



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 194 OF 2008

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION APPELLANT

AND

FIRST MERCANTILE SECURITIES CORPORATION RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Lesiit, J) dated 20th December, 2007

In

H.C. Misc. C. C. No. 695 of 2007)

JUDGMENT OF THE COURT

On the 22nd July, 2002, the Government of Kenya (GOK) entered into a written agreement with First Mercantile Securities Corporation, hereinafter “*the Respondent*,” and the said agreement involved the sum of USD \$811,787,000/-. The Postal Corporation of Kenya, (PCK) a statutory body created by the Postal Corporation Act, had wanted to purchase some telecommunication equipment from an American company known as Spacenet Inc. USA, but it appears that neither GOK nor PCK could immediately pay in lump-sum the \$811,787,000/- required for the purchase of the requirement. The PCK had its own Board and under **section 7** of the Postal Corporation Act, 1998, the Board has power to:-

“manage, control and administer the assets of the Corporation in such manner as best promotes the purposes for which the Corporation is established.”

Under **section 3 (2)** of that Act,

“The Corporation shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of –

(a) suing and being sued;

(b) taking, purchasing, charging and disposing of movable and immovable property;

(c) borrowing or lending money; and

(d) doing or performing all such other things or acts for the proper performance of its functions or the furtherance of the provisions of this Act which may be lawfully done by a body corporate.”

It was PCK which wanted to buy the telecommunications equipment from Spacenet of USA. But as we have said, PCK did not have the lump-sum to buy the equipment; and GOK also did not have the lump-sum required. At least, that is the inference we can draw from the agreement between GOK and the Respondent. But for some unexplained reason, instead of PCK itself entering into the agreement with the Respondent it was GOK which itself chose to enter into the agreement. **Section 5** of the State Corporations Act, **Chapter 446** of the Law of Kenya, provides as follows:-

“5 (1) Subject to this Act every state corporation shall have all the powers necessary or expedient for the performance of its functions.

(2) After the commencement of this Act and notwithstanding subsection (1), the power of a state corporation to borrow money in Kenya or elsewhere shall be exercised only with the consent of the Minister and subject to such limitations and conditions as may be imposed by the Treasury with respect to state corporations generally or specifically with respect to a particular state corporation.

(3) -----

(4) -----

The effect of these provisions is that a state corporation such as PCK has the power, of course with the consent of the Minister and upon such terms and conditions as may be imposed by the Treasury, to borrow money from bodies or organizations outside Kenya. PCK could itself have entered into the agreement with the Respondent, though before doing so, it would seek the consent of the Minister under which it falls, in this case the Minister for Transport and Communication. The Treasury would also be entitled to impose such terms and conditions as it thought fit and proper, but we do not know that such terms and conditions would entitle the Treasury itself to assume the role of the borrower. There is also **section 3** of the Guarantee (Loans) Act, **Chapter 461** Laws of Kenya, which provides:-

“3 (1) The Government may, with prior approval of the National Assembly, guarantee in such manner and upon such conditions as it may think fit the due performance of any covenants on the part of a local authority or a body corporate under the terms of any legal instrument to which such local authority or body corporate is a party.

(2) The power conferred by subsection (1) shall include power to guarantee the repayment of the principal money (including any further advances and other variations within the limits of any principal amount specified under section 5) of and the payment of the interest and other charges in respect of any loan raised either within or outside Kenya by a local authority or a body corporate.

(3) -----”

The substance of the agreement between GOK and the Respondent was that the Respondent was to pay, and the Respondent contended it had paid to Spacenet USA the sum of US \$ 12.8 million for the purchase of the equipment which PCK wanted. GOK was subsequently required to pay the Respondent in various instalments the money the Respondent said it had paid over to Spacenet. PCK could itself have entered into that agreement with the Respondent and all that GOK would be required to do was to guarantee the repayment to the Respondent by PCK. Of course before entering into such a guarantee, GOK would be required to obtain the prior approval of the National Assembly. That is our understanding

of the State Corporations Act, the Guarantee (Loans) Act, and the Postal Corporation of Kenya Act. But for some reason of its own, GOK chose to contract directly with the Respondent and the agreement of 11th July, 2002 was signed by one Samuel Bundotich, the Financial Secretary to the Treasury and witnessed by another D. Onyonka for and on behalf of the Ministry of Finance. One A Gusman signed for the Respondent in the presence of one Z. Sundstrem.

Why do we set out these facts and law?

On 2nd May, 2003, the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, came into force in Kenya and **section 6** of the Act established a body known as the Kenya Anti-Corruption Commission, hereinafter "*the Appellant*". By **section 8 (1)**:-

"The Commission shall have a Director who shall be the chief executive officer of the Commission and who shall be responsible for its direction and management."

The functions of the Commission are set out in **section 7** of the Act which is in these terms:-

"7 (1) The Commission shall have the following functions –

(a) to investigate any matter that, in the Commission's opinion raises suspicion that any of the following have occurred or about to occur –

(i) conduct constituting corruption or economic crime.

(ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;

(b) to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime;

(c) to assist any law enforcement agency of Kenya in the investigation of corruption or economic crime;

(d) at the request of any person, to advise and assist the person on ways in which the person may eliminate corrupt practices;

(e) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures that, in the opinion of the Commission, may be conducive to corrupt practices;

(f) to advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such bodies that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt practices;

(g) to educate the public on the dangers of corruption and economic crime and to enlist and foster public support in combating corruption and economic crime;

(h) to investigate the extent of liability for the loss of or damage to any public property and –

(i) to institute civil proceedings against any person for the recovery of such property or for compensation; and

(ii) to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya; and

(i) to carry out any other functions conferred on the Commission by or under this Act or any other

law.

(2) A matter may be investigated by the Commission under subsection (1) at the request of the National Assembly, the Minister or the Attorney – General, or on receipt of a complaint, or on its own initiative.

(3) The Commission may refer any offence that comes to its notice in the course of an investigation under subsection (1) to any other appropriate person or body.”

We must point out here that the first function of the Appellant as set out in **section 7 (1) (a) and (b)** is the investigation of the crime of corruption and also economic crime and to carry out such investigation, it is enough if the Appellant is of the opinion, we suppose based on reasonable grounds, that those crimes may have been or are about to be committed.

Then **section 12** of the Act gives an indication of the manner in which the Appellant may perform the functions listed in **section 7**. **Section 12** provides:-

“12 (1) The Commission may in the performance of its functions work in co-operation with any other persons or bodies it may think appropriate, and it shall be the duty of any such person or body to afford the Commission every co-operation.

(2) Without limiting the generality of subsection (1), such persons or bodies include the Controller and Auditor General and the Director of Criminal Investigation Department.

(3) The Commission may in the performance of its functions work in co-operation with any foreign government or international or regional organization.

We have no doubt that the persons or bodies mentioned in **section 12 (1)** must be persons or bodies within the Republic of Kenya and **section 12 (2)** then gives an example of such persons or bodies. Then **section 12 (3)** authorizes the Appellant to work in co-operation with foreign governments, and international or regional organizations. These are powers or authority conferred on the Appellant by Parliament itself. As we will be concerned with the provisions of **section 12 (3)** in particular, we shall return to that issue later on.

Section 23 of the Act was also discussed both in the superior court and in this Court as well. That section provides:-

“23 (1) The Director or a person authorized by the Director may conduct an investigation on behalf of the Commission.

(2) Except as otherwise provided by this part, the powers conferred on the Commission by this part may be exercised, for the purposes of an investigation, by the Director or an investigator.

(3) For the purposes of an investigation, the Director and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Director or investigator has under this Part.”

Once again, the plain reading of these provisions can lead only to one conclusion, namely that the Director of the Appellant or an investigator authorized by the Director has the power to investigate the commission or alleged commission of the crime of corruption or a crime of economic nature. Otherwise what would be the use of conferring on them the powers, privileges and immunities of a police officer? Remember that **section 12 (2)** obliges the Director of Criminal Investigation Department to co-operate with the Director of the Appellant if the latter asks for such co-operation.

Having set out these statutory provisions, we can now return to the core of the dispute which was before the superior court and from which the appeal before us arises.

We started with the agreement between the GOK and Respondent. That agreement provided that on its being signed, GOK was to pay US\$ 929,250; that was apparently paid. The other instalments of US \$ 982,250 each were to be paid on **15th February, 2003, 15th May, 2003, 15th August, 2003, 15th November, 2003 15th February, 2004, 15th May, 2004, 15th August, 2004, 15th November, 2004, 15th February, 2005, 15th May, 2005, 15th August, 2005 and 15th November, 2005**. The total sum to be paid by GOK, inclusive of the deposit paid on the signing of the agreement was US \$12,716,250. GOK paid the various instalments upto **14th June, 2004**, leaving an outstanding balance of US \$5,936,910.09. For some reason or reasons which we need not concern ourselves with in the judgment, GOK thereafter refused to pay any further instalments. We only need to point out that this agreement is one of those now notoriously referred to in Kenya as the Anglo-Leasing Scandal.

The Respondent treated the refusal by GOK to make further payments as a default. The Respondent, by its “DEMANDE EN PAIEMENT (PAYMENT ACTION) dated 16th December, 2005 sued GOK in Geneva, claiming the balance of the sum which remained unpaid. GOK entered a defence to the claim and apparently moved the Geneva court to strike out the claim on the ground of inadmissibility. The motion to strike out the claim was apparently rejected.

Then on 3rd May, 2007, the Appellant joined in the fray; on that date, the Appellant’s Director wrote a “LETTER OF REQUEST” to the Federal Office of Justice and Police, Section of Mutual Assistance in Criminal Matters and the introductory part of the letter read thus:-

“The Director of the Kenya-Anti-Corruption Commission (KACC) presents his compliments to the competent Judicial Authorities of the Swiss Confederation and has the honour to inform them of the following facts and respectfully to submit this official request for judicial assistance pursuant to the provisions of the Swiss Law on Mutual Legal Assistance in Criminal Matters. The present request is supported by the Attorney-General of the Republic of Kenya (Enclosure 1).

This request is presented in relation to the investigation carried on by the KACC into a case of serious or complex fraud which there are reasonable grounds to believe has been committed in Kenya with some acts in the UK, Switzerland and other countries.

The Kenya Anti-Corruption Commission is an independent statutory investigative authority which is empowered by statute to work with any international authority in furtherance of its investigations under section 12 (3) of the Anti-Corruption and Economic Crimes Act of 2003 (AC & ECA 2003) a copy of which is attached and marked Enclosure 2. Section 23 (1) of AC & ECA 2003 confers investigative powers on the Director, KACC and empowers him, therefore to request assistance from the Swiss Confederation where the request involves serious or complex fraud.

Limitation on Use:

The Director requests the assistance set out below for the purposes of the aforesaid investigation and for use of the evidence gathered in any resulting prosecution and in any ancillary or related proceedings in court such as applications for restraint, confiscation or compensation orders. The evidence obtained under this Letter of Request shall not be used for any purpose other than that specified in the letter without prior consultation with the competent Authorities of the Swiss Confederation.

A. Summary:

KACC is investigating in the present case serious criminal offences which include breach of laws, procedures and regulations, corrupt transactions with agents, in which Government of Kenya officials acting on false and or fraudulent information, awarded a contract for US\$12.8 million. About US \$6.8 million was paid out to First Mercantile Securities Corporation, Tortola, Succursale de Geneva, a subsidiary of First Mercantile Securities Corporation, British Virgin Islands (Enclosures 3 & 4) to Swiss Bank Accounts which is the reason the present request for MLA is made to Swiss Authorities.”

There then followed a narration of what the Director saw as the relevant facts constituting the alleged crimes he was investigating and concluded his letter by setting out the kind of evidence which he hoped the Swiss investigators were likely to find, namely:

“The relationship between FMSC and its Fiduciaries in Geneva, who pays them, how, when and for what.

- ***The source of funds that pays these Fiduciaries.***
- ***Verification of the address used when entering into the contract and the relationships thereof with the beneficial owners of FMSC.***
- ***Banking records and the identities of the beneficiaries of the funds to whom the monies paid out by the Government of Kenya under the contract may have been remitted.***
- ***The principals behind the FMSC contract, related parties and the extent of each person’s involvement.***
- ***Whether any bribes or kickbacks may have been paid to Kenyan Government officials.***
- ***Whether FMSC actually financed the supply of equipment to PCK under the contract as purported in the contract.***
- ***Acquisition cost of equipment sold to the Kenya Government.***
- ***It is believed that the persons under investigation will be taking various measures to ensure that they cannot be traced or their assets seized.”***

The letter was signed by Justice A. Ringera, the then Director of the Appellant.

It appears that upon receipt of the Director’s Letter for Mutual Legal Assistance, the Swiss authorities started to act upon it. The Respondent was aggrieved by that and on 28th June, 2007, Messers Ngatia & Associates, Advocates of Nairobi, lodged in the High Court at Nairobi a summons in chambers under **Order 53** of the Civil Procedure Rules and under the Law Reform Act and the two relevant prayers sought in the summons were that leave ought to be granted to the Respondent to apply for judicial review orders of certiorari and prohibition in respect of the Director’s Letter for Mutual Legal Assistance (LMA hereinafter) and that the leave so granted ought to act as an order staying the enforcement of the LMA. Nyamu, J (as he then was) heard the summons on the 28th June, 2007 and he granted leave which he also directed to operate as a stay. The notice of motion was itself lodged on 17th July, 2007 and apart from the Statutory Statement, the motion was supported by the affidavit of Heine Kalstrup of av du cure band 34, 1212 Lancy, Switzerland and in the said affidavit he stated as follows:-

“1. THAT I am a director of the Applicant (i.e. the Respondent herein) and duly authorized to make this affidavit.

2. THAT the Government of Kenya (hereinafter referred to as “the Government) did enter into a contract with Spacenet Inc. for the supply of Satellite telecommunications equipment and in order to finance the acquisition, the Government entered into a contract with the Applicant dated 11th July, 2002. A copy of the agreement is attached hereto marked HK – 1.

3. THAT in terms of the contract, the Applicant undertook to pay the debt incurred by the Government to the supplier Spacenet Inc. The Applicant duly paid all the debt incurred by the Government.

4. THAT the Government did honour the repayments due to the Applicant but defaulted as from

15th August, 2004. Various letters were written to the Government culminating to commencement of civil proceedings in Geneva. I attach hereto the Payment Action filed by the Applicant in Geneva marked HK – 2.

5. THAT the Government did file a defence to the action and I attach hereto a copy of the defence marked HK – 3.

6. THAT the Respondent (i.e. the Appellant herein) by a letter dated 3rd May, 2007 requested the Swiss Confederation to carry out investigations on the Applicant, amongst other persons. I attach hereto a copy of the request marked HK – 4.

7. THAT acting upon the request, the Swiss Confederation did approach the applicant and demanded access to all the Applicant's books and/or records.

8. THAT the Applicant did consult its lawyers in Switzerland who were able to establish that;

(a)The requested Mutual Legal Assistance was made by the Respondent (i.e. the Appellant).

(b)The Swiss Confederation considered that a criminal process was in place in Kenya and therefore, it was appropriate to act upon the request for Mutual Legal Assistance.

(c)THAT the Swiss Confederation shall transmit all the information acquired to the Respondent [Appellant] and its agents.

9. THAT it will be most detrimental to the Applicant to have its affairs published to the Respondent and its agents.

10. THAT the Swiss Confederation has commenced investigations and/or inquiries. I pray that interim orders be made.

11. THAT the Applicant entered into the contract with the Government on the basis of fundamental representations which are contained in the Agreement. The representations have not been rescinded by the contracting parties and I verily believe that the Respondent cannot usurp the power vested upon the Government.

12. THAT what is deponed herein is true to my knowledge save where expressly stated and source of information clearly identified.”

The statutory statement summarized the grounds on which the LMA was being challenged as follows:-

1. ABUSE OF POWER

(i) The LMA requested the Swiss Confederation to investigate all the Applicants (i.e. Respondent's) records.

Mutual Legal Assistance is an inter-state procedure upon the condition that “*a criminal proceeding is in existence in the requesting state.*” No criminal process has been commenced in Kenya relating to the Applicant.

(ii) The LMA is available to the judicial and/or prosecutorial authority of the requesting state. The Respondent is neither an organ of the state nor a judicial or prosecutorial authority.

(iii) The LMA is made by a body corporate which has neither the statutory power nor authority to make the request.

2. MISUSE OF POWER:

Under this sub-head, it was contended that the information which might be supplied by the Swiss Confederation as a result of the LMA would be prejudicial to the Applicant because:-

- (i) Appellant intended to share that information with other persons, notably its alleged representatives in Switzerland and other private persons in Kenya and elsewhere;
- (ii) The implementation of the LMA was intended to seek to criminalize a commercial agreement between GOK and the Applicant so as to obtain an undue advantage in favour of GOK.
- (iii) The LMA was not intended to advance any legitimate public concern but to intimidate the Applicant so as to abandon the pending suit.

3. LEGITIMATE EXPECTATION AND UNFAIRNESS.

Here it was contended that the Respondent in the appeal had acted upon express representations made by the GOK and that the Appellant had no residual power to criminalize the contract and/or to invoke public law. For that contention the Respondent in the appeal relied on the case of R (ZEQIRI) VS. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2002] UKHL 3 where it was said:-

“The question is not whether it would have founded estoppel in private law but the broader question of whether as Simon Brown, LJ. said in Uniliver, a public authority acting contrary to the representation would be acting ‘with conspicuous unfairness’ and in that sense abusing its power.”

On this aspect of the matter the learned Judge whose judgment is the subject of the appeal before us, Lesiit, J found and held, correctly in our view, that the Appellant which is a statutory body and operates independently of the GOK , had not even been created in 2002 when the contract was entered into and had not and could not have made any representations to the Respondent. The Judge, in other words, rejected the Legitimate Expectation and unfairness sub-head and there is no cross –appeal over that.

4. ABUSE OF PROCESS & IMPROPER MOTIVE

On this ground it was contended that the Appellant was seeking to invoke the criminal process in order to frustrate the civil litigation which the Respondent had instituted in Geneva and that the Appellant was also seeking to usurp the power of GOK to enter into commercial contracts, which the Appellant had no power to do and further that the information to be obtained through the LMA, would be used to the detriment of the Respondent in that:-

- (i) it constituted an unjustified intrusion into the Respondent’s affairs and would expose such information to persons who have no legitimate and/or bona fide reason to receive such information.
- (ii) It was complete departure from the rights and obligations expressly stated in the contract.
- (iii) It sought to reverse the contractual rights and obligations stated in the contract.

For the Appellant one Julie Adell-Owino, who described herself as the Senior Forensic Investigator with the Appellant, swore a replying affidavit contesting the grounds put forward by the Respondent. She swore that the Appellant is an independent statutory body with its functions as set out in **section 7** of the Act, that under **section 12 (3)** of the Act, the Appellant had power to work in co-operation with any foreign government or organization, international or regional, that the Appellant had indeed sent the LMA and largely repeated the contents of the LMA as the basis for their having made the request. She further swore that Professor Githu Muigai, learned counsel for the Appellant, had advised them that the orders sought by the Respondent could not be granted because those orders purported to interfere with the operations of the Federal Office of Justice and Police in Switzerland, that the Swiss Government is Sovereign and as such the court lacked jurisdiction to restrain it from undertaking the investigations as that would be a violation of international law; that the application for the orders was an attempt to obtain

orders against the Swiss Authorities; that if the orders sought were granted, it would amount to a violation of the Appellant's right to receive information under **section 79** of the Kenya Constitution and that if the orders were granted the Appellant would not be able to perform duties imposed on it by statute. She lastly swore to her belief that if the orders were granted, Kenya's reputation as a signatory to the United Nations Convention Against Corruption and other international co-operation instruments would be greatly compromised and that Kenya would be seen to condone corruption by undermining global efforts to tackle it.

These were the conflicting positions that Lesiit, J was called upon to resolve. As we have seen, she rejected the Respondent's claim based on the issue of legitimate expectation and unfairness. But she allowed the motion on the other grounds which we have already set out.

On the question of whether the Appellant had power or authority to make a request for LMA, the learned Judge summarized the things she understood the LMA was asking the Swiss Authorities to do and she listed them as follows:-

- “1. Investigation of bank accounts.***
- 2. Inquiries and interviews of certain persons***
- 3. Warrants authorizing the seizure of documents to be issued and effected.***
- 4. Seizure of equipment.***
- 5. Freezing of assets.”***

The learned Judge correctly appreciated that in Kenya, the Appellant could only do some of the listed things if it has obtained relevant orders from the Kenyan courts. To search bank accounts or premises the Appellant would be obligated to apply for relevant court orders before doing so. The police or any other investigatory authority always do so.

Does the Appellant have the power, in the first place to send the LMA to the Swiss Authorities or to any other foreign organization? On this point, the learned Judge ruled that **section 12 (3)** of the Act creating the Appellant did not give it such power. We quote from the “*Ruling*” of the Judge which actually ought to have been a judgment:-

“KACC in the letter of Request for Mutual Legal Assistance breached Municipal Law. KACC was requesting a foreign country to carry out functions and exercise powers which are not donated to KACC under the Act. KACC was in breach of the Act in that it purported it had power and duty to perform functions which either it could not do under the Act and or which it could only perform in a stipulated laid down procedure without or with judicial enforcement. I do find and hold that the letter of Request for Mutual Legal Assistance was in breach of municipal law. KACC was seeking seizure of documentary evidence and of equipment and freezing of accounts, through means that are unlawful in Kenya, and definitely the Act did not permit the seizure of property, the freezing of back (sic) accounts and the obtaining of documentary evidence in the manner by KACC in the letter of request for Mutual Legal Assistance.”

The Appellant complains against that conclusion and the complaints appear to be covered by Grounds 1, 2, 3 and 4 of the Appellant's Memorandum of Appeal which are in these terms:-

- “1. The learned Judge of the Superior Court erred in law in failing to appreciate the powers conferred on the Appellant by the Anti-Corruption and Economic Crimes Act, 2003.***
- 2. The Learned Judge of the Superior Court misdirected herself in the interpretation of the powers conferred by section 12 (3) and 23 (1) of the Anti-Corruption and Economic Crimes Act, 2003.***

3. The Learned Judge erred in law in failing to find that the Appellant is empowered to conduct its investigations with the co-operation of agencies outside Kenya and to make such request for mutual legal assistance as it had in the circumstances made.

4. The learned Judge erred in law in restraining the Appellant from performing its statutory mandate.”

For our part we would start by stating the obvious, namely that the Anti-Corruption and Economic Crimes Act is a legislation made by the sovereign Parliament of Kenya and, therefore, forms part of the law of the State of Kenya. There cannot be any doubt that under **section 7 (1) (a), (b) and (c)** Parliament conferred on the Appellant the power to investigate the crime of corruption and crimes of economic nature. There are other functions the Appellant can perform like those set out in **section 7 (1) (h)** upon which the learned Judge laid stress in her judgment but the functions set out in **7 (1) (h)**, namely:-

“to investigate the extent of liability for the loss of or damage to any public property and –

(i) to institute civil proceedings against any person for the recovery of such property or for compensation; and

(ii) to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya,”

do not and cannot over-ride the functions set out in **section 7 (1) (a), (b) and (c)**, namely:-

“(a) to investigate any matter that, in the Commission’s opinion, raises suspicion that any of the following have occurred or are about to occur:-

(i) conduct constituting corruption or economic crime;

(ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;

(b)to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime;

(c)to assist any law enforcement agency of Kenya in the investigation of corruption or economic crime.”

Under these provisions it is clearly the duty of the Appellant to investigate corruption and crimes of economic nature. What the Appellant does or can do with the results of its investigation into those crimes is a totally different matter and we are not concerned with that in this judgment.

Under **section 23 (1)** of the Act the Director of the Appellant or any other person authorized by him are the people to carry out such investigations and the contentious **section 12 (3)** of the Act provides that:-

“The Commission may in the performance of its functions work in co-operation with any foreign government or international or regional organization.”

Once again it is the sovereign Parliament of Kenya which has given to the Appellant power to work in co-operation with any foreign government. What does “*working in co-operation with any foreign government*” mean in this context?

The Oxford Reader’s Digest, Complete Word Finder defines the word “*cooperate*” as “work or act together; assist (of things) concur in producing an effect.” And “**co-operation**” is defined as “working together to the same end; assistance -----”

So in **section 12 (3)** the Parliament of Kenya has conferred upon the Appellant the power to work or act

together or assist and be assisted by other foreign governments and if the Appellant is carrying out an investigation into corruption or economic crime it is at liberty to work or act together and to be assisted by any foreign government, international or regional organization. It must logically follow that if the Appellant wishes to call upon the assistance of a foreign government, it must ask for that assistance. Whether such assistance be called “**Mutual Legal Assistance**” or whatever name one may give it the truth of the matter is that the Parliament of Kenya has given the Appellant authority to seek such assistance and in our view it is idle to say that before the Appellant can seek the assistance it must be shown that there is “reciprocity” between the requesting party and the party to whom the request is made. The mere making of the request does not mean that the request will be automatically given; it may well be refused. But that the Appellant has the right to make such request is specifically provided for under **section 12 (3)** of the Act which creates the Appellant and it would be wrong for the courts in Kenya to turn around and ask the Appellant:-

“It is true Parliament may have given you the right to make the request to be assisted by a foreign government but has that foreign government also provided that you (the Appellant) can also assist them?”

That, with respect, would be confusing the Appellant’s right to request for the assistance with the issue of whether the party requested is under an obligation to grant the request.

The Gibraltar case of **AT ARCHE TREUHAND AG & ANOTHER VS. THE ATTORNEY GENERAL , [1995] 1 LRC 656** was cited to the learned Judge as being on all-fours with our case. We note with some gratification that that case was decided by Chief Justice A.A. Kneller who was a distinguished member of this Court before moving to Gibraltar as Chief Justice. We do not know the exact relationship between Gibraltar and the United Kingdom but the United Kingdom has its Criminal Justice (International Co-Operation) Act of 1990 and the operations of that Act had not been extended to Gibraltar which did not have its own legislation on the subject of Mutual Legal Assistance, just as Kenya still does not have one. We were shown the Mutual Legal Assistance Bill of 2009 but that still remains nothing but a Bill. It may well be that that Bill was published as a result of the decision of Lesiit, J in this case . But we do not accept the proposition that the absence of such legislation nullifies the specific provisions of **section 12 (3)** of the Act under which the Appellant operates. In the absence of such legislation the Attorney-General of Kenya may well be in a different position from that of the Director of the Appellant , and the Attorney-General might well be caught by the reasoning in the Gibraltar case. The Appellant is in a different position from the Attorney-General because the Appellant is specifically covered by **section 12 (3)** of its Act. The Attorney General of Kenya must push for the passing of the 2009 Bill so that he too can be in the same or better position than that of the Appellant’s Director.

The learned Judge was apparently of the view that the Appellant was asking the Swiss Authorities to do what the Appellant is not authorized to do under Kenyan law. Under Kenyan law, the Appellant cannot, on its own, search premises without a search warrant, investigate and freeze bank accounts or seize documents and equipment. We have said that that is basically correct. The Appellant would have to obtain court orders authorizing it to do anything of that kind.

But as far as we understand the matter, the Appellant, in its LMA was not telling the Swiss Authorities:-

“Whatever may be your law on the position, ignore that law and get for me the information and the documents and equipment which i require to assist me with my investigation.”

Any request like that would be insulting to a sovereign foreign country and would be bound to be rejected off-hand. We have already set out the relevant portions of the LMA:

“The Director of the Kenya Anti-Corruption Commission (KACC) presents his complements to the competent Judicial Authorities of the Swiss Confederation and has the honour to inform them of the following facts and respectfully to submit this official request for judicial assistance pursuant to ‘THE PROVISIONS OF THE SWISS LAW ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS.’ -----“

The request was, if accepted, to be carried out in accordance with the Swiss Law. If that law allowed Swiss Authorities to seize documents and equipment, to freeze bank accounts etc. without any need to seek court orders there would be nothing wrong with that. If the Swiss law required them to obtain court orders before doing any of those things, it would be the duty of the Swiss Authorities to do so. The Appellant could not have told the Swiss Authorities to provide their assistance and in doing so, comply with the Law of Kenya. That again would be insulting to a foreign government. The LMA was made under **section 12 (3)** of the Kenyan Act, and if the Swiss Authorities accepted the request, it was for them to determine how to carry it out in accordance with their Law. On this aspect of the matter, the learned Judge was, with respect, in error.

In Ground 5 of the Appellant's grounds of appeal, the complaint is that:-

“The Learned Judge of the Superior Court erred in law and acted in excess of Jurisdiction in making an order that purports to restrain the Federal Office of Justice and Police in Switzerland from conducting investigations.”

There is no merit in this ground. The Respondent had sought an order to quash the LMA issued by the Appellant. If the LMA was quashed in Kenya, there would be nothing upon which the Swiss Authorities investigations would be based. The Appellant is a statutory body under Kenyan Law and it can only do that which its creating statute empowers it to do. We did not understand Professor Muigai to contend that the actions of the Appellant cannot be questioned in Kenyan courts. We reject this ground of appeal.

Ground 6 concerns the application of principles of international law and on this ground it was contended that Kenya being a signatory to the United Nations Convention on Corruption is obligated to apply those principles even though it may not have domesticated the Convention on Corruption. We have already held that the Appellant was entitled to issue the LMA under **section 12 (3)** of its creating statute and we see no reason to go into the question of principles of international law.

Ground 7 deals with the Appellant's right to receive and publish information from whatever source and in accordance with **section 79** of the Constitution. We would only repeat that the Appellant is a creature of statute and has specific functions under that statute. If the information it is to receive is injurious to a party who feels that the information is being received contrary to the statute creating the Appellant, such a party has the right to challenge the manner of receipt and whether the Appellant is entitled to receive it at all under its creating statute. Ground 7 adds nothing to the matter and we reject it.

We have already dealt with Ground 8 which deals with the construction of the Appellant's investigative powers under **section 7** of the Act and we do not wish to add anything more on that issue.

Finally we must deal with Ground 9 which is in the following terms:-

“9. The learned Judge of the Superior Court erred in law and in fact in finding that the request for Mutual Legal Request (sic) was made for an illegal or collateral purpose.”

This ground concerns the case filed in Geneva by the Respondent against the GOK and it was contended that any prosecution could only be aimed at unfairly influencing the outcome of the case in Geneva. On this aspect of the matter, the learned Judge had this to say:-

“I have already set out the functions and powers of KACC. Under section 7, it is quite clear that if KACC was of the view that public property was lost, it had the statutory duty to institute civil proceedings for purposes of recovery. Since a civil suit has already been filed, a counterclaim for recovery of the funds is a good option.

In the instant case, it is significant to note that KACC took no action until ex parte applicant filed suit in Geneva. Prior to the suit KACC was very much aware of the existence of the now impugned contract between the Government of Kenya and the ex-parte Applicant.

The core function for KACC is to recover public property, even property outside Kenya. Why is it that KACC has opted to pursue the criminal process through which no recovery can be effected; which is of paramount importance to the company (sic) the recovery of lost public funds and property or criminal prosecution of criminal elements suspected to have siphoned K.shs.2.6 billion of public funds? Therein lies the key to determining this issue. Whether there is collateral purpose in the request of Mutual Legal Assistance. -----

It is clear that what KACC has done is to commence parallel criminal investigations. The motive of so doing cannot be bona fide. The intention simply put is to influence the civil proceedings before the Swiss court. It is the intention or purpose in the commencement of the parallel criminal investigations which constitutes harassment and makes the act highly prejudicial to the ex-parte Applicant. This Court cannot countenance such institution of parallel process meant only to harass a party and influence civil proceedings legally instituted in a competent court. It is very clear that the issue could competently be dealt with in the civil process. It was not necessary to commence the criminal investigations at this late stage.”

We do not wish to take too long on these findings by the Judge. First, we must point out that the Appellant is not a prosecuting authority; it cannot institute any criminal prosecution in court. That role is reserved for the Attorney-General of Kenya. None of the functions set out in **section 7** of the Act includes that of prosecution. All that the Appellant can do is to investigate alleged or suspected crimes under its mandate and if there is to be a prosecution, the Attorney-General takes over.

Secondly, even if the Appellant intended to institute recovery proceedings in civil courts, it would still need to gather evidence to enable it support the claim in the civil court. Thirdly, the Appellant was not a party to the contract between GOK and the Respondent. Naturally, the Respondent did not and could not have included the Appellant in the suit in Geneva. How could the Appellant have filed a counter-claim in a suit to which it was not a party? And if the Appellant was to file a civil suit, would it be against the Respondent alone or against both the Respondent and GOK?

The Appellant, in its operations, is independent of GOK. The Appellant can investigate GOK officials if they are suspected to have been involved in corrupt practices or to have committed economic crimes. The investigations the Appellant was asking the “Swiss Authorities” were not confined solely to the Respondent. The names of high ranking GOK officials are specifically mentioned in the LMA. Are those investigations also to be stopped? We repeat that even if the Appellant was to lodge civil claims against the Respondent or the officers of GOK, the Appellant would still require evidence to support such claims. With respect, the learned Judge was once again, in error on this aspect of the matter as well.

We have said enough, we think, to show that this appeal must be allowed. We accordingly allow the appeal, set aside the orders made by the learned Judge and substitute therefor an order dismissing the Respondent’s notice of motion dated 16th July, 2007 and lodged in the High Court on 17th July, 2007. We award to the Appellant the costs of the motion in the High Court and the costs of this appeal. Those shall be the orders of the Court.

Dated & delivered at Nairobi this 16th day of July, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.