribunal to hear complaints by clients on an advocate's failure to render legal services or to render deficient legal services upon being paid by a client; and it is further mandated to order the advocate to refund a client legal fees paid for services not rendered or part of the fees paid for services deficiently rendered.

In light of the foregoing, EACC lacked the mandate to investigate and or determine an alleged dispute over legal fees purportedly paid by the Company for services that were allegedly not rendered by Ojienda and as a result, he sought for protection of the court in the following manner *inter alia*;

> ***(a) A declaration that the warrants to investigate an account given to Michael Kasilon and Eustace Waweru on the 18th day of March 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015; Ethics and Anti-Corruption Commission versus Standard Chartered Bank, breached the Petitioner's rights and fundamental freedoms under the provisions of Articles 27(1), 27(4), 27(5), 31, 40(1), 40(2), 47(1), 47(2) and or 50(1) of the Constitution of Kenya, hence void for all intents and purposes.***
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> ***(b) Judicial Review by way of an order of certiorari to remove into the Court and quash warrants to investigate an account given to Michael Kasilon on the 18th day of March 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015; Ethics and Anti-Corruption Commission versus Standard Chartered Bank.***
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> ***(c) Judicial Review by way of an order of prohibition directed to the Ethics and Anti-corruption Commission, Michael Kasilon, Eustace Waweru, Julius Muraya, either by themselves, agents and or associates from investigating or further investigating, inspecting or further inspecting and or lifting or further lifting copies of account opening documents, statements, cheques, deposit slips, telegraphic money transfers, client instructions, bankers books and or any other information in respect to Account Number [particulars witheld] held in the name of Prof. Tom Ojienda & Associates at Standard Chartered Bank Ltd and Account Number [particulars withheld] in the names of Prof. Otieno Odek, Prof Ojienda & Wanyama Advocates or any other account held by the Petitioner.***
>
> ***(d) Judicial Review by way of an order of Mandamus compelling the Director of Public Prosecutions to direct the Inspector General of the National Police Service under Article 157(4) of the Constitution to forthwith investigate Michael Kasilon, EACC herein, for possible commission of the offence of perjury in respect of the supporting Affidavit sworn by Michael Kasilon on 9th day of March 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015; Ethics and Anti-Corruption Commission versus Standard Chartered Bank and prosecution of Michael Kasilon if the investigations reveal that Michael Kasilon is culpable for the offence.***
>
> ***(e) A declaration that the appropriate forum to hear and determine any dispute regarding Advocate-client relationship at the first instance is the Advocates' Complaints Commission and or the Advocates Disciplinary Tribunal.***

In opposition to the petition and in support of their mandate, EACC filed a Replying Affidavit sworn on 9th April 2015 by Michael Kalison, a Forensic Investigator with EACC and a Further Replying Affidavit sworn on 23rd April 2015. It was deposed that on 16th February 2015, EACC received an intelligence report concerning fictitious payments made by the Company to various advocates, including Ojienda, as alleged legal fees.

Further investigations revealed that the Company made various suspicious payments amounting to Kshs 280,000,000.00 to Ojienda's bank account held at Standard Chartered Bank. Dr. Evans Kidero, who was the then Managing Director of the Company, allegedly caused the irregular payments to be made prior to his exit from the Company. Therefore the application for issuance of the warrants was necessary in order to assist in the investigations into the fictitious payments which were at the time considered to be criminal in nature. This was in tandem with the statutory mandate of EACC, which is to investigate all allegations that raise reasonable suspicion of corrupt conduct or an economic crime against any individual or institution.

He further deposed that EACC moved the court by dint of **section 180(1)** of the **Evidence Act** and **section 23** of **ACECA**. Thus the court was satisfied that such orders were necessary and issued the warrants pursuant to **section 118** of the **Evidence Act**.

On the allegations of the constitutional violations, it was deposed that EACC was not obligated to give notice to Ojienda of its intention as

section 27 of **ACECA** is not couched in mandatory terms; that Ojienda was not a victim of discrimination as the intelligence received had no allegation against any other law firm; that the law envisages instances where the right to privacy may be abridged and since this matter involved embezzlement of public funds, that right was properly abridged; Ojienda's right to property was not violated as at no time was he deprived of any property and **Article 40** of the Constitution does not extend to property that has been unlawfully acquired; that **Article 50(1)** of the Constitution cannot be invoked where no trial had taken place; and that client-advocate privilege is not protected when an illegality, fraud or crime has been committed or is suspected to have been committed.

Additionally, it was deposed that enjoining the officers of EACC in their personal capacity on account of actions performed while on official duty amounted to victimization. The same was also in violation of **section 20** of **ACECA** which protects the officers from personal liability for acts undertaken in fulfilment of EACC's mandate.

The 3rd respondent through the office of the Attorney General filed submissions in opposition to the Petition. Counsel emphasised what has already been stated by EACC on its mandate to investigate economic crimes and concluded that there was nothing untoward or unlawful about the investigation in question. It was asserted that the 3rd respondent had jurisdiction to issue the warrants under the provisions of **section 118** of the **Criminal Procedure Code** and the same cannot be challenged through a Petition. It was urged that Ojienda failed to demonstrate how his fundamental rights were violated by failing to demonstrate how he was discriminated against by failing to adduce evidence that he was the only one among many advocates in similar circumstances who got such treatment; his right to property was violated yet he was still in possession of the bank account and neither was it misappropriated nor frozen; **Article 47** is not applicable in this instance since EACC's action was not administrative but law enforcement in nature and on **Article 51(1)** he pronounced himself similarly to EACC. On the issuance of the notice, it was submitted that it was an unreasonable expectation as that would have given Ojienda time to conceal the incriminating evidence.

The DPP opposed the Petition and filed grounds of opposition dated 10th April 2015 which stated;

> ***(a) The warrants to investigate the account of the Petitioner were lawfully issued pursuant to section 118 of the Criminal Procedure Code Cap.75, as read with Section 180 of the Evidence Act and Section 23 of the Anti-Corruption and Economic Crimes Act, 2003.***
>
> ***(b) The Petitioner's rights are subject to constitutional limits enshrined in Article 24 of the Constitution so as to protect public interest in detection, prevention and prosecution of corruption and economic crimes.***
>
> ***(c) That a clear reading of Section 134 and 137 of the Evidence Act demonstrates that the client advocate privilege is not protected in case of commission or omission that amounts to illegality, fraud, or when crime is committed or suspected to have been committed.***
>
> ***(d) That the Petitioner's right to property by dint of Article 40 of the Constitution does not extend to any property that has been found to be unlawfully acquired.***
>
> ***(e) That EACC is lawfully conducting investigations as empowered under Section 13(2)(c) of EACC Act and its officers are protected by Section 20 of EACC Act from any commission or omission done in good faith for purposes of executing their powers under the same Act.***
>
> ***(f) That no complaint is filed with the Director of Public Prosecutions regarding commission of any offence of perjury by Michael Kasilon or any other officer of the first Respondent that will warrant the DPP in exercise of powers conferred under Article 157(4) of the Constitution to direct the Inspector General of National Police Service to investigate the commission of the said offence.***
>
> ***(g) That the pendency of a dispute before the Advocates Complaints Commission and or Disciplinary Tribunal is not a bar to prosecution of any offence resulting from simultaneous professional misconduct."***

In his submissions, Counsel reiterated some of the arguments made by EACC and 3rd respondent and added, that; the power to investigate and prosecute bestowed upon EACC and the police ought not to be exposed to judicial review except if undertaken in bad faith; that the DPP could not direct an investigation into the alleged perjury by Mr Kalison since no formal complaint had been made on the same and; pendency of a matter before the Advocates Complaints Commission or the Advocates Disciplinary Tribunal does not absolve an advocate from criminal prosecution born out of professional misconduct.

The 4th respondent herein was enjoined in the matter as *Amicus Curiae* on 7th July 2015. Through its senior counsel Mr. Nzamba Kitonga, it faulted EACC for its failure to summon Ojienda and requesting him to furnish it with the bank accounts statements, before applying for the search warrants. The application for the impugned warrants would only have been justified in the event that Ojienda refused to comply with the request. The 3rd respondent was not spared blame either as counsel contended that all the parties involved ought to have been heard before issuance of the warrants. That way, the principles of natural justice would have been adhered to.

Senior counsel further submitted that EACC and 3rd respondent were under a duty to adhere to all the applicable constitutional and statutory dictates as they undertook investigations. On this occasion, they were bound to respect Ojienda's right to privacy and human dignity. On the issue of advocate/client privilege, it was opined that an advocate cannot be compelled to disclose a client's affairs without express authority or consent of the client in question. Therefore, EACC and 3rd respondents cannot use underhanded methods to compel an advocate to breach the said privilege. The principle of advocate-client privilege is the backbone of court litigation, legal practice and the rule of law and it should not be abridged as that would pose a grave danger to the system of administration of justice and the conduct of legal affairs.

Lenaola, J. (as he was then) considered the Petition, submissions and authorities cited and delivered a judgment on 19th March 2013. It is

worth noting that he struck out the names of the 2nd – 4th respondents, as they appeared in the Petition with no orders as to costs. Ojienda's Petition partly succeeded to the extent that the following orders were made;

> ***(a) A declaration is hereby issued that the warrants to investigate an account given to Michael Kasilon and Eustace Waweru on the 18th day of March 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015; Ethics and Anti-Corruption Commission versus Standard Chartered Bank, breached the Petitioner's rights and fundamental freedoms under the provisions of Articles 47(1), 47(2) and 50(1) of the Constitution of Kenya, hence void for all intents and purposes.***
>
> ***(b) A Judicial Review order by way of an order of Certiorari is hereby issued to remove into the Court and quash warrants to investigate an account given to Michael Kasilon on the 18th day of March 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015; Ethics and Anti-Corruption Commission versus Standard Chartered Bank.***

Two parties were aggrieved by the judgment and each lodged its appeal separately. The DPP herein filed its appeal under this case while EACC filed its appeal under Civil Appeal No. 103 of 2014. By an order of this Court dated 19th May 2017, it was ordered that Civil Appeal No. 103 of 2016 be consolidated with Civil Appeal No. 109 of 2016, with the latter being the main file. The memorandum of appeal for the DPP herein contains nine (9) grounds, which can be summarised as that the learned judge erred in law and in fact by;

> **(a) Failing to uphold that the warrants to investigate Ojienda were lawfully obtained under the provision of section 180 of the Evidence Act.**
>
> **(b) Failing to uphold that the 3rd respondent had jurisdiction to issue the warrants as provided for in section 118 of the Criminal Procedure Code.**
>
> **(c) Failing to appreciate that section 23 of ACECA, section 180(1) of the Evidence Act and section 118 of the Criminal Procedure Code were available to EACC in discharging its mandate.**
>
> **(d) Holding that Ojienda's right to be given due notice prior to the application of the warrants violated section 28 of ACECA and Article 47 of the Constitution.**
>
> **(e) Failing to uphold that Ojienda's rights were limited by Article 24 of the Constitution in favour of the protection of public interest.**

EACC's memorandum of appeal contained six (6) grounds of appeal with the following being additional to those already detailed by the DPP. They are that learned Judge erred in law and fact by;

> **(a) Failing to appreciate that the investigative process by EACC was not administrative but a constitutional one mandated by statute.**
>
> **(b) Failing to appreciate EACC's assertion on the threat of the issuance of notice to a suspect gives him an opportunity to conceal evidence that would have been otherwise necessary to create a case against him.**

Ojienda was also aggrieved by the partial success of his Petition and filed a cross-appeal which contained complaints that the learned Judge erred in law and fact by;

> **(a) Failing to hold that his fundamental right to privacy, to property and not to be discriminated against were violated.**
>
> **(b) Holding that EACC had a factual basis which warranted the issuance of the impugned search warrants.**
>
> **(c) Failing to hold that the bank account was not confidential communication therefore not covered by privilege.**
>
> **(d) Failing to award him damages based on the violation of his right to fair administrative action.**

It is worth-noting that Ojienda had in his cross-appeal, challenged the constitutionality or legal mandate of EACC to conduct criminal investigations. It was a weighty issue with grave implications namely that EACC as a creation of **Article 79** of the Constitution is empowered to only enforce **chapter 6** of the same and does not have investigative powers. Since that ground was abandoned, however, we shall say no more on it.

When the appeal came up for plenary hearing, learned counsel **Mr Ashimosi** appeared for the DPP while **Ms Awuor**, **Mr Ruto** and **Mr. Ngumbi** who held brief for **Mr Onyiso** appeared for Ojienda, EACC and the 3rd respondent, respectively. All the parties had filed written submissions.

Mr Ashimosi submitted that section **23(4)** of **ACECA** provides that **section 180(1)** of the **Evidence Act** and **section 118** of the **Criminal Procedure Act** are applicable to EACC for purposes of detection, prevention and investigation of offences related to corruption and economic crimes. For that submission he cited **KENYA ANTI-CORRUPTION COMMISSION V REPUBLIC & 4 OTHERS [2013] eKLR**, a decision of this Court. He continued that the learned Judge erred by reading **section 27** and **28** of **ACECA** in isolation of **section 23(4)**. Moreover, **section 28** of **ACECA** is only applicable when the assets of a person of interest are known and ascertainable. It was counsel's argument that **Article 50(1)** of the Constitution was not violated as an investigation is not a dispute capable of adjudication and is therefore not subject to the dictates of a fair hearing.

In response to the cross-appeal, counsel adopted and affirmed the learned Judge's finding on the alleged violation of Ojienda's right against discrimination, right to privacy and the lack of advocate-client privilege. He urged the Court to uphold the appeal and dismiss the cross-appeal.

Mr. Ruto argued, in urging EACC's appeal that the learned Judge erred in holding that criminal investigation is an administrative action protected under **Article 47** of the Constitution, yet criminal investigations fall within criminal justice, not the administrative justice ambit. Moreover, **section 180** of the **Evidence Act** and **section 118** of the **Criminal Procedure Code** do not derogate from the core essence of this right. To him, there is enough procedural fairness contained in the afore-mentioned sections that conform to **Article 47**.

Counsel contended that the learned Judge misapplied the provisions of **sections 27** and **28** of **ACECA**, in that there is nothing in those provisions that barred EACC from invoking relevant provisions of the **Evidence Act** in order to investigate Ojienda. The non-issuance of a notice of an impending search warrant application serves a wider public interest as the success of an investigation is so often dependant on the element of surprise.

Consequently, the very legislative purpose of an application for warrants to investigate a bank account or search premises would be frustrated and rendered meaningless if notice were issued to the affected parties.

Finally, counsel agreed with the learned Judge that bank accounts are not covered by advocate-client privilege. Likewise, the learned Judge correctly pronounced himself on the issue of discrimination and the claim for damages by Ojienda.

Ms Awour submitted on the cross-appeal and maintained that EACC violated Ojienda's right to privacy due to the unlawful disclosure of the bank account details pursuant to obtaining the search warrants. Counsel submitted that payment of legal fees is part and parcel of an advocate-client communication and is therefore covered by privilege. The learned Judge erred in finding that the same was a private bank account owned by Ojienda. Equally, the learned Judge further erred in failing to determine that Ojienda was discriminated against even after proof was adduced to show that his firm was singled out among many others due to his perceived closeness to the former Managing Director of the Company, Dr Evans Kidero.

In opposition of the appeal, counsel contended that investigations conducted by EACC are done in an administrative capacity and are therefore regulated by **Article 47** of the Constitution. EACC cannot ignore the requirement of **section 23(4)** of **ACECA** by invoking the provisions of **section 118** of the **Criminal Procedure Code**.

Mr. Ngumbi made submissions on **Article 47**, along the lines of those made by Mr. Ashimosi and Mr. Ruto. To rehash would be repetitive and will serve no useful purpose. The other issue he submitted on was on the right to a fair hearing, that **Article 50** of the Constitution was prematurely invoked as it only applies when a court is resolving disputes, not during a preliminary issue such as an investigation. The courts should be reluctant to interfere with EACC's mandate of investigation of crimes that are of public interest. Hence the Judge erred in his finding on this issue.

Having carefully read and considered those rival submissions in light of the entire record we have distilled the following as the issues for determination; whether Ojienda's fundamental rights under **Article 27**, **31**, **40** and **50** of the Constitution were violated; whether the bank accounts amounted to confidential information under the advocate-client privilege; whether the actions of EACC were administrative and therefore under the ambit of **Article 47** of the Constitution and whether EACC was required to issue a written notice to Ojienda prior to the application for the warrants.

We appreciate that as a first appellate court, we have a duty to re-evaluate and re-analyze the evidence adduced at the High Court and make a fresh, independent determination on the same. This was well captured in **ROBIN ANGUS PAUL & 2 OTHERS V MIRIAM HEMED KALE [2019] eKLR;**

> ***"As stated earlier, on first appeal this Court is enjoined to re-evaluate, re-assess and re-analyze the entire evidence adduced before the trial court and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way."***

We also acknowledge that the matters at hand invoked the learned Judge's discretionary powers. As such we pay due respect to the determination of the High Court and are slow to interfere with it save for certain well known circumstances. In **KENYA REVENUE AUTHORITY & 2 OTHERS V DARASA INVESTMENTS LIMITED [2018] eKLR,** for instance this Court addressing the issue stated as follows;

> ***"…..whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR. The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice."***

We shall bear those principles in mind in dealing with this appeal. For convenience, and in view of the determinations we shall make thereon, the first issues we shall deal with are whether Ojienda's right against discrimination, privacy, property and advocate-client privilege were violated as contended in the cross appeal.

The right against discrimination is enshrined in **Article 27** of the Constitution. It was Ojienda's contention that he was discriminated against by EACC as he was the only advocate to be singled out from the Company is panel of advocates, which comprised twenty law firms, as having received fictitious payments and then warrants against him were procured. However, Ojienda failed to demonstrate that he was treated differently, without any objective or reasonable justification among the rest who were in a similar situation. It has been asserted

without controvert that no other law firm was alleged to have received fictitious payments and that was the basis for the action taken in his case. We think there did exist a sound reason for differentiation. Consequently, we, see no reason to upset the finding of the learned Judge when he stated;

> ***"With respect to the Petitioner, I am unable to make any finding on the discrimination allegation made because no material has been placed before this Court to support the said allegation. I do not for instance have the names of the other advocates who are in the panel of Mumias Sugar Company Ltd who were paid legal fees like the Petitioner and have not been investigated. What evidence of differential treatment then do I have to make an affirmative finding. None and the claim must therefore fail."***

Another violation complained of was the right to privacy as enshrined in **Article 31** of the Constitution. Ojienda contended that EACC unlawfully disclosed facts about his advocate-client account which amounted to an infringement of the said right. We acknowledge that the right to privacy entails that an individual ought to have control over his or her personal information and that the same should be shielded from unwarranted intrusion. We respectfully opine that this principle is in contradiction to Ojienda's assertions that the account is not his personal property but one that belongs to his various clients dictated by the nature of advocates holding money for their clients in the advocate-client account. This begs the question of, whose privacy had really been violated: Ojienda or his clients? Since the answer leans towards the clients, they would be the right persons to complain. There was no evidence of any such complaint. This ground accordingly fails.

Similarly, on the issue of advocate-client privilege as provided for in **section 134** and **section 137** of the **Evidence Act**, we think that Ojienda misapprehends the true nature of the privilege. The provisions are clear enough;

> ***134. Privilege of advocates***
>
> ***(1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure—***
>
> ***(a) any communication made in furtherance of any illegal purpose;***
>
> ***(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.***
>
> ***(2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.***
>
> ****....***
>
> ***137. Communications with an advocate***
>
> ***No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his advocate unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.***

Under **section 134** which is germane to our determination, an advocate is expressly prohibited from disclosing communication made to him by his client or divulging information regarding documents that come to his attention in the course of employment as the client's advocate. The prohibition is for the protection of the client and not of the advocate. All the advocate gets is the privilege on non-disclosure. The client's protection is not absolute, however, as there are instances stated in the proviso, where the advocate may be required, for the stated compelling reasons to disclose such communication or content and condition of documents. That the protection belongs to clients and is essential to the rule of law and administration of justice has long been recognised at common law. A century and a half ago, the English Court of Chancery in **ANDERSON V BANK OF BRITISH COLUMBIA, ENGLAND LAW REPORTS [1876] 2 ChD 644** stated the principle thus (per Sir George Jessel MR at page 648);

> ***"What is the rule [as to privilege] and what is the meaning of the rule? The meaning of the rule is, as I understand, truly laid down by LORD BROUGHAM in the case of Greenough v. Gaskell, and is thoroughly well explained, if I may use the phrase in reference to so great a judge as LORD COTTENHAM, in the case of Reid v. Langlois, followed in every case in equity, not excepting the case before STAURT, V.C, in which a dictum has been strained to an extent which, if the Vice-Chancellor's attention has been drawn to it, I think, he would not have thought warranted. The object and meaning of the rule is this: that as by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to prosecute of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly conduct his litigation. This is the meaning of the rule."***

The importance of the privilege was acknowledged by the English Court of Appeal in **CONLON V CONLONS LIMITED [1952] 2 All ER 462** with that court observing that the privilege has been zealously guarded by the courts as long as the history of the law goes and that there are only two instances in which it is lost; if something of a criminal nature is involved and if there is waiver by the client. In the case at bar, the learned Judge found, and correctly so in our view that Ojienda could not claim the protection of the rule, as it belongs to the client and not the advocate. Moreover, the acknowledged exceptions were also present as the Company had voluntarily given information thus waiving the right and there were also allegations of the criminal acts of corruption.

We need only add that **ACECA** in **section 28 (10)** does itself acknowledge and protect the privilege in both **section 134** and **137** of the **Evidence Act**.

On the violation of the right to property as provided for in **Article 40** of the Constitution, we concur with the learned Judge to the extent that Ojienda did not demonstrate how he was deprived of his right since he still had control and ownership of the bank account during the investigation. We see no need to upset this finding of the learned Judge;

> ***"I have alluded to the matter elsewhere above and my answer is that I do not think so. I say so because as correctly submitted by the Respondents, I did not hear the Petitioner to claim that his bank account had been frozen or that he was not able to access the same or that money had been appropriated from it. How then can it be said that the right has been violated also noting that the intrusion into it was lawful" Having said so, it is therefore obvious that I do not find a violation of his right to property as alleged."***

The effect of our findings on those issues raised in the cross-appeal is that it is bereft of merit and shall be dismissed.

Turning now to the appeal proper, a fundamental issue to be determined is whether or not the action of EACC was administrative in nature. The learned Judge correctly pronounced himself on the issue as follows;

> ***"It is indeed true therefore that an investigation is an administrative function of Ojienda notwithstanding that it sought and obtained, by a judicial process, warrants to search the Petitioner's accounts. Either way, the right to have due notice under Section 28 of ACECA as read with Article 47 of the Constitution was clearly violated and I so find."***

We need only add that the requirement for issuance of notice in writing to a person in Ojienda's situation, which precludes the path chosen by EACC, is a duty imposed by **section 27 (3)** of **ACECA** as well, and EACC's action was improper and thus properly invalidated by the learned Judge.

Whereas at first blush it appears odd that the learned Judge should have found that investigations fall under the constitutional requirement for fair administrative action, on a deeper analysis EACC's particular investigations do attract constitutional control as envisioned in **Article 47** of the Constitution. It provides that;

> ***(1)Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2)If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***
>
> ***(3)Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—***
>
> > ***(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***
> >
> > ***(b) promote efficient administration.***

This Article has been actualized by the enactment of the **Fair Administrative Action Act** which in **section 2** defines administrative action as including;

> ***(i) the powers, functions and duties exercised by authorities or quasi judicial tribunals; or***
>
> ***(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.***

It is clear that the learned Judge accepted the contention that EACC, as a creation of **Article 79** of the Constitution is governed by the dictates of **Article 47** in executing its mandate. Its actions as we have outlined earlier in this judgment do affect the rights or interests of the persons it investigates. Parliament in its wisdom defined administrative action in very broad terms and it is the duty of courts to interpret statutes for what they say and not to re-write them. We think, with respect that the learned Judge properly directed his mind and arrived at a proper conclusion of law we have no basis for interfering with his decision. It is worth recalling that **Article 2** of the Constitution declares its supremacy and binding nature on all State Organs;

> ***(1)This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***

For the avoidance of doubt, **Article 260** defines;

"State organ" means a commission, office, agency or other body established under this Constitution.

From the definition above, EACC as a creature of statute anchored in **Article 79** of the Constitution is bound by the dictates of the Constitution and therefore not at liberty to pick and choose which of its actions are bound by the Constitution. The intent of the Constitution was to ensure that there are enough controls to safeguard the rights and interests of the Kenyan people. In **JUDICIAL SERVICE COMMISSION V MBALU MUTAVA & ANOTHER [2015] eKLR**, this Court held on the importance of **Article 47** of the Constitution;

> ***"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."***

Therefore all the powers and functions given to EACC by the Constitution and the specific provisions contained in **ACECA** which give life to its parameters and controls are subject to being administered lawfully, reasonably and in a manner that is procedurally fair. It follows that the argument that investigations are not administrative actions has no feet to stand on and therefore falls.

In order to determine whether the non- issuance of notice was lawful and procedurally fair, we have to examine the controls and parameters set out by **ACECA**. We take cognisance that it is an Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crimes and related offences and for matters incidental thereto and connected therewith, as its long title states. It creates a special regime of law by its very nature which has far-reaching consequences when triggered. For instance public officers who are charged thereunder get suspended from duty; it provides for stiff sentences of imprisonment for up to 10 years; provides for mandatory fines of double the benefit conferred or loss suffered and also the drastic order of lustration involving disqualification from being appointed or elected into public office for ten years after conviction.

It is precisely because of the far-reaching, nay life changing consequences that come into play once **ACECA** is activated that courts must be vigilant to ensure that citizen's rights are scrupulously protected. The Constitutional Court of South Africa has had occasion to explore the tension and interaction between power and its control, rights and the permissible limitations thereto, which must be based on reasonableness. In **S V. SAMUEL MANAMELA & ANOTHER (2000) (5) BCLR 491 (CC)** that court stated;

> ***"As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected…. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness."***

We understand the importance and the need for the functions of EACC under the **ACECA** with regard to ensuring that public funds are not embezzled by citizens or other entities. It is also important to have such serious sanctions so as to deter anyone from engaging in corruption or any other economic crime. Due to the seriousness of the Act and the consequences of guilt therein, Parliament struck a necessary balance by ensuring there are safeguards put in place to protect the rights of suspects. In any case the issuance of orders to stop investigations into bank accounts of Kenyans is nothing new and they issued in appropriate and deserving cases. Majanja J, put the matter in perspective in **MANFRED WALTER SCHMITT & ANOTHER [2013] eKLR**;

> ***"I would be remiss if I did not comment on the nature of the proceedings before the subordinate court. The duty imposed on the judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual. The Court is not a conveyor belt for issuing warrants when an application is made nor must the court issue warrants of search and seizure as a matter of course. When an application is made, the Court is required to address itself to the facts of the case and determine, in accordance with the statutory provisions, whether a reasonable case has been made to limit a person's rights and fundamental freedoms. On the other hand, the duty of the State and its agencies, in investigating and prosecuting crime, is to furnish the Court with facts upon which the court can conclude that there is reasonable evidence of commission of a crime by the person it seeks to implicate by the application for search and seizure."***

Furthermore, we are called upon to determine the extent of those safeguards in light with the mandate of EACC in the interest of the public. EACC's assertion that its actions were properly grounded in law and were based on **section 23(4)** of **ACECA** which provides;

> ***(4) The provisions of the Criminal Procedure Code (Cap. 75), the Evidence Act (Cap. 80), the Police Act (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator.*** *(Our emphasis)*

It was contended that the foregoing assigned all power, privileges and immunities under the **Criminal Procedure Code**, the **Evidence Act** and the **Police Act** for detention, prevention and investigation of corruption and economic crime-related offences. Therefore **section 23** of **ACECA** read together with **section 118A** of the **Criminal Procedure Code** and **section 180** of the **Evidence Act** enables EACC to obtain search warrants to carry out investigations and criminal proceedings if the evidence discloses criminal culpability. Those provisions relied on are in these terms;

118A. Ex-parte application for search warrant

An application for a search warrant under section 118 shall be made ex-parte to a magistrate.

….

180. Warrant to investigate

(1) Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book.

In support for their reading of these provisions the DPP relied on **KENYA ANTI-CORRUPTION COMMISSION V REPUBLIC & 4 OTHERS [2013] eKLR** urging that this Court had considered and upheld the applicability of **section 180** of the **Evidence Act** and **section 23** of the **ACECA** as enabling provisions under which warrants to investigate accounts are issued. Having read that judgement which emanated from a decision of the High Court in exercise of its judicial review jurisdiction, we respectfully find it to be clearly distinguishable. The specific arguments made herein by Ojienda touching on **sections 27** and **28** of **ACECA** which require the issuance of notice were not made nor decided upon in that matter. The argument made before us, is different and a more nuanced and takes us back to the primacy of sections **27** and **28 ACECA** which, while having the same effect of enabling EACC to obtain information and documents, are nonetheless ring-fenced by specific safeguards requiring notice. Our interpretation of those provisions must necessarily devolve in favour of the citizen who takes umbrage and succour thereunder. It is logical, meet and proper that the specific provisions of **ACECA**, a special statute, do take precedence over the general provisions of the other statutes sought to be relied on by the investigators. There is even a Latin maxim to that effect; *generalia specialibus non derogant*. Halbury's Laws of England (2nd ed. 1938), vol 31, p. 549, at para. 732 states the point as follows;

"Rights given by a special statute are not taken away because they cause difficulties in the permissive working of the general statutes not directed to the special point…."

This was well explained by Rinfret J, of the Supreme Court of Canada in **CITY OF OTAWA V. TOWN OF EAST VIEW[1941]S.C.R. 448** at pg 462;

"The principle is, therefore, that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception to the subject-matter of the rule from the general Act."

This was followed by the same court in **LALONDE V. SUN LIFE ASSURANCE CO. OF CANADA (1992) 3 S.C.R. 261**.

Given this understanding, the learned Judge properly rejected EACC's argument that the general provisions of the **Evidence Act** and the **Criminal Procedure Code** divested them of the obligation imposed by **sections 26**, **27** and **28** of **ACECA**. We find and hold that in its investigations EACC is inflexibly bound to comply with the provisions of those sections which, for the avoidance of doubt, are as follows;

26. Statement of suspect's property

(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property—

….

27. Requirement to provide information, etc.

(1) The Commission may apply ex parte to the court for an order requiring an associate of a suspected person to provide, within a reasonable time specified in the order, a written statement stating, in relation to any property specified by the Secretary, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

….

28. Production of records and property

(1) The Commission may apply, with notice to affected parties, to the court for an order to—

(a) require a person, whether or not suspected of corruption or economic crime, to produce specified records in his

possession that may be required for an investigation; and

(b) require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not.

(2) A requirement under subsection (1)(b) may include a requirement to attend personally to provide explanations and information.

(3) A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.

The text of these provisions is quite clear and admitting to no ambiguity whatsoever, it is the duty of the courts to give full effect and meaning to them in interpretation, and the obligation of EACC to fully comply there with. We find persuasive the approach in **BARNESS – VS- JARVIS [1953] I W.L.R. 649**, where Lord Goddard C.J. said;

> ***"A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."***

It is obvious from the above-quoted sections of the **ACECA** that the Legislature's intention was for a person of interest or suspect to be aware of the intended action of EACC against him. It also intended for a person of interest to first be given a chance to voluntarily comply with the notice before any action is taken against him. This was not done by EACC who chose the easier general path of seeking warrants, *ex parte* instead of paying due regard to the preliminary steps required under its constitutive and operative statute. In so doing, it infringed on Ojienda's fundamental rights and affected his interests, hence the learned Judge's invalidating action, which we have no difficulty endorsing.

We heard the argument, which was difficult to fathom, that **section 26** of the ACECA required notice to issue only to an associate and not to a suspect. The argument was that as Ojienda was a suspect he was not entitled to any notice. With respect, the plain and unambiguous text of **section 26(1)** puts paid to that argument. The framers of the Act intended that a suspect be furnished with a notice to provide details or information about property in the first instance. No such notice was issued to Ojienda and this vitiated its action of seeking warrants. The safeguard to the suspect is for good reason and it is an advantage to him that it was not open to EACC to deny at a whim.

Furthermore the reading of **section 23(4)** of **ACECA** where its states that the police powers are conferred to EACC in "***so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator.***

This is a clear indication that the Legislature did not envision a situation where EACC conveniently falls back on the mere general and less regulated powers of the **Evidence Act** and the **Criminal Procedure Code** when executing their specific mandate under their parent Act. Therefore EACC must adhere to the procedural guidelines set out in **ACECA** as to how it should handle investigations and not approbate and reprobate by a piecemeal invocation of its powers while disregarding its safeguards. Such guidelines and regulations also help EACC discharge its mandate better as it has a chance to summon suspects, be furnished with the necessary information before preferring charges against individuals. This approach aids in the fair administration of investigation under **ACECA**.

Even in light of the public interest, and at the risk of appearing to repeat, the dictates of the Constitution must be adhered to at all times as it is the supreme law of the land. This Court well elucidated this point, in a ruling in **CHRISTOPHER NDARATHI MURUNGARU V KENYA ANTI-CORRUPTION COMMISSION & ANOTHER [2006] eKLR**;

> ***"But in our view, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In a dictatorship, we could simply round up all those persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decisions."***

Having found as we have, the appeal just like the cross-appeal, is not meritorious. It too is for dismissal. The final orders are that both Civil Appeals No. 103 & 109 of 2016 be and are hereby dismissed. The cross-appeals in both are also dismissed. The parties shall bear their own costs.

Dated and delivered at Nairobi this 28th day of June, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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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.

DEPUTY REGISTRAR