IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 193 OF 2014

BETWEEN

MERU COUNTY GOVERNMENT.....APPELLANT

AND

THE ETHICS & ANTI-CORRUPTION COMMISSION...RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Majanja, J.) dated 9th June, 2012

in

H.C. Petition No. 177 of 2014)

****

JUDGMENT OF THE COURT

By this appeal the appellant, the Meru County Government challenges the decision of the High Court at Nairobi (Majanja, J.) by which the appellants petition against the Ethics and Anti-Corruption Commission (the Commission) was dismissed.

That petition had been filed claiming that the Commission through its officers had violated various rights and fundamental freedoms of the appellant's officers and also violated the Constitution in certain named respects on account of actions it took against the appellant between 20th March and 15th April 2014. Those actions included several and incessant commando-style raids on the officers of the appellant without notice during which they took possession of and carted away all documents from the Procurement Department. The raids were accompanied by squads of armed police officers who took positions with a view to intimidating, bullying and threatening the appellant?s officials with the possible use of force. The petitioner perceived and described that conduct as capricious, arbitrary and unconstitutional for being outside chapter 6 of the Constitution and the Ethics and Anti-Corruption Act, 2011. They were, therefore, an affront to justice and the rule of law. The raids were moreover not followed by any explanation as to their purpose and no corruption charges were preferred against the appellant?s officers.

The seizure of the appellant?s original documents without opportunity to make copies thereof curtailed and impigned the appellant?s capacity to render services to the people of Meru County and to properly account for resources. Moreover, the appellant was apprehensive that the raids were politically motivated that and the seized documents were in peril of being destroyed to its irreparable loss. The appellant then expressed itself as approaching the court in the public interest on behalf of the people of Meru County. It averred at paragraph 28 that;

> ***"The effect of the respondent?s illegal and unprocedural raids on the offices of the County Government of Meru violates and is likely to continue violating the fundamental rights and freedoms of the County Government and the people of Meru County contrary to the fore stated Articles the Constitution."*** *(Our emphasis)*

The petition went on to enumerate provisions of the Constitution alleged to have been violated by the Commission?s actions, including Article 10 on the national values and principles of governance; Article 35 on the right to access information; Article 40(2) which outlaws arbitrary deprivation of property; Article 47(2) on the right to fair administrative action; Article 50(2)(a) on the presumption of innocence; Article 50(2)(b)(c) on the right of an accused person to be informed of the charge and to have adequate time to prepare a defense; Article 73(2) on the guiding principles of leadership and integrity that include accountability to the public for decisions and actions taken; and Article 73(2)(b) for allowing themselves to be influenced by favouritism and political bias.

By way of reliefs, the appellant then prayed as follows;

> ***"(a) A declaration that the raid and seizure conducted by officers of the respondent on the petitioner's offices was done in violation of the Constitution of Kenya and was therefore an illegality;***
>
> ***(b) A declaration that the raid conducted by officers of the respondent on the petitioner's offices infringed on the fundamental rights and freedoms of the petitioner as contained in Articles 31, 35(1) (b) and 40(2) of the Constitution of Kenya;***
>
> ***(c) A declaration that the raid conducted by officers of the respondent on the offices of the petitioner was laced with mala fides, was conducted to intimidate the County Government of Meru and as such violated the petitioner?s fundamental rights and freedoms contained in Articles 73 (2) of the Constitution of Kenya.***
>
> ***(d) An order does issue and hereby issues to the respondent to return to the petitioner with immediately effect, all the original files and documents illegally and unprocedurally seized from their possession on account of the so stated raids and seizures.***
>
> ***(e) A permanent injunction does issue and hereby issues restraining the respondents jointly and severally from harassment and intimidation of the petitioner herein.***
>
> ***(f) A prohibition does issue and hereby issues to restrain the respondents jointly and severally from using any evidence obtained from the illegal and unprocedural raids and seizures from being used in any way against petitioner.***
>
> ***(g) An order of certiorari does issue and hereby issues to quash any proceedings, findings and/or investigations purportedly performed or conducted by the respondent using the illegally seized documents.***
>
> ***(h) Any other relief that this Honourable Court may deem just and appropriate to safeguard the fundamental rights and freedoms of the petitioner and the citizens of the County of Meru.***

The averments in the petition were evidentially supported by the affidavits, all sworn on 16th April 2014, of **Julius Kimathi** the appellant's County Secretary; **Julius Kang'ote M'Abuaba**, a retired Chief and resident of Meru County who swore that the raids were instigated by one Japhet Baithalu Alaine, an employee of the Commission at Nyeri but a political allay of one Dr. Kilemi Mwiria who was the supposed rival of the Meru Governor Peter Munya, and of Newton Njeru, an employee of the appellant and Director in charge of Procurement.

Responding to the petition the Commission filed a detailed replying affidavit sworn by one **Ali Goyo Galgalo** on 25th April 2014 who swore that the Commission in exercise of its statutory mandate moved into the appellant?s offices to investigate complaints and allegations that contracts for public works, including for the re-furbishment and fencing of the county office, ward offices and the Meru Bus Park had been irregularly awarded. He swore that he did apply for and obtain search warrants from the Chief Magistrate?s

Court in Nyeri vide Misc. Criminal Application No. 46 and 48 of 2014, which entitled him to enter and search the offices of the Meru Country Secretary, Supply Chain Manager and Works Officer and there seize and take possession of the documents relevant to the investigation. He visited the said offices on 20th April 2014 and the County Secretary authorized his officers to hand over the needed documents after first consulting the county legal officers who perused the search warrants and advised compliance.

An inventory was duly prepared and signed by the appellant?s officers as was another for more documents collected in like fashion on 26th March 2014 (sic). It is only later that the appellant?s officers and Governor Peter Munya refused to cooperate and accused the Commission?s officers of having a political agenda.

The deponent defended the jurisdictional competence of the Chief Magistrate to issue the warrant and asserted that the appellant had other avenues for redress or challenge against the warrants instead of invoking the High Court'ss constitutional jurisdiction. He also stated that the preliminary investigations did establish certain irregularities, on the basis of which he pleaded that the Commission be let to conclude the investigations in the public interest. He defended the continued detention of the documents as permissible under the Criminal Procedure Code and stated that the same were always available for photocopying should the appellant need them. He denied that the holding on to the documents pursuant to a valid court order amounted to a deprivation of the appellant's right to property, which in fact cannot exist in public documents.

The Commission also took the view that the appellant was not a citizen to whom the right of access to information under **Article 35(1)** of the Constitution applied and neither was it a natural *person* to whom the right to privacy under **Article 31** applied. That right, moreover, was not absolute but amenable to limitation and qualification. It denied exceeding or abusing its constitutional and statutory mandate in investigation. It argued that our grant of the prayers sought by the appellant would have prohibited (sic) it from discharging its mandate under the law. The documentary proofs were attached to the affidavit.

A second affidavit sworn on behalf of the Commission was by its Forensic Investigator, **Japhet Baithalu Alaine** who deposed on 25th April 2014 that he had never had any political differences with Hon. Peter Munya as he had never been involved in politics having been a public servant for some 28 years. He denied any person al relationship or political alliance with K. Mwiria. He denied being involved or in any way interfering in the investigation leading to the petition. He swore to being aware that the said investigations were not aimed at the appellant but at certain of its officers and asserted that they were being conducted in an independent and professional manner with no violation of rights. What is more, the result of the investigation would be forwarded to supervisors and the legal service directorate before going to the Director of Public Prosecutions whose sole mandate it was to authorize prosecution of suspects. He urged the court not to interfere with the investigations.

The appellant responded to those two affidavits by the further affidavit wordily titled *"Further Replying Affidavit to the respondents? replying affidavit dated 25th April 2014*" of **Julius Kimathi** sworn on 7th May 2014 in which it was dismissive of the Commission?s stated position. The deponent complained at the Commission?s failure to make a written request for the documents it sought – which he termed discriminatory – and repeated that the Commission acted *ultra vires* and abused its statutory mandate in raiding the appellants offices „with impunity? thereby formenting anarchy and chaos and hampering government operations and stalling delivery of services to the people. The allegation of the investigation being politically motivated was repeated.

The appellant amended its petition on 17th May 2014 introducing additional facts on the Commission?s violation of the Constitution. It also made additional prayers as follows;

> ***"(d) A declaration that the respondent acted ultra vires and violated Article 79 of the Constitution of Kenya by seizing the petitioner?s original documents on 20th March 2014 without notice and detaining the same since without allowing the petitioner to make copies therefore and without preferring any criminal charge against any of the petitioner?s officers.***
>
> ***(e) A declaration that the seizure of the petitioner?s documents on 20th March 2014 and failing to tender the same before court since is a clear and flagrant disregard of the law and thus unconstitutional.***
>
> ***(f) A declaration that the respondent violated Article 27(1) of the Constitution of Kenya by applying double standards in their investigations to wit formally requesting for documents to assist with investigations from other public entities but opting to raid and seizure documents from the petitioner.***
>
> ***(g) A declaration that the respondent is bound by the national values and principles of Governance enumerated in Article 10 of the Constitution of Kenya to inter alia adhere to the rule of law, non discrimination and transparency in its operations.***
>
> ***(h) A declaration that the respondent as a public body is bound by the provisions of Article 73(2)(d) and 75(2)(a) of the Constitution in subjecting its officers to disciplinary action and that a mandatory order to issue compelling the respondent to investigate the action of Japhet Baithalu Alaine.***
>
> ***(i) An order of mandamus does issue and hereby issues directed at the respondent?s to discharge its statutory mandate under the provisions of section 11 of the Ethics and Anti-Corruption Commission Act to address the petitioner?s complaints and take disciplinary action against one Japheth Allaine Baithalu."***

The parties filed written submissions and authorities and heard on the basis of those submissions before Majanja, J. wrote his judgment, (read on his behalf by Ngugi, J) dated and delivered on 9th June 2014. He dismissed the petition in entirety after making the following substantive findings;

> ***"(a) The county government is not a person who can petition the High Court for violation of its fundamental rights and freedoms under Article 22 of the Constitution by another State organ.***
>
> ***(b) Notwithstanding the finding in (a), the Court has the duty satisfy itself of the legality of the action of the Commission in respect of the County. This is a matter within the jurisdiction of the High Court to inquire under Article 165(3)(d) of the Constitution.***
>
> ***(c) The provisions of sections 26, 27 and 28 of the Ethics and Anti-corruption Act are not applicable to the facts and circumstances of this case as the County government is not a person reasonably suspected of corruption or economic crimes or an associate of such person or a person contemplated by the said provisions.***
>
> ***(d) In line with its duty to investigate corruption, the Commission was entitled to apply for warrants of search and seizure under section 118 of the Criminal Procedure Act and as result of the execution, material collected from the petitioner is now the subject of the subordinate court that issued the warrants. The County government is entitled to move the subordinate court to vary discharge or deal with the material under its custody as it deems fit.***
>
> ***(e) Any complain against an officer or employee of the Commission must be lodged before the Commission in the first instance. The petitioner has not shown that the Commission has failed to exercise its mandate hence an order of mandamus cannot issue against the Commission directing it to deal with the complaint against it member of staff."***

That dismissal aggrieved the appellant who, after filing a notice of appeal, challenged it in a memorandum of appeal raising some twenty grounds which we summarize as stating that the learned Judge erred in law and fact by;

- **Failing to appreciate that the appellant is a person to whom the Bill of Rights, binding upon the respondent, applied and merited protection.**
- **Failing to appreciate that the commission's powers derived from the Anti-Corruption and Securicor Crimes Act and the Ethics and Anti-Corruption Commission Act which supercede any other law including the Criminal Procedure code and not** *vice versa***.**

- **Failing to find that the Commission acted in excess of jurisdiction by raiding the appellant's premises and seizing original documents instead of copies and without first making a written demand for them.**

- **Failing to appreciate that the Commissioners actions were contrary to the appellant's legitimate expectation and right to fair administrative action.**

- **Failing to find that seizure and indefinite detention of the documents without transfer to court was illegal and unconstitutional.**

- **Curtailing the appellant's inviolable right to fair hearing by failing to accord the appellant the opportunity to reply to the commission's submissions.**

- **by proceeding with the hearing on a day meant for mention.**

- **failing to find that the Commission violated the law by failing to address complaints made against its officer Japhet Baithalu Alaine.**

- **Making contradictory findings on the same issue in violation of the purpose and principles of the Constitution especially Article 159.**

The appellant thus prayed that the impugned judgment be set aside and this Court be pleased to grant the prayers sought in the petition as amended.

Before this Court, counsel for the parties filed written submissions which they highlighted in their addresses to us. For the appellant, learned senior counsel **Mr. Okongo Omogeni** started off by criticizing the learned Judge for finding that the appellant was not a *person* who can petition the High Court under **Article 22** for violation of its fundamental rights and freedoms by another state organ. According to senior counsel, the definition of *person* contained in **Article 260**; namely that it "includes a company, association or body of persons whether incorporated or unincorporated" should be construed liberally to include a county government such as the appellant.

He pursued the liberal interpretative motif by stating that under **Article 22(2)(c)** the appellant was qualified as a person who could enforce the Bill of Rights acting in the public interest.

Mr. Omogeni then charged that the learned Judge "got mixed up" in that he correctly appreciated but failed to give effect to the fact that the High Court had jurisdiction under **Article 165(c)(d)(iii)** to hear a question respecting the interpretation of Constitution including determination of;

> ***"any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of the government."***

Counsel cited in aid the decision of this Court sitting in Kisumu in ***COUNTY ASSEMBLY OF KISUMU & 2 OTHERS vs.THE KISUMU COUNTY ASSEMBLY SERVICE BOARD C.A. 17 & 18 OF 2015*** (consolidated) which upheld the competency of a petition and found that the Kisumu County Assembly Service Board was a „*person*? as defined by **Article 260** of the Constitution and was thus entitled, like a natural person , to seek redress, even against another state organ, for violation of its constitutional rights. He then proceeded to urge that the learned Judge was wrong not to find that under **section 29** of the ACECA, the Commission would only be entitled to apply for warrants without due regard to the procedures set out in its own constitutive statute. It was not open to it to proceed as if everybody other than itself was corrupt and so take liberties with people?s reputations. Senior counsel then charged that "*someone must rein in a Commission which, in the name of independence, becomes roguish*" He sought to persuade us that the someone to do so was this Court, and the occasion, the instant case.

To him, the fact that the raids were attended by tip offs to the press, and the timing being when a by election was imminent, were proof of the improper political motivation and was tantamount to abuse of power, which was further demonstrated by the Commission?s continued detention of the documents seized instead of presenting them to court.

Mr. Omogeni referred to this Court?s decision in ***TEACHERS SERVICE COMMISSION (TSC) vs. KENYA UNION OF TEACHERS (KNUT) & 3 OTHERS*** **[2015] eKLR** which, in disallowing the notion that independence is synonymous with unaccountability, stated, *inter alia* as follows;

> ***"Independence does not mean that constitutional and statutory procedures and rule of law limitations to the authority of the independent commission are neither enforceable nor justicable. Independence does not mean that independent commission must neither heed nor pay attention to other constitutional organs or other players in public governance.***
>
> ***In Namibia Supreme Court case of Minister of Defence, Nambia vs. Mwandighi (1992) 2 SA 355 it was stated that:***

„The independence clause" does not accord independent "carte blanche" to act or conduct ... on whim; ... independence is, by design configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matric. „Independence? does not mean „detachment?, "isolation" or „disengagement? from the other players in the public governance?"

The Supreme Court in **RE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011] eKLR** expressed itself in the following terms as regards independent commissions;

"While bearing in mind that the various commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or person s outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law ...."

It was counsel?s view that there was sufficient basis and enough material had been laid before the learned Judge upon which he ought to have quashed the warrants issued against the appellant and that he erred in failing to do so. He faulted the learned Judge for failing to make appropriate orders respecting Japhet Baithalu on account of there being no complaint against him, yet such complaint was on record. The Commission was duty bound to investigate the said complaint but had failed, refused or neglected to do so and the learned Judge ought to have issued appropriate and effective wears but failed to do so.

Rising to oppose the appeal, learned counsel for the Commission, **Mr. Muraya** posited that in the context of the Bill of Rights the appellant was not a *person*. For this submissions he referred generally to the United Nations Declaration of Human Rights and the African Charter on Human and People?s Rights under which States and their organs are guarantors of human rights, which they do not themselves enjoy. He contended that human rights and fundamental freedoms are specified and protected under the Bill of Rights for individuals. He referred us to a passage in ***R vs. SOMERSET*** **[1995] QBD 513** where Prof Wade?s

Administration Law was quoted thus at p 524;

"But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake. At every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose."

Mr. Muraya?s submission on the definition of *„person*? in **Article 260** of the Constitution is that it must be contextual in meaning. Referring to ***THOMAS PATRICK CHOLMONDELEY vs. REPUBLIC*** **[2008] eKLR,** a decision of this Court under the retired Constitution, he posited that the rights in the Bill of Rights belong to individuals and cannot therefore be claimed by the State or an organ of it such as the appellant. He drew our attention to the following passage in that judgment to buttress his point;

"The other rights set out under chapter 5 of the Constitution which is headed „protection of fundamental rights and freedoms of the individual? run from section 70 to section 82. Section 70 of which marginal notes are „fundamental rights and freedoms of individual? opens with the averment that:-

„Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely ....?

The various succeeding sections, among them section 77, then set out the various rights which each individual in Kenya is entitled to. Surely the state cannot qualify as an individual in the sense set out in these provisions. No individual person can deprive the state of its life or existence; only another state can deprive the state in Kenya of its right to exist and only through an act of war. No person can deprive the Republic of its liberty; no person can hold the Republic in slavery or servitude except another state and by an act of war. Nor can any person subject the Republic to torture or inhuman or degrading treatment. All these rights are rights which are inherent in each and every individual living in Kenya and the prosecution, as an adjunct of the state, cannot claim those rights as being applicable to them."

Counsel?s view was that it was a conceptual flaw for the petition to have been framed and presented within the Bill of Rights and for that flaw it was bound to fail, as it in fact failed.

Turning to the argument that the Commission acted in breach of the law and the Constitution, learned counsel defended as well-founded the learned Judge?s holding that **section 118** of the CPC was applicable and added that the said provision was in no way inconsistent with the provisions of **sections 27, 28** and **29** of ACECA. In answer to the question we posed whether the Commission upon seizing the documents did present them to court, counsel replied that it took an inventory of them to court on 1st April 2014, which was in compliance with **section 118** of the CPC. He urged us to dismiss the appeal.

Mr. Omogeni?s rejoinder confined itself to the legality of the seizure and detention of the documents. His view was that under **section 121** of the CPC, it is only after presentation of the things seized that the Commission could detain them. At any rate, the detention for over two years was indefensible. He reiterated that the guiding law for the Commission was ACECA, and stated that section 118 of the CPC was inconsistent therewith. He concluded by urging that what the Commission should have done is written to the appellant, which was not a suspect, requesting for the documents, which it could then use against whoever it considered a suspect.

We have set out the pleadings, procedural history and the submissions made before us in some length and given the entire record full consideration consistent with our duty as a first appellate court to subject the entire case to a fresh and exhaustive examination and re-evaluation with a view to arriving at our own conclusions of fact. We do accord the findings and conclusions of the first instant court due respect but are free to depart therefrom when the same are unsustainable from the material on record, are plainly and/or have resulted in misjustice. Indeed, our latitude to depart is wider where, as here, the matter in the court below proceeded by way of affidavit evidence and counsel?s submissions thereon, as opposed to by way of *viva voce* evidence in which case that court would have been at a decided advantage of having heard and seen the witnesses, for which due allowance must be made. In the instant case, what was invoked was the learned Judge?s discretion and we would be slow to interfere with it unless under the circumstances held by the predecessor of this Court in ***MBOGO vs. SHAH*** **[1968] EA 93**;

> ***"(ii) (per Newbold, P.) a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

Applying all of those principles to the instant appeal, we think that the only issue we need to determine in this appeal notwithstanding the rival formulations of them by the parties, are the following;

(i) Whether the appellant is a *person* possessed of and capable of enforcing human rights and fundamental freedoms.

(ii) Whether the Commission is obligated to issue written notice prior to undertaking searches.

(iii) Whether enforcement of search warrants undermines the appellant as a County Government.

As the 2nd and 3rd issues can only be relevantly and with any utility be answered only if the 1st issue is in the affirmative. We apprehend that a negative answer to the latter will be determinative of this appeal as it would render the other two merely academic in this appeal.

Is the Appellant a Person Under the Bill of Rights?

This question is central to the fate of this appeal. The appellant contends quite correctly, that the definition of „*person*? contained in the interpretative **Article 260** of the Constitution "***includes a company, association, or other body of person s whether incorporated or unincorporated***." To the appellant way of thinking, it is a *person* both from that definition, and from a plain reading of **section 6** of the Country Government Act, No. 17 of 2012 which provides that;

> ***"(1) As an entity exercising constitutional authority, a County Government shall be a body corporate with perpetual succession and shall have all power necessary for the discharge of its functions."***

As such body corporate a county government is capable of various functions and may enter into contract, acquire, purchase or lease any land, as well as delegate any of its functions to its officers, decentralized units or other entities within the county. (Sub section 2).

That county government is a legal *person* and therefore capable of the various powers and functions prescribed by law is in fact not contested by the Commission which submits that;

> ***"It is not in dispute that, whereas the Meru County Government is a legal person, it is also an institution of devolved governance, and therefore, an organ of the State."***

The Commission relies on the same **Article 260** of the Constitution which contains the following definitions; of „state? and **„**state organs?

> ***"„State?, when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution;***
>
> ***'State organ' means a commission, office, agency or other body established under this Constitution?;"***

As far as legal capacity is concerned in the sense of being capable of holding property; of suing and being sued, the county governments are as much persons in a loose sense as the national government which has like capacities. These have been recognized in statute law including by the Government Proceedings Act, Cap 40 Laws of Kenya. The point of departure between the parties herein which is the gravemen of this appeal, is whether by reason of being a *person*, a county government can sue for violation of the rights and fundamental freedoms enumerated in the Bill of Rights in respect of itself.

It would be axiomatic that if by reason only of having capacity to sue a county government would also be in a position to sue andn enforce rights in the Bill of Rights, then by parity of reasoning, the national government and indeed the State would be equally entitled to do so. But can this be? We think that the answer lies in the opening words of **Article 260** of the Constitution which precedes the various meanings to be attached to a selection of term with the words;

> ***"In this Constitution, unless the context requires otherwise – ..."***

(our emphasis)

We take it that the Constitution itself does recognize that depending on context, the interpretation of terms is provides may differ in meaning or be limited in application. And we do think that when it comes to the Bill of Rights, the context must dictate that the rights and fundamental freedoms cannot possibly attach to a county government. Indeed, the content of the Bill of Rights is by definition largely anthromorphic and deals with human rights as such. There would thus be an absurdity for a county government to purport to directly claim or seek to enforce for itself the rights and freedoms listed therein. It bears recalling that the entire human rights edifice lies on theoritical framework built in large part on the natural law theories which treat human rights as a human attribute flowing directly and inescapably from the humanness of the right holders**.** The learned authors of International Human Rights; Law, Policy and Process 4th Ed. [2009] (Weissbrodt; Ni Aolain; FitzPatrick and Newman) while addressing the theoretical foundations of human rights, make that connection in these terms;

> ***"Natural law served as the principal basis for the development of natural rights theory. According to the natural rights theory, individuals have certain immutable rights as human beings. The Universal Declaration of Human Rights reflects natural rights thinking in pronouncing in Article 1: "All human beings are born equal in dignity and in rights." According to natural rights theory, these rights may be derived from divine sources or some other universal principle of human nature.***
>
> ***....***
>
> ***One advantage of the natural law and natural rights theories is that they can explain why human beings have certain inviolable rights and why those rights must be protected. For example, natural law supports the norm of equality as derived from a belief in a common human nature of all people."***

Professor Julius Stone in Human Law & Human Justice Universal Law Publishing Co. (1965) traced modern human rights to natural law and its central thesis that individual human beings are endowed with certain rights flowing from the laws of nature as follows at (p89-90);

> ***"The principal aim of society, said Blackstone, opening his pages in Vattelian fashion, „is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature ...? And he also tells us that „this law of nature being coeval with mankind and dictated by God himself, is of course, superior in obligation to any other .... No***
>
> ***human laws are of any validity if contrary to this.***
>
> ***....***
>
> ***When the Declaration of Independence recited as self-evident men?s endowment with the rights of life, liberty and the pursuit of happiness, and that the people were entitled to replace any government destructive of these rights, it marked the beginning of a spectacular career of natural law in American constitutional development. In the books, as well as in the Federal and State „Bills of Rights?, the doctrine persisted explicitly throughout the century. When its revolutionary phase was over, it still continued to operate, endowing traditional legal rights with the authority of natural rights, and these natural rights in turn with the force and immutability of a rigid constitution."***

He then went on to assert these thoughts as informing and reflected in the fundamental human rights documents in Anglo-Saxon experience including the Magna Carta, the Petition of Right (1927) the Habeas Corpus Acts, the American Declaration of Independence and the Constitution of the United States of America. These documents formed the backdrop for the Universal Declaration of Human Rights and are echoed in many modern libertarian constitutions, including our own.

Another scholar, Professor Amartya Sen in this The Idea of Justice (2009) (Penguin Books) also makes that essential and fundamental connection as follows at p 357;

> ***"What exactly are human rights? Are there, as is often asked, really such things? There are some variations in the ways in which the idea of human rights is invoked by different people. However, we can see the basic concerns behind these articulations by examining not only the contemporary practice of utilizing the concept, but also the history of its use over a very long period. That substantial history includes the invoking of „inalienable rights? in the American Declaration of Independence and similar affirmations in the French declaration of the „rights of man? in the eighteenth century, but also the relatively recent adoption by the United Nations of the Universal Declaration of Human Rights in 1948."***

We are thus firmly persuaded that in its historical origins, conceptually and doctrinally, the Bill of Rights in our Constitution enumerates rights that are essentially human rights and so are claimable essentially by individuals. Indeed, under the general provisions relating to the Bill of Rights, the Constitution at **Article 19(2)** and **(3)** declares the centrality of the individual person as the owner of rights and by juxtaposition contrasts with the State, as follows;

> ***"19(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.***
>
> ***(3) The rights and fundamental freedoms in the Bill of Rights-***
>
> ***(a) belong to each individual and are not granted by the State;***
>
> ***(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to***

the extent that they are inconsistent with this Chapter; and

(c) are subject only to limitations contemplated in this Constitution." (our emphasis)

These rights are spoken of together and often interchangeably with fundamental freedoms and the context is clearly personal and individualized. The Constitution at **Article 21(4)** commands the State to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

These obligations flow from international and regional human rights treaties, conventions and other covenants which all speak of human rights and fundamental freedoms of individuals. It is no surprise indeed that **Article 25,** in declaring the fundamental rights and freedoms that may not be limited, the „super rights? if one please, that are non-derogable, contains a list that is self-evidently personal and can only belong to individuals in their natural human capacity. The entire corpus of rights is of the same character in tone, content and context and proceeds overwhelming from an individual, human personalized perspective.

When it comes to enforcement of the Bills of Rights, however, the Constitution in **Article 22(1)** provides for *locus* by first acknowledging that every *person* has the right to institute court proceedings claiming that a right or fundamental freedoms in the Bill of Rights has been denied, violated or infringed, or is threatened. This acknowledges the primacy of the individual as the first claimant and enforcer of the Bill of Rights in respect of himself. Besides the implicated individual, however, the Constitution literally flings open the gates of *locus standi*, long held shut by narrow minimalist approaches, in the next sub-Article;

"22. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of person s;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members."

Our understanding of this provision is that whereas only individual persons bear rights and can be victims of violation of such rights, either in singular or in plurality, say as a group or a class of persons, when it comes to enforcing the Bill of Rights, the litigant need not be a person directly affected. Thus one may sue on behalf of a person unable to act in their own name, such as a child, and one may also sue in representative capacity or in the public interest. Moreover, an association may move the Court on behalf and in the interest of its members.

For purposes of enforcement, therefore, all one needs establish is that he or she is a person capable of suing and **Article 21** must, consistently and in conformity with the contextual command of **Article 260,** be so construed as to include persons other than individual human persons in the construction of the persons who can enforce rights even though, against contextually, such non-individuals may not be themselves holders or wielders of rights and fundamental freedoms under the Bill of Rights.

So understood, we see no conflict between what we have explained and what the Kisumu bench held in the **COUNTY ASSEMBLY OF KISUMU** case (supra). That Bench, while commenting on the very judgment of Manjaja. J, subject of this appeal, which had been cited to them as authority for the proposition that the Kisumu County Assembly Service Board could not by suit enforce its constitutional rights against another State organ, reasoned thus;

"19. We know of no constitutional or statutory provision restraining a State organ from enforcing its constitutional rights against another State organ. What Majanja J. said in the case of The County Government of Meru v. The Ethics and Anti-Corruption Commission (supra) which counsel for the appellants relied on in support of their contention, was that the Meru County Government as a State organ could not lodge a claim under Article 22 to enforce against another State organ its fundamental rights to privacy, freedom of information, property and fair administrative action under Articles 31, 35, 40 and 47 respectively. The 1st respondent in this matter never sought any relief under the Bill of Rights in the Constitution. It is the 2nd respondent, a natural person and a joint petitioner in the petition, who sought relief under Article 22 of the Constitution which is in the Bill of Rights. The relief the 1st respondent sought in the petition was that the Kisumu County Assembly had no constitutional or statutory authority to disband, dissolve or suspend the Kisumu County Assembly Service Board. The persuasive authority in that case is therefore distinguishable.

20. In the circumstances, we cannot see why the Kisumu County Assembly Service Board cannot challenge an unlawful act that threatens its very existence. We therefore hold that a State organ can enforce its constitutional rights against another State organ. Accordingly this ground of appeal also fails."

(Our emphasis)

We respectfully agree with the sentiments expressed in that case. State organs can indubitably file suit ***inter se*** to protect various rights, capabilities, competencies and privileges accorded to them by the Constitution. What they cannot in and of themselves do, is to purport to claim for themselves and enforce for themselves ***qua State*** organs, the rights enumerated in the Bill of Rights. Such rights as we have stated, and the Kisumu Bench as well, belong only to individuals as natural persons who only can enforce or protect them in person or through any other persons be they natural or juristic.

Now, had the various officers of the appellant or any one of them, on behalf of whom the appellant went to court, been co-petitioners claiming that their rights as *individual natural persons* had been or were in danger of being violated or infringed, the petition before the learned Judge would have been competent. They were not joined, however, and the claim as it stood was to the effect that the appellant, a juristic person and a State Government at that, had been a victim of violation of various postulates of the Bill of Rights. We think that in principle the petition as presented was making impossible claims and was factually contradictory and so incompetent. This finding is on all fours with the pronouncement of this Court in the CHOLMONDLEY (supra) case which we have referred to earlier in this judgment and with which we are in full concurrence: the Bill of Rights affords protections and guarantees for natural persons as individuals and that protection does not extend to the State or its organs such as national and county governments.

We are thus persuaded that the learned Judge was correct in holding as he did that the appellant is not a person who can petition the High Court for violation of own fundamental rights and freedoms under **Article 22** of the Constitution by another State organ.

After making that proper finding, we note that the learned Judge nonetheless proceeded to pronounce himself and hold that **sections 26**, **27** and **28** of ACECA were inapplicable to the appellant as it was not a *person* reasonably suspected of corruption or economic crimes, or an associate of such person there-contemplated. That finding appears on its face to be correct but in view of what we had earlier expressed on the determinative nature of our finding on whether the appellant could sue to enforce the Bill of Rights in respect of itself qua county government, we think it was unnecessary for the learned Judge to have gone into an interrogation of the question which was rendered otiose by his first finding.

Equally unnecessary for the Judge to have gone into, or for us to engage ourselves with, is the question of whether the Commission acted properly in moving the subordinate Court for warrants of search and seizure under **Section 118** of the Criminal Procedure Code. It seems rather obvious to us, as the learned Judge ultimately found after in-depth engagement with provisions of the statute and the authorities cited, that the question is not a constitutional one, much less a Bill of Rights one. The petition before the Court was for redress of violation of rights whic, as we have said the appellant had no capacity to do with regard to itself. As to the procedural aspects of warrants of search and seizure and what is to befall any goods seized, we, like the learned Judge, agree that remedies are to be found in the statute itself.

Whatever the arguments there may be on both sides with regard to the intersection of and interaction between the Criminal Procedure Code and ACECA and whether the exercise of search and seizure powers as against persons suspected of corruption is abusive, whether potentially or in actuality, of various rights in the Bill of Rights, we would be engaging in an exercise in futility and launching into a wholly academic and theoretical, hypothetical pursuit since what conclusions we would arrive at would be in the realm of argument and polemics only, given the appellant is not possessed of those rights. We think that those arguments must best await a pronouncement that can only be made in an appropriately live and ripe case, which this one is not. Thus, even though we have read the copious authorities and case law on the twin subjects that were cited before us, we need not, and will not, analyze or make determinations thereon even as we appreciate the industry of counsel in assembling them.

The upshot is that this appeal is devoid of merit and we accordingly dismiss it. Given the nature of the dispute in that it touched on the Bill of Rights and the public interest, we order that each party do bear own costs.

Dated and delivered at Nairobi this 16th day of March, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR