



**Ethics and Anti-Corruption Commission & another v Ojienda & 2 others (Petition 30 & 31 of 2019 (Consolidated)) [2022] KESC 59 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KESC 59 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION 30 & 31 OF 2019 (CONSOLIDATED)  
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & W OUKO, SCJJ  
OCTOBER 7, 2022**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> APPELLANT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**TOM OJIENDA, SC T/A PROF TOM OJIENDA & ASSOCIATES**

**ADVOCATES ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF MARGISTRATE, KIBERA LAW COURTS ..... 2<sup>ND</sup> RESPONDENT**

**LAW SOCIETY OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the Judgment and Orders of the Court of Appeal at Nairobi (Nambuye, Kiage & Kantai, JJA) delivered in Civil Appeal No. 109 of 2016, consolidated with Civil Appeal No. 103 of 2016, delivered on 28th June, 2019)*

**Factors to be considered before the issuance of notices by the Ethics and Anti-Corruption Commission to those it intends to investigate**

Reported by Kakai Toili

***Criminal Law*** - corruption and economic crimes - Ethics and Anti-Corruption Commission (EACC) - mandate of the EACC - nature of EACC's mandate in combating corruption and economic crimes - factors to be considered before the issuance of notices by the Ethics and Anti-Corruption Commission to those it intended to investigate - whether EACC had to always give prior notice to those it intended to investigate before commencing an investigation - Anti-Corruption and Economic Crimes Act (cap 65) sections 23, 26, 27, and 28.

***Administrative Law*** - fair administrative action - scope - powers of the Ethics and Anti-Corruption Commission to investigate and arrest - whether the powers highlighted were administrative actions - Constitution of Kenya article 47; Fair Administrative Action Act (cap 7L) section 2; Anti-Corruption and Economic Crimes Act (cap 65) sections 23(3), 29, 31, and 32.



**Jurisdiction** - jurisdiction of the Supreme Court - appellate jurisdiction - appellate jurisdiction in matters involving the interpretation or application of the Constitution - what were the factors to consider in invoking the Supreme Court's appellate jurisdiction as a matter involving the interpretation or application of the Constitution - Constitution of Kenya article 163(4)(a).

**Words and Phrases** - administrative - definition of administrative - concerning or relating to the management of affairs - Concise Oxford Dictionary (9<sup>th</sup> Ed).

**Words and Phrases** - administrative - definition of administrative - among others, directorial, guiding, managerial, regulative, supervisory - Burton's Legal Thesaurus (4<sup>th</sup> Ed).

**Words and Phrases** - administrative action - definition of administrative action - a decision or an implementation relating to the government's executive function or a business's management - Black's Law Dictionary (11<sup>th</sup> Ed).

### **Brief facts**

A complaint had been lodged before the 1<sup>st</sup> appellant, the Ethics and Anti-Corruption Commission (EACC), alleging Kshs. 280 million had been fictitiously paid into the 1<sup>st</sup> respondent's advocate-client bank account. Based on that allegation, the EACC obtained warrants *ex-parte* to investigate and inspect the bank account. Aggrieved, the 1<sup>st</sup> respondent filed a constitutional petition contending that the warrants had been issued *ex-parte* and had been obtained and enforced secretly without notice.

The 1<sup>st</sup> respondent urged that the EACC's actions amounted to an infringement of his right to privacy, property, fair administrative action, and fair hearing and contradicted sections 28(1), (2), (3), and (7) of the Anti-Corruption and Economic Crimes Act (ACECA), which required the EACC to issue a notice informing him of its intended application and allowing him to be heard before a court could legitimately issue any warrants.

The High Court held, among others, that the warrants to investigate the bank account breached the 1<sup>st</sup> respondent's rights and fundamental freedoms under the provisions of articles 47(1), 47(2), and 50(1) of the Constitution, hence void for all intents and purposes. Aggrieved, the appellants lodged appeals at the Court of Appeal, while the 1<sup>st</sup> respondent also filed a cross-appeal against part of the judgment. The Court of Appeal upheld the High Court decision and dismissed both the appeals and cross-appeal for lack of merit. The appellants were further aggrieved and thus filed the instant appeal.

### **Issues**

- i. What were the factors to be considered before the issuance of notices by the Ethics and Anti-Corruption Commission to those it intended to investigate?
- ii. Whether the Ethics and Anti-Corruption Commission was required to always give prior notice to those it intended to investigate before commencing an investigation.
- iii. What was the nature of the Ethics and Anti-Corruption Commission's mandate in combating corruption and economic crimes in society?
- iv. What was the definition and scope of what amounted to an administrative action?
- v. Whether the Ethics and Anti-Corruption Commission's investigative and arresting powers could be described as administrative actions?
- vi. What were the factors to consider when invoking the Supreme Court's appellate jurisdiction as a matter involving the interpretation or application of the Constitution?

### **Relevant provisions of the Law**

#### **Constitution of Kenya**

##### **Article 47 - Fair administrative action**

(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, and independent and impartial tribunal; and*  
*(b) promote efficient administration.*

**Held**

1. For a litigant to invoke the Supreme Court's appellate jurisdiction under article 163(4)(a) of the Constitution, it had to be demonstrated that the matter in issue revolved around constitutional contestation that had come through the judicial hierarchy, running up to the Court of Appeal and requiring the Court's final input. At the very least, an appellant had to demonstrate that the Court's reasoning and conclusions that led to the determination of the issue, put in context, could properly be said to have taken a trajectory of constitutional interpretation or application.
2. The issues before the High Court and Court of Appeal, leading to the impugned judgments, squarely brought the instant appeal within the ambit of article 163(4)(a) of the Constitution. Besides, the 1<sup>st</sup> respondent, having filed a constitutional petition and succeeded before the two superior courts, could not claim that the resultant appeal therefrom was not sustainable under article 163(4)(a). The Court had the jurisdiction to hear and determine the instant matter.
3. The argument that the impugned warrants which triggered the appeals were sought, issued, and enforced in 2015 and, as such there was no justiciable issue between the parties was far-fetched given the fact that the enforcement of the impugned warrants did not resolve the grievances. Indeed, it was the issuance of those warrants that prompted the 1<sup>st</sup> respondent to move to the High Court seeking to have them quashed.
4. Articles 47 and 260 of the Constitution did not define an administrative action. Section 2 of the Fair Administrative Action Act (FAA Act) defined an administrative action as including the powers, functions and duties exercised by authorities or quasi-judicial tribunals or any act, omission, or decision of any person, body, or authority that affected the legal rights or interests of any person to whom such action related.
5. The definition of an administrative action under section 2 of the FAA Act did not provide an accurate picture of the meaning of an administrative action. It simply addressed the elemental aspects of the phenomenon before describing its nature. On the face of it, therefore, any power, function, and duty exercised by authorities or quasi-judicial tribunals constituted an administrative action. Likewise, any act, omission, or decision of any person that affected the legal rights or interests of any person to whom such action related constituted an administrative action. Such definition, without more, would bring within the ambit of an administrative action just about anything done or any exercise of power by an authority or quasi-judicial tribunal.
6. Article 47 of the Constitution provided that Parliament was to enact legislation to give effect to the rights in clause (1) and that legislation should promote efficient administration. By stipulating that the legislation so contemplated had to among other things, promote efficient administration, the Constitution left no doubt that an administrative action was not just any action or omission, or any exercise of power or authority, but one that related to the management of affairs of an institution, organization, or agency. That explained why such action was described as "administrative" as opposed to any other action.
7. Part IV of the ACECA specifically provided for the EACC's investigative powers. The powers granted therein included powers, privileges and immunities of a police officer under section 23(3), to search premises under section 29, to apply for surrender of travel documents under section 31, and to arrest persons under section 32 amongst others. Strictly speaking, those powers when exercised, could not be described as administrative actions within the meaning of article 47 of the Constitution.



8. There was no basis for holding that the 1<sup>st</sup> respondent's rights were violated for failure to observe the requirements of article 47 of the Constitution. In the absence of proof of violation of his rights, the impugned warrants should not have been quashed based on that claim.
9. Under section 26 of the ACECA, the EACC was required to issue a notice in writing where the Secretary to the EACC (the Secretary) was satisfied that it could assist or expedite an investigation. The language in section 26 was permissive rather than mandatory. It all depended on whether the Secretary was satisfied that the furnishing of information regarding specified property could assist or expedite an investigation. That explained why the person reasonably suspected of corruption was the one required through a notice in writing to furnish the requisite information relating to the property or properties specified in the notice.
10. If the Secretary was not satisfied that such notice would assist or expedite an investigation, then he/she did not have to issue it. The Secretary could very well believe that such notice, instead of assisting or expediting an investigation, could actually jeopardize or delay it. Such notice, if necessary, would be issued during an ongoing and not before an investigation. Before the conclusion that certain information was required, preliminary investigative processes had to have been undertaken.
11. Under section 27 of the ACECA, the EACC had two options, either, it could move directly and obtain an *ex-parte* order from court against an associate of a person suspected of corruption, requiring such associate to produce certain documents or information, or it could with notice in writing require the associate to produce the specified information. Where the EACC opted for the court process, no notice was required to be issued to the associate. Only where it chose to get the information directly from the associate was the EACC required to issue the notice in writing. The language of the statute was permissive rather than mandatory.
12. Under section 28 of the ACECA, the EACC could, with notice in writing to the affected parties, seek a court order requiring the production of specified records in the possession of any person whether or not suspected of corruption. The notice could be issued to any person, and not just one suspected of corruption. It could be reasonably assumed that in such a situation, the notice was to be issued before the commencement of an investigation. The section stated that such specified records could be required for an investigation, hence what was envisaged was a process of investigation that was yet to commence. That explained the fact that the notice was not confined to persons suspected of corruption but extended to any others that the EACC believed had such records.
13. Under section 28 of the ACECA, the EACC could issue notice directly to a person suspected of corruption or economic crimes, requiring him to produce the specified property as opposed to specified records. The property was so required for inspection. In the instant case, it could be reasonably assumed that such notice could be issued by the EACC during an ongoing investigation. Section 28 was however silent as to whether in that regard, the issuance of notice by the EACC was also dependent on the opinion of the Secretary.
14. Section 23(4) of the ACECA conferred upon the Secretary and investigators under the Act, powers, privileges and immunities of a police officer in so far as the same were not inconsistent with the provisions of the Act or any other law. Therefore, the Secretary and investigators were given police powers, which they could exercise in the course of their duties under the relevant provisions of other applicable laws. Such laws included the Police Act, the Criminal Procedure Code (CPC), and the Evidence Act, among others. The EACC was not limited to the provisions of the ACECA, in carrying out its investigative mandate. Where the provisions of the ACECA were unambiguous, the EACC's first resort had to be to that enabling statute.
15. The EACC had a wide and critical mandate under the Constitution and the law to combat corruption and economic crime in society. In executing that mandate, the EACC assumed different postures depending on the nature of the specific function it was carrying out. Thus, the EACC could assume a non-confrontational and largely facilitative role when for example, it was educating the public on the



- nature and vices of corruption, or conducting research into the nature of corruption, or undertaking a systems review of a specific agency to seal corruption loopholes.
16. The EACC could assume a law enforcement posture when conducting investigations into suspected corrupt conduct, effecting arrests of corruption suspects, disrupting corruption networks and through the Office of the Director of Public Prosecutions, arraigning suspects before courts of law. The EACC could assume an intelligence-gathering posture when for example it was tracing the proceeds of crime (asset tracing) with a view to recovering the same.
  17. The EACC would apply different sets of laws and strategies. Regarding investigations, it all depended on what was at stake, the nature of the evidence required and the urgency with which the evidence had to be acquired. It could not be said that the EACC had to always give prior notice to those it intended to investigate before commencing an investigation.
  18. Sections 26, 27 and 28 of the ACECA set out very specific circumstances in which the EACC could issue notice. If the conditions so specified obtained, then the EACC could issue notice in writing to the affected parties. If the EACC was carrying out a police operation or an intelligence gathering or asset tracing exercise, it could not be required to issue a prior mandatory notice to the intended targets. In such a situation, section 23 of the ACECA, the Evidence Act, the CPC, and any other enabling legislation came into play. At all times, whatever the nature of the investigations the EACC could be undertaking, it had to do so within the confines of the Constitution and the law.
  19. The Court could not state with certainty that the EACC should not have moved to court under section 26 of the ACECA because there was no information on record showing that the Secretary had formed an opinion that the information sought was to aid or expedite the ongoing investigation. Neither could the court state that the 1<sup>st</sup> appellant ought to have moved to court under section 27 of the ACECA since it was not investigating the 1<sup>st</sup> respondent as an associate of a person suspected of corruption or economic crime. The EACC ought not to have moved to court under section 28 of the ACECA, which was confined to notices requiring the production of records or property, as the case could be because in that instance, the investigations had already commenced.
  20. It was difficult to sustain the declaration by the Court of Appeal to the effect that, the EACC was inflexibly bound to issue notice in the conduct of its investigations. Where the EACC was acting under its police powers, it was bound by the laws pursuant to which the police conducted their investigations and connected purposes. Where it conducted investigations in circumstances where the law required it to issue written notice, then it had to issue the notice. The people expected that the law enforcement agencies established under the Constitution and the law were effective enough to protect them from crime and related dangers. By the same token, the people expected that such agencies would carry out their mandates in accordance with the Constitution and the law.

*Consolidated appeals allowed; judgment of the Court of Appeal dated June 28, 2019 overturned.*

### **Orders**

*Each party to bear its own costs.*

### **Citations**

#### **Cases**

##### *Kenya*

1. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition 5 of 2012; [2012] KESC 6 (KLR); [2012] 2 KLR 454 - (Applied)
2. *Institute for Social Accountability & another v National Assembly & 5 others* Petition 1 of 2018; [2022] KESC 39 (KLR) - (Explained)
3. *Joho & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] 1 KLR 111 - (Mentioned)



4. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Explained)
5. *Kenya Anti-Corruption Commission v Republic & 4 others* Civil Appeal No 284 of 2009; [2013] eKLR - (Applied)
6. *Kenya Human Rights Commission and Community Advocacy & Awareness Trust (Crawn Trust) v Non-Governmental Organizations Co-ordination Board & Law Society of Kenya* Petition 404 of 2017; [2018] KEHC 8915 (KLR) - (Explained)
7. *King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & another v M/s Kaplan & Straton Advocates* Criminal Appeal 55 of 1993; [1993] KECA 57 (KLR); [1900-1994] EA 214 - (Mentioned)
8. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Mentioned)
9. *Manfred, Walter Schmitt & another v Republic & another* Criminal Revision 569 & 2326 of 2012; [2013] KEHC 5455 (KLR) - (Explained)
10. *Meru County Government v Ethics & Anti-Corruption Commission* Civil Appeal 193 of 2014; [2018] KECA 720 (KLR) - (Explained)
11. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR); [2014] 3 KLR 36 - (Explained)
12. *Muriithi, Samuel & another v Republic* Criminal Appeal No 2 of 2013; [2015] eKLR - (Explained)
13. *Murungaru, Christopher Ndarathi v Kenya Anti-Corruption Commission & another* Civil Suit 54 of 2006; [2006] KEHC 2645 (KLR) - (Mentioned)
14. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Explained)
15. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR) - (Mentioned)
16. *Republic v Cabinet Secretary Ministry of Information and Communication ex-parte Adrian Kamotho Njenga 2 others* Miscellaneous Civil Application 48 of 2014; [2014] KEHC 3508 (KLR) - (Explained)
17. *Republic v National Environment Tribunal & 2 others ex- parte Abdulhafidh Sheikh Ahmed Zubeidi* Miscellaneous Civil Application 155 of 2012; [2013] KEHC 2615 (KLR) - (Explained)
18. *Rutongot Farm Ltd v Kenya Forest Service & 3 others* Petition 2 of 2016; [2018] KESC 27 (KLR) - (Applied)
19. *Sirma v Independent Electoral and Boundaries Commission & 2 others* Petition 13 of 2018; [2019] KESC 64 (KLR) - (Applied)
20. *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others* Civil Appeal 196, 195 & 203 of 2015; [2015] KECA 239 (KLR) - (Explained)

### **Uganda**

*Tinyefuza v Attorney General* [1997] UGCC 3 - (Explained)

### **South Africa**

1. *Chairman Board on Tariffs & Trade & another v Brenco Incorporated & another* (285/99) [2001] ZASCA 67 - (Explained)
2. *Competition Commission v Yara (South Africa) (Pty)Ltd & others* (784/12) [2013] ZASCA 107 - (Explained)
3. *Simelane NO & others v Seven-Eleven Corporation SA (Pty) Ltd & another* (480/01) [2002] ZASCA 141; [2001-2002] CPLR 13 (SCA); [2003] 1 All SA 82 (SCA) - (Explained)

### **United States**

*Mills v Green* 159 US 651 (1895) - (Applied)

### **Texts**

1. Burton, W., (Ed) (2013), *Burton's Legal Thesaurus* New York: McGraw-Hill Education



2. Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 11th Edn
3. Pearsall, J., (Ed) (2002), *Concise Oxford English Dictionary* New York: Oxford University Press 9th Ed

## **Statutes**

### ***Kenya***

1. Anti-Corruption and Economic Crimes Act (cap 65) sections 11(1)(d); 23; 26; 27; 28(1)(2)(3)(7); 30 - (Interpreted)
2. Constitution of Kenya articles 24, 27(1)(4)(5); 31; 40; 47; 50; 79; 163(4)(a); 191(5); 252; 259; 260 - (Interpreted)
3. Criminal Procedure Code Act (cap 75) sections 118, 118A, 121 - (Interpreted)
4. Ethics and Anti-Corruption Commission Act (cap 7H) sections 13, 26 - (Interpreted)
5. Evidence Act (cap 80) sections 13(1); 134; 137; 180 - (Interpreted)
6. Fair Administrative Action Act (cap 7L) section 2 - (Interpreted)
7. Supreme Court Act, 2011 (cap 9B) section 15(2) - (Interpreted)
8. Supreme Court Rules, 2012 (cap 9B Sub Leg (Repealed)) rules 9(1); 33(2) - (Interpreted)

### ***South Africa***

Constitution of South Africa, 1996 section 33 - (Interpreted)

## **Advocates**

None mentioned

## **JUDGMENT**

### **A. Introduction**

1. Before this court are two Petitions, Nos 30 and 31 of 2019 dated July 30, 2019 and July 31, 2019 respectively. The appeals are brought pursuant to article 163(4)(a) of the *Constitution*, section 15(2) of the *Supreme Court Act, 2011* and rules 9(1) and 33(2) of the *Supreme Court Rules, 2012* (now repealed). They challenge in part the judgment and orders of the Court of Appeal (Nambuye, Kiage & Kantai, JJA) in Civil Appeal No 109 of 2016, consolidated with Civil Appeal No 103 of 2016. By an order of this court issued on September 21, 2021 the appeals were consolidated with Petition No 30 of 2019 as the lead file.

### **B. Background**

#### **i. At the High Court**

2. A complaint was lodged before the 1<sup>st</sup> appellant, the Ethics and Anti-Corruption Commission (EACC) alleging Kshs 280 million had been fictitiously paid into the 1<sup>st</sup> respondent's advocate-client bank account by Mumias Sugar Company Limited. Based on this allegation, the 1<sup>st</sup> appellant filed *ex-parte* CMC Misc. Criminal Application No 168 of 2015 seeking warrants to investigate and inspect the said bank account. On March 18, 2015 the Chief Magistrate's Court allowed the *ex-parte* application.
3. Aggrieved by this order, the 1<sup>st</sup> respondent filed Constitutional Petition No 122 of 2015. He contended that the warrants had been issued *ex-parte* and had been obtained and enforced secretly without Notice. He therefore urged that the 1<sup>st</sup> appellant's actions amounted to an infringement of his right to privacy, property, fair administrative action, and fair hearing enshrined in articles 31, 40, 47 and 50 of the *Constitution*.



4. Moreover, it was his contention that the 1<sup>st</sup> appellant's actions contradicted sections 28(1), 28(2), 28(3) and 28(7) of the [Anti-Corruption and Economic Crimes Act \(ACECA\)](#), which require the Commission to issue a Notice to the 1<sup>st</sup> respondent informing him of its intended application and affording him an opportunity to be heard before a court could legitimately issue any warrants. In any event, the 1<sup>st</sup> respondent argued that payment of legal fees was privileged communication under sections 13(1), 134 and 137 of the [Evidence Act](#), which in the absence of voluntary waiver by a client, a public body could not, without justifiable basis, ignore.
5. On their part, the appellants contended that they did not act ultra- vires their lawful mandate as the warrants were obtained pursuant to the provisions of the [ACECA](#), sections 118 of the [Criminal Procedure Code](#) (CPC) and 180 of the [Evidence Act](#). They further urged that, in so doing, they did not violate any of the 1<sup>st</sup> respondent's constitutional rights.
6. Consequently, the 1<sup>st</sup> respondent sought the following summarized reliefs:
  - a. A declaration that the warrants to investigate an account granted on the March 18, 2015, breached the petitioner's rights and fundamental freedoms protected under 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.
  - b. Judicial Review by way of an order of *certiorari* to remove into the Court and quash warrants to investigate an account granted on the March 18, 2015;
  - c. Judicial Review by way of an order of prohibition directed to the Ethics and Anti-Corruption Commission, its 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 the 1<sup>st</sup> respondent's identified account, or any other account held by the 1<sup>st</sup> respondent.
  - 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 to investigate Michael Kasion, EACC herein, for possible commission of the offence of perjury; and
  - 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.
7. The High Court framed three key issues for determination: whether warrants to investigate the 1<sup>st</sup> respondent's bank account were issued in violation of his fundamental rights and freedoms protected under articles 27, 40, 47 and 50 of the [Constitution](#); whether the advocate/client privilege was applicable and consequently, whether the prayers sought could be granted; and whether there was another forum for determining the issue in dispute.
8. In a Judgment delivered on February 5, 2016 the court (Lenaola, J, as he then was), granted the following declarations:
  - a. A declaration that the warrants to investigate an account granted on the March 18, 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No 168 of 2015, breached the 1<sup>st</sup> respondent'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* to remove into the court and quash warrants to investigate an account granted on the March 18, 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No 168 of 2015;
- c. Michael Kasion and Eustace Waweru are struck off the proceedings; and
- d. Each party to bear its own costs.

## ii. At the Court of Appeal

9. Aggrieved by this Judgment, the appellants lodged Civil Appeals Nos 103 and 109 of 2016, which were consolidated on May 19, 2017. The 1<sup>st</sup> respondent also filed a cross appeal against part of the Judgment. The consolidated appeal was premised on the grounds summarized as follows, that the learned Judges erred in:
  - i. Failing to uphold that warrants to investigate the 1<sup>st</sup> respondent's bank account was lawfully obtained under the provision of section 180 of the *Evidence Act*;
  - ii. Failing to uphold that the Chief Magistrate's Court had jurisdiction to issue warrants under section 118 of the *Criminal Procedure Code*;
  - iii. Failing to appreciate that the provisions of section 23 of ACECA, section 180(1) of the *Evidence Act* and section 118 of the *Criminal Procedure Code* were available to EACC in the discharge of its mandate;
  - iv. Holding that the 1<sup>st</sup> respondent's right to due notice prior to an application for warrants violated section 28 of ACECA and article 47 of the *Constitution*;
  - v. Failing to uphold that the 1<sup>st</sup> respondent's rights were limited by article 24 of the *Constitution* in favour of the protection of public interest;
  - vi. Failing to appreciate that the investigative process by EACC was not administrative but a constitutional process; and
  - vii. Failing to appreciate that issuance of prior notice grants a suspect an opportunity to conceal evidence otherwise necessary in the prosecution of crimes.
10. The cross appeal on the other hand, was premised on grounds that the learned Judge erred in law and fact by:
  - i. Failing to hold that the 1<sup>st</sup> respondent's fundamental right to privacy, to property and against discrimination were violated;
  - ii. Holding that EACC had a factual basis which necessitated the issuance of impugned search warrants;
  - iii. Failing to hold that the bank account was confidential communication covered by client-advocate privilege;
  - iv. Failing to award him damages based on the violation of his right to fair administrative action; and
  - v. For failing to find that EACC lacks constitutional mandate to investigate any alleged criminal conduct, which is the exclusive role of the National Police Service.



11. The Court of Appeal framed four issues for determination; whether the 1<sup>st</sup> respondent's fundamental rights under article 27, 31, 40 and 50 of the Constitution had been violated; whether the 1<sup>st</sup> respondent's bank accounts amounted to confidential information protected by advocate-client privilege; whether actions by EACC were administrative hence under the ambit of article 47 of the Constitution; and whether EACC was required to issue prior Notice to the 1<sup>st</sup> respondent. In a Judgment delivered on June 28, 2019 the learned Judges upheld the High Court on all issues and dismissed both the appeal and cross- appeal for lack of merit.

**(iii) At the Supreme Court**

12. Aggrieved by the entire Judgment, the appellants filed the instant appeal, citing several grounds of appeal. The lead appeal raises the following summarized grounds, that the judges of appeal erred in law in:
  - a. Adopting a narrow interpretation of article 47 of the Constitution consequently rendering the 1<sup>st</sup> appellant ineffective in the performance of its constitutional functions;
  - b. Failing to hold that the warrants to investigate the 1<sup>st</sup> respondent's bank account were lawfully issued pursuant to sections 23 of the ACECA as read with section 118 and 121 of the Criminal Procedure Code;
  - c. Making an omnibus finding that the 1<sup>st</sup> appellant is inflexibly bound by the provisions of sections 26, 27 and 28 of the ACECA;
  - d. Failing to appreciate that the investigation process, including obtaining of the warrants was undertaken by the 1<sup>st</sup> appellant in line with the provisions of article 10 of the Constitution;
  - e. Failing to find that the 1<sup>st</sup> appellants investigative function is not an administrative action hence the provisions of article 47(1) and (2) of the constitution and the Fair Administrative Act are not applicable;
  - f. Failing to find that section 23 of the ACECA, Section 118 of the Criminal Procedure Code and section 180 of the Evidence Act are in tandem with the provisions of article 24 of the Constitution;
  - g. Failing to appreciate the element of surprise in criminal investigations envisaged under section 118A of the CPC; and
  - h. Failing to hold that section 30 of the ACECA is in tandem with article 50 (1) of the Constitution.
13. It seeks the following reliefs, that:
  - a. The appeal be allowed with costs;
  - b. The decision of the Court of Appeal delivered in Civil Appeal No. 103 of 2019 (Consolidated with No 109 of 2016) be set aside and in lieu the appeal be allowed;
  - c. The High Court judgment delivered in Petition No 122 of 2015 be set aside and in lieu thereof the petition be dismissed with costs;
  - d. A declaration that an application for warrants to investigate accounts before the subordinates courts is I tandem with article 24(3) of the Constitution; and



- e. Declaration that investigations by the EACC as a law enforcement agency are not an administrative action envisaged under article 47 of the Constitution;
14. The second appeal raises similar grounds, which though not articulated in the body of the petition, were listed in its written submissions. It seeks the following orders, that:
- i. The appeal be allowed with costs;
  - ii. The decision of the Court of Appeal be set aside and in lieu of the appeal be allowed with costs; and
  - iii. The decision of the High Court in Petition No. 122 of 2015 be set aside and in lieu, the petition be dismissed with costs.

### C. Parties Respective Submissions

#### i 1<sup>st</sup> appellant's case

15. The 1<sup>st</sup> appellant filed its submissions, dated October 29, 2019, September 7, 2019, September 3, 2019 and supplementary submissions dated February 27, 2020. It raises three issues for determination, that is, whether an investigation within EACC's constitutional mandate under article 79 and 252 of the Constitution is an administrative action; whether a restrictive interpretation of articles 47, 79 and 252 of the Constitution renders EACC's ineffective in the discharge of its constitutional mandate; and in the alternative, whether the judicial process in section 118 of the CPC and section 180 of the Evidence Act meets a constitutional threshold for limitation of right under article 24 of the Constitution.
16. The 1<sup>st</sup> appellant contends that investigations within its constitutional mandate is a preliminary step that does not pose any adverse threat to the rights of a person who is under investigation. It argues that under article 47 as read with section 2 of the FAA Act, the element of adverse effect is a prerequisite to ascertaining whether an action is an administrative action or not. To determine whether the 1<sup>st</sup> appellant's investigative function is an administrative action which inflexibly binds it to the provisions of article 47 of the Constitution, the court is invited to first ascertain whether EACC's actions violated or threatened to violate any of the 1<sup>st</sup> respondent's fundamental rights and freedoms.
17. Consequently, it is the 1<sup>st</sup> appellant's submission that in view of the findings by the two superior courts that none of the 1<sup>st</sup> respondent's rights had been violated, the investigative powers of the 1<sup>st</sup> applicant cannot be categorized as administrative action within the ambit of the Constitution and the applicable law. To further persuade the court, it relies on the Supreme Court of South Africa's Decision in the Competition Commission v Yara (South Africa) (Pty)Ltd & Others (784/12) [2013] ZASCA 107 and section 33 of the South African Constitution.
18. Alternatively, it is asserted that issuance of prior Notice in an application under section 23(4) of the ACECA is not a mandatory requirement. It is argued that any contrary finding would amount to loss of exigencies of investigations and obliteration of vital evidence. The 1<sup>st</sup> appellant cites the Court of Appeal's Decision in Kenya Anti-Corruption Commission v Republic & 4 others; Civil Appeal No 284 of 2009; [2013] eKLR, to sustain this argument. It also urges that in the impugned decision, the appellate court insouciantly departed from this position without distinguishing it.
19. The 1<sup>st</sup> appellant urges that the Court of Appeal usurped Parliament's legislative mandate in finding that notice under section 26 of the ACECA was a mandatory requirement. On the contrary, it contends that the Section is limited in its reach and application. Whether to issue notice or not, is left to the



discretion of the Commission's secretary. It is therefore contended that in so far as the secretary did not deem it necessary to issue a Notice, the 1<sup>st</sup> appellant's actions were lawful and fair.

20. The 1<sup>st</sup> appellant further submits that AcECA has no special procedure for obtaining warrants. Rather, it is argued, the procedure applicable is as set out under sections 180 of the Evidence Act and 118 and 121 of the CPC. In view of the, foregoing Sections, the 1<sup>st</sup> appellant argues that the Court of Appeal in its impugned finding, went against its own decision in *Samuel Muriithi & another v Republic*, Nairobi criminal Appeal No 2 of 2013 [Unreported], in which it held that the limitation in section 180 of the Evidence Act, read together with sections 118 and 121 of the CPC are in consonance with article 24 of the Constitution. Similarly, the 1<sup>st</sup> appellant submits that section 13 of the Ethics and Anti-Corruption Act vests in upon it powers necessary to exercise its functions under the Constitution and any other written law. It argues that the doctrine of *generalia specialibus non derogant* is inapplicable in this case. Consequently, it maintains that the provisions of the Evidence Act and the CPC are necessary legal tools which it must periodically deploy to effectively carry out its mandate under the Constitution and the ACECA.
21. The 1<sup>st</sup> appellant further submits that the Court of Appeal's interpretation of article 47 of the Constitution renders it ineffective in the discharge of its constitutional mandate. It contends that an omnibus application of article 47 of the Constitution denies it flexibility to the detriment of its objects under articles 79 and 252 of the Constitution. On the contrary, it maintains that section 13 of the Ethics and Anti-Corruption Commission Act permits the 1<sup>st</sup> appellant to invoke provisions of any other law where necessary to exercise its functions. It argues that the appellate court ought to have been guided by the provisions of article 191(5) of the Constitution to arrive at a reasonable interpretation that avoids conflict between the said legislations and its constitutional mandate.
22. It relies on the Court of Appeal decision in *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others*; Civil Appeal No 196, 195 and 203 of 2015 (Consolidated), [2015] eKLR, to further the argument that an interpretation that renders a constitutional provision idle and an Independent Commission ineffective is unconstitutional. It further relies on the Supreme Court of South Africa decisions in *Simelane NO & others v Seven-Eleven Corporation SA (Pty) Ltd & another* (480/01) [2002] ZASCA 141 and *Chairman Board on Tariffs & Trade & Another v Brenco Incorporated & another* (BRESCO) (No 285/99) to urge for flexibility in the application of the principles of natural justice.
23. In conclusion and without prejudice, it is submitted that even if this Court were to find that the 1<sup>st</sup> appellant's investigations amounted to an administrative action, the warrants were obtained through a judicial process in terms of section 180 of the Evidence Act and 118 of the CPC and could only be quashed upon a finding that there were no reasonable grounds for granting them. It cites *Manfred Walter Schmitt & another v Republic & another*; Criminal Revision 469 and 2326 of 2012, [2013] eKLR (the Manfred Case), to support this submission. It is urged that the right to fair administrative action is not absolute but can be limited in terms of article 24 of the Constitution. It maintains that in any event, criminal processes including investigations, do not in themselves constitute a violation of the rights and freedoms of the person under investigation. The process is not only constitutional, but is also clothed with safeguards against the danger of infringement of one's rights and freedoms.

## 2<sup>nd</sup> appellant's case

24. The 2<sup>nd</sup> appellant addresses the court on the following issues; whether this court has jurisdiction; whether warrants to investigate a bank account can be lawfully issued in public interest; whether an application for warrants to investigate is in tandem with article 24(3) of the Constitution; whether an application for warrants to investigate before the Chief Magistrate's Court is a safeguard or a violation



- of constitutional rights; whether EACC is inflexibly bound to issue prior Notice before applying for warrants; and whether investigations by EACC is an administrative action subject to article 47 of the Constitution.
25. As regards this court's jurisdiction, it is the 2<sup>nd</sup> appellant's submission that the appeal raises issues of constitutional interpretation and application, which have been litigated through the judicial hierarchy. It relies on this court's decisions in Erad Suppliers & General Contractors Ltd v. National Cereals & Produce Board; SC Petition No 5 of 2012, [2012] eKLR and ; SC Petition No 10 of 2013 [2014] eKLR.
  26. On substantive issues, the 2<sup>nd</sup> appellant submits that the 1<sup>st</sup> appellant's application for warrants was in accordance with the principles set out under article 24 of the Constitution. To this end, it is submitted that the 1<sup>st</sup> appellant reasonably demonstrated to the 2<sup>nd</sup> respondent that an offence had been committed or was about to be committed, necessitating the grant of warrants. It cites the Manfred Case and urges that the obligation imposed on the Judiciary to issue warrants for search and seizure is a constitutional safeguard to protect the rights and freedoms of an individual.
  27. On the issue as to whether the 1<sup>st</sup> appellant is inflexibly bound to issue Notice before applying for warrants, the 2<sup>nd</sup> appellant answers in the negative. It relies on the provisions of articles 79, 252, 259 of the Constitution, sections 11 and 13 of the Ethics and Anti-Corruption Commission Act (EACC Act) and sections 23, 26 to 30 of the ACECA, to urge that the appellate court misinterpreted the provisions of sections 23(4) *vis-à-vis* the provisions of section 26, 27 and 28 of the ACECA.
  28. On the issue as to whether investigations by EACC is an administrative action subject to article 47 of the Constitution, it is the 2<sup>nd</sup> appellant's submission that section 2 of the Fair Administrative Action Act No 4 of 2015 (FAA Act), defines "an administrative action" as an action that determines the culpability of a person. An investigation and the process thereof, including an application for a warrant, argues the 2<sup>nd</sup> appellant, does not entail the determination of one's culpability within the meaning of section 2 of the FAA Act. Such a process cannot be said to constitute an infringement of the rights and freedoms of the person under investigation. It is the 2<sup>nd</sup> appellant's further argument that an administrative action refers to the powers, functions and duties exercised by authorities or quasi-judicial tribunals, as opposed to law enforcement agencies. Consequently, it is submitted that the Appellate Court mis-applied the provisions of article 47 of the Constitution to the constitutional mandate of the 1<sup>st</sup> appellant, while ignoring articles 79 and 252 of the Constitution, and the ACECA and EACC Act.
  29. It is the 2<sup>nd</sup> appellant's case that the appellate court erred in departing from its own decision in Kenya Anti-Corruption Commission v Republic & 4 others (*Supra*) in which it had held that; there was no requirement for issuance of prior Notice in an application under sections 23 of the ACECA as read with section 180 of the Evidence Act and sections 118 and 121 of the CPC; and that failure to issue such Notice does not constitute infringement of the rules of natural justice. Additionally, it is contended that the impugned decision is contradictory to the appellate court's decision in CACRA 2/2013 Samuel Mureithi Watatu & another v Republic (unreported) where the court found that every citizen has the right against arbitrary search which extends to one's property including their bank account but that right is not absolute, and can be limited under article 24 of the Constitution on reasonable grounds.

### iii. 1<sup>st</sup> respondent's case

30. In response, the 1<sup>st</sup> respondent filed a Notice of preliminary objection, challenging the court's jurisdiction and a replying affidavit reproducing the arguments before the High Court. He also filed submissions and supplementary submissions dated October 24, 2019 and February 17, 2020 respectively. The 1<sup>st</sup> respondent submits on three issues; this Court's jurisdiction; whether the 1<sup>st</sup>



- appellant's investigations must align with the provisions of *ACECA*; whether the 1<sup>st</sup> appellant was bound by law to issue prior Notice before seeking the ex-parte warrants; and whether the 1<sup>st</sup> appellant is an Administrative Commission bound by the principles of fair administrative action.
31. He contends that the court lacks jurisdiction under article 163(4) (a) of the *Constitution* as the appeal do not raise any issues involving the interpretation or application of the *Constitution* or raise any cogent issues of constitutional controversy. But rather, seek the interpretation of section 23 of the *ACECA*, section 118 of the *CPC* and section 180 of the *Evidence Act*. He relies on this Court's decisions in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*; SC Application No 5 of 2014, [2014] eKLR (Munya Case); *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*; SC Petition No 3 of 2012, [2012] eKLR (Lawrence Nduttu Case); *Peter Ngoge v Francis ole Kaparo & 5 others* (Peter Ngoge Case); SC Petition No 2 of 2012, [2012] eKLR; *Rutongot Farm Ltd v Kenya Forest Service & 3 others*; SC Petition No 2 of 2016, [2018] eKLR; *Musa Cherutich Sirma v Independent Electoral & Boundaries Commission & 2 others*; SC Petition No 13 of 2018, [2019] eKLR; and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others*; SC Application No 2 of 2011, [2012] eKLR, to support his arguments on jurisdiction.
  32. Similarly, it is the 1<sup>st</sup> respondent's argument that the subject matter of the appeal is moot and is an abuse of the court process. He relies on grounds that the impugned warrants were sought, issued and enforced in 2015, hence there is no justiciable controversy between the parties. He cites the United States of America case of *Mills v Green*, 159 US 651, 653 (1895) in support of this assertion.
  33. On the substantive issues, it is submitted that the 1<sup>st</sup> appellant's powers are limited to the *Constitution* and statute and must align with the provisions of its enabling statute, specifically sections 26 to 28 of the *ACECA*. It is contended that the 1<sup>st</sup> appellant cannot rely on general provisions to wit sections 118 of the *CPC* and 180 of the *Evidence Act*, to avoid express obligations created under its enabling statute. He urges the court to give sections 26 to 28 of the *ACECA* their plain and ordinary meaning. He cites the decisions of *Republic v Cabinet Secretary Ministry of Information and Communication & 8 others ex-parte Adrian Kamotho Njenga & 2 others*; Misc. Application No 401 of 2014, [2014] eKLR; and *Republic v National Environment Tribunal & 2 others ex-parte Abdulhafidh Sheikh Ahmed Zubeidi*; Misc Application No 155 of 2012, [2013] eKLR.
  34. On the issue as to whether the 1<sup>st</sup> appellant is bound by principles of fair administrative action under article 47 of the *Constitution*, the 1<sup>st</sup> respondent submits that EACC is a state organ by virtue of article 260 of the *Constitution*, discharging a public administrative function and therefore bound by the provisions of article 47 of the *Constitution*, *FAA Act* and sections 23(4) as read with sections 27 to 28 of *ACECA*. Moreover, it is urged that all chapter 15 Commissions, are clothed with general investigative functions, which though constitutional, are carried out in an administrative capacity. He relies on this court's decision in *Judicial Service Commission v Mbalu Mutava & another*; Civil Appeal No 52 of 2014, [2015] eKLR, to support the contention that the investigative function of constitutional Commissions as embodied under Article 252(1) of the *Constitution*, though forming part of their constitutional mandate is an administrative function subject to the provisions of article 47 of the *Constitution* and its enabling statute.
  35. It is the respondent's further case that any decision, action or omission by the 1<sup>st</sup> appellant in the conduct of its investigations under sections 11(1)(d) and part IV of the *ACECA*, has adverse effects on the legal rights or freedoms of the subject under investigations. Furthermore, it is argued that sections 26 and 28 of the *ACECA* calls for respect of article 47 of the *Constitution*, by requiring the issuance of prior notice. The 1<sup>st</sup> respondent argues that EACC must conduct its duties and functions under the ambit of the *Constitution*, while upholding the right to fair administrative action. Consequently, it is



submitted that any action by the 1<sup>st</sup> appellant that is divorced from constitutional principles and the Bill of Rights is unconstitutional.

36. He asserts that administrative action flowing from statutes must meet the constitutional test of legality, reasonableness and procedural fairness. He relies on the Court of Appeal's decisions in *County Government of Meru v Ethics & Anti-Corruption Commission*; Civil Appeal No 193 of 2014, [2014] eKLR and *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-Ordination Board & Another*; HC Petition No 404 of 2017, [2018] eKLR, to urge his case. In conclusion, the 1<sup>st</sup> respondent asserts that *ACECA* takes precedence over general provisions in the *Evidence Act* and the *CPC*, with regard to the conduct of investigations. Likewise, he submits that public interest is not a sufficient ground for limiting the right to fair administrative action. On the contrary, it is submitted that the *Constitution* embodies the supreme public interest and its provisions must be upheld by the courts, sometimes to the annoyance of the public. He relies on the Court of Appeal's decision in *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another*; Misc Civil Application No 54 of 2006, [2006] eKLR, in support of his argument.

#### iv. 3<sup>rd</sup> respondent's case

37. The 3<sup>rd</sup> respondent's submissions are dated November 22, 2019 and filed on November 29, 2019. It submits that this court has jurisdiction to hear and determine the appeals before it as they raise issues of constitutional controversy that have arisen through the court's hierarchy.
38. It submits that section 26 of the *EACC Act* enhances and promotes values espoused under article 47 of the *Constitution*. It is urged that before any adverse administrative action can be undertaken against affected persons, they must be granted an opportunity to respond. It argues that any orders made ex-parte thereof are arbitrary, adverse and amount to violation of fundamental rights and freedoms. It is submitted that with the enactment of anti-laundering regulations and with modern technologies that enable the tracing of movements of money, the 1<sup>st</sup> appellant's fear that prior Notice might jeopardize investigations is misguided.
39. The 3<sup>rd</sup> respondent submits that the *Constitution* must be read as a whole, with each article complementing and not destroying the other. Therefore, it is contended that article 79 must be read together with article 47 of the *Constitution*, which leads to the conclusion that the EACC, being an institution established by the *Constitution*, cannot negate the provisions of article 47. It relies on the Ugandan Case of *Tinyefuza v AG* [1997 UGCC3]. The 3<sup>rd</sup> respondent further submits that prior notice, is a mandatory requirement under the provisions of section 26 of the *ACECA* and article 47 of the *Constitution*. It is also submitted that sections 118A of the *CPC* and 180 of the *Evidence Act* must be read in a manner that brings them in conformity with the *Constitution* as is the requirement under the sixth schedule. Accordingly, it is submitted that the two Sections are also subject to the requirement of article 47 of the *Constitution*.
40. In conclusion, it is the 3<sup>rd</sup> respondent's submission that the requirement to issue prior Notice is particularly important to the legal profession, specifically to advocates-client confidentiality which is the backbone and bedrock of legal practice. Furthermore, it is argued that to issue a search warrant against an advocate-client account without Notice, adversely undermines and invades the privacy of not only the client, the subject of investigations, but all other clients whose affairs are made public. It cites the case of *King Wollen Mills Limited & another v Kaplan & Stratton Advocates* [1900-1994] EA 214.



## D. Issues for Determination

41. On the basis of the pleadings and submissions by the parties herein, we consider that four issues merit our determination:
  - i. Whether the court has jurisdiction under article 163(4)(a) of the Constitution to entertain the appeal;
  - ii. Whether investigations by the 1<sup>st</sup> appellant constitute an administrative action, within the meaning of article 47 of the Constitution, and section 2 of the Fair Administrative Action Act;
  - iii. Whether the 1<sup>st</sup> respondent's fundamental rights and freedoms were violated by the 1st appellant's investigative actions against him; and
  - iv. Whether the 1<sup>st</sup> appellant is inflexibly bound to issue prior notice before commencing its investigations including applying for warrants.

## E. Analysis

### i. On jurisdiction

42. The 1<sup>st</sup> respondent has challenged this court's jurisdiction under article 163(4)(a) of the Constitution. He contends that the consolidated appeal does not raise any issues involving the interpretation or application of the Constitution, or cogent issues of constitutional controversy. It is argued that all the appellants seek, is the interpretation of statutory provisions. Moreover, he maintains that the appeal is moot as the impugned warrants were issued and effected, hence spent. Conversely, the appellants urge that the appeal raises issues of constitutional interpretation and application, which have arisen through the judicial hierarchy. The 3<sup>rd</sup> respondent agrees with this contention.
43. Article 163(4)(a) stipulates:
  - “ Appeals shall lie from the Court of Appeal to the Supreme Court—
    - a. as of right in any case involving the interpretation or application of this Constitution; and
    - b. in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)” [emphasis added].
44. This court has settled the law on when an appeal lies to this court under article 163(4)(a) of the Constitution. In Lawrence Nduttu Case the court observed:
  - “ [28] The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a)” [emphasis ours].



45. Subsequently, in the *Munya* Case, the court in determining whether it had jurisdiction under article 163(4)(a) of the *Constitution* stated that:
- “The import of the court’s statement in the *Ngoge* Case}} is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application” [emphasis added].
46. Flowing from the above, it is settled that for a litigant to invoke this court’s appellate jurisdiction under article 163(4)(a) of the *Constitution*, it must be demonstrated that the matter in issue revolves around constitutional contestation that has come through the judicial hierarchy, running up to the Court of Appeal and requiring this court’s final input. At the very least, an appellant must demonstrate that the court’s reasoning and conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.
47. Upon an extensive examination of the record, it is apparent that the issue before the trial court was whether warrants issued ex-parte infringed the 1<sup>st</sup> respondent’s rights enshrined in articles 27, 40, 47 and 50 of the *Constitution*. The 1<sup>st</sup> respondent sought a declaration, among others, that the impugned warrants breached his rights and fundamental freedoms protected under articles 27, 31, 40, 47 and 50 of the *Constitution* of Kenya.
48. The High Court partly found for the 1<sup>st</sup> respondent. It determined that the 1<sup>st</sup> appellant’s actions or omission were in breach of the 1<sup>st</sup> respondent’s right to fair administrative action and fair hearing under articles 47 and 50 of the *Constitution*. On appeal, the appellate court upheld the High Court. The appeal before us raises *inter alia* the issue as to whether investigations by the 1<sup>st</sup> appellant constitute an administrative action subject to article 47 of the *Constitution* as read with articles 10 and 24 of the *Constitution*. The superior courts’ finding on violations of the 1<sup>st</sup> respondent’s rights under articles 47 and 50 of the *Constitution* is challenged.
49. From the foregoing, we are convinced that the issues before the High Court and Court of Appeal, leading to the impugned judgments squarely bring the instant appeal within the ambit of article 163(4) (a) of the *Constitution*. Besides, the 1<sup>st</sup> respondent having filed a constitutional petition and succeeded before the two superior courts, cannot now claim that the resultant appeal therefrom is not sustainable under article 163(4)(a) of the *Constitution*. We consequently find that we have the jurisdiction to hear and determine it.
50. The 2<sup>nd</sup> respondent also submits albeit tangentially, that this court lacks jurisdiction on ground of mootness. It is his argument, that the impugned warrants which triggered the appeals were sought, issued and enforced in 2015, and as such, there is no justiciable issue between the parties. We find this argument far-fetched given the fact that the enforcement of the impugned warrants did not resolve the grievances that have remained live up-to this day. Indeed, it was the issuance of those warrants that prompted the 1<sup>st</sup> respondent to move to the High Court seeking to have them quashed. The question of when an issue is to be regarded to have become moot was extensively addressed by this court in Institute for *Social Accountability & another v National Assembly & others* (Petition No 1 of 2018) [2022] KESC 39 (KLR) (Civ) (8 August 2022) (Judgment).



**ii. Whether investigations by the 1<sup>st</sup> appellant constitute an administrative action within the meaning of article 47 of the Constitution**

51. The appellants contend that the provisions of article 47 of the Constitution and the FAA Act are not applicable as the 1<sup>st</sup> appellant's investigative function is not administrative but rather amounts to law enforcement. The appellants therefore urge that they did not act *ultra-vires* their lawful mandate as the impugned warrants were obtained pursuant to the provisions of sections 27, 28(1), 28(2), 28(3) and 28(7) of ACECA, Section 180 of the Evidence Act and section 118 of the CPC.

52. In response, it is the 1<sup>st</sup> respondent's case that in seeking warrants to investigate his bank account, the appellants violated his rights to fair administrative action. He urges that the 1<sup>st</sup> appellant's failure to issue him with a notice in writing of its application to the 5<sup>th</sup> respondent, was in violation of sections 27 and 28 of ACECA. Therefore, the question before court is whether the 1<sup>st</sup> appellant's investigations under the provisions of ACECA can be said to constitute administrative action under article 47 of the Constitution and the FAA Act.

53. Article 47 of the Constitution protects the right to fair administrative action in the following terms:

- “ 47. Every person has the right to administrative action that is expeditious, efficient,
- (1) 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, and independent and impartial tribunal; and
    - b. promote efficient administration.”

54. So, what constitutes “an administrative action” within the meaning of article 47(1) of the Constitution? Articles 47 and 260 of the Constitution do not define an “administrative action”. Section 2 of the FAA Act which was enacted to give effect to article 47, defines ‘administrative action’ as follows:

“Administrative action” includes—

- 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”.

55. Unfortunately, the foregoing definition does not provide an accurate picture of the meaning of an “administrative action” as it simply addresses the elemental aspects of the phenomenon before describing its nature. On the face of it therefore, any power, function, and duty exercised by authorities or quasi-judicial tribunals constitutes an “administrative action”. Likewise, any act, omission or decision of any person that affects the legal rights or interests of any person to whom such action relates constitutes an “administrative action”. Such definition, without more, would bring within the ambit



of an “administrative action” just about anything done, or any exercise of power by an “authority” or “quasi-judicial tribunal”.

56. A close scrutiny of article 47 of the Constitution gives a glimpse of what an

“administrative action” entails. Towards this end, the said Article provides that:

...

3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall–

(b) promote efficient administration.”

57. By stipulating that the legislation so contemplated has to among other things, promote efficient administration, the Constitution leaves no doubt that an “administrative action” is not just any action or omission, or any exercise of power or authority, but one that relates to the management of affairs of an institution, organization, or agency. This explains why such action is described as “administrative” as opposed to any other action. The Concise Oxford Dictionary (9<sup>th</sup> Ed) defines the word “administrative” as “concerning or relating to the management of affairs” Black’s Law Dictionary, (11<sup>th</sup> Ed) defines “administrative action” to mean “a decision or an implementation relating to the government’s executive function or a business’s management”. Burton’s Legal Thesaurus (4<sup>th</sup> Ed) defines the adjective “administrative” to mean among others, “directorial, guiding, managerial, regulative, supervisory.

58. Does the 1<sup>st</sup> appellant’s investigative powers fall within the corners of this definition? Part IV of the ACECA specifically provides for the 1<sup>st</sup> appellant’s investigative powers. The powers granted therein include powers, privileges and immunities of a Police Officer under section 23(3), to search premises under section 29, to apply for surrender of travel documents under section 31, to arrest persons under section 32 amongst others. Strictly speaking, these powers when exercised cannot be described as “administrative action” within the meaning of article 47. For example, how can “conducting a house search” or “effecting an arrest” be considered as exercising administrative action? On the contrary, these are special powers conferred by a specific legal regime, to be exercised for a special purpose.

### **iii. Whether the 1<sup>st</sup> respondent’s fundamental rights and freedoms were violated by the 1<sup>st</sup> appellant’s investigative actions against him**

59. In his response, the 1<sup>st</sup> respondent maintains that by commencing and conducting investigations against him in the manner that it did, the 1<sup>st</sup> appellant violated his fundamental rights and freedoms guaranteed by the Constitution. In particular, he submits that his right to fair administrative action was violated by the 1<sup>st</sup> appellant due to its failure to issue Notice before commencing the investigations against him.

60. Article 20(1) of the Constitution, provides that the Bill of Rights applies to all and bind all State organs and all persons. It entrenches the enjoyment of rights and fundamental freedoms in the Bill of Rights by every person and to the greatest extent consistent with the nature of the right or fundamental freedom. The right to fair administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair is one such right under the Bill of Rights.

61. Having already concluded that the investigative actions of the 1<sup>st</sup> appellant cannot be categorized as “administrative action” within the context of article 47 of the Constitution, we find no basis upon which we can hold, that the 1<sup>st</sup> respondent’s rights were violated for failure to observe the requirements of the said article. Therefore, in the absence of proof of violation of his other fundamental rights and



freedoms guaranteed by the Constitution, the impugned warrants ought not to have been quashed on the basis of this claim.

#### iv. Whether the 1<sup>st</sup> appellant is inflexibly bound to issue prior notice before applying for warrants

62. It was the Court of Appeal's finding that the EACC is inflexibly bound to comply with the provisions of sections 26, 27 and 28 of ACECA. This finding is challenged by the 1<sup>st</sup> appellants on grounds that the omnibus interpretation and application of article 47 of the Constitution renders the EACC ineffective in the discharge of its constitutional mandate. The 2<sup>nd</sup> appellant also urges that the ex-parte application was in accordance with the principles set out under article 24 of the Constitution. This being the case, he argues, the appellate court misinterpreted the provisions of sections 23(4) *vis-à-vis* the provisions of sections 26, 27 and 28 of the ACECA. It was the appellants' argument that the appellate court's finding departed from its earlier decisions, without giving reasons. The 1<sup>st</sup> and 3<sup>rd</sup> respondents support and agree with the Court of Appeal's finding.

63. To ascertain the correct legal position, we must interrogate, interpret and apply the provisions of sections 23, 26, 27 and 28 of the ACECA. Section 26 provides:

- (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 —
  - a. enumerating the suspected person's property and the times at which it was acquired; and
  - b. stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property..." [emphasis added].

64. Section 27 of the ACECA provides:

- “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.
2. In subsection (1), “associate of a suspected person” means a person, whether or not suspected of corruption or economic crime, who the investigator reasonably believes may have had dealings with a person suspected of corruption or economic crime.
3. The Commission may by notice in writing require any person to provide, within a reasonable time specified in the notice, any information or documents



in the person's possession that relate to a person suspected of corruption or economic crime.

4. A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.
5. No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act (cap 80).”

65. While section 28 provides:

- “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;
  8. The Commission may by notice in writing require a person to produce for inspection, within a reasonable time specified in the notice, any property in the person's possession, being property of a person reasonably suspected of corruption or economic crime.
  9. A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.
  10. No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act (cap 80)” [emphasis added].

66. What meaning is to be ascribed to the forgoing provisions regarding the requirement to issue notice by the EACC (the 1<sup>st</sup> appellant herein) in the course of its investigations? Can these provisions be the basis for the conclusion that “the EACC is inflexibly bound to issue prior notice in the conduct of its investigations?” In other words, is the EACC bound to issue prior Notice to each and every person it intends to investigate before it commences its investigations? Or is notice only required in circumstances specified by the law? And if so, what are these circumstances?

67. Under section 26, the 1<sup>st</sup> appellant is required to issue a notice in writing where the secretary is satisfied that it could assist or expedite an investigation. The language in this section is permissive rather than mandatory. It all depends on whether the secretary is satisfied that the furnishing of information regarding specified property could assist or expedite an investigation. This explains why the person reasonably suspected of corruption is the one required through a notice in writing to furnish the requisite information relating to the property or properties specified in the notice. Obviously, if the secretary is not satisfied that such Notice will assist or expedite an investigation, then he/she does not have to issue it. The secretary may very well be of the opinion that such Notice, instead of assisting or



expediting an investigation, could actually jeopardize or delay it. It is also clear to us that such Notice, if necessary, would be issued during an ongoing, and not prior to an investigation. Otherwise, how would the secretary form an opinion that an investigation requires to be assisted or expedited, if it was not ongoing? Before the conclusion that certain information is required, preliminary investigative processes must have been undertaken.

68. Under section 27, the 1<sup>st</sup> appellant has two options, either, it can move directly and obtain an ex-parte order from court against an associate of a person suspected of corruption, requiring such associate to produce certain documents or information, or it can with notice in writing require the associate to produce the specified information. It is noteworthy that where the 1<sup>st</sup> appellant opts for the court process, no notice is required to be issued to the associate. Only where it chooses to get the information directly from the Associate, is the 1<sup>st</sup> appellant required to issue the notice in writing. Again, the language of the statute is permissive rather than mandatory.
69. Under section 28, the Commission may with notice in writing to the affected parties seek a court order requiring the production of specified records in the possession of any person whether or not suspected of corruption. It is again to be noted that in this instance, the notice may be issued to any person, and not just one suspected of corruption. It may be reasonably assumed that in such a situation, the notice is to be issued before the commencement of an investigation. The section clearly states that such specified records may be required for an investigation, hence our determination that what is envisaged, is a process of investigation that is yet to commence. This explains the fact that the Notice is not confined to persons suspected of corruption but extends to any others that the Commission believes are in possession of such records.
70. Secondly under this section, the Commission may issue notice directly to a person suspected of corruption or economic crimes, requiring him to produce specified property as opposed to specified records. The property is so required for inspection. In this instance, it can be reasonably assumed that such Notice may be issued by the Commission during an on-going investigation. Section 28 is however silent as to whether in this regard, the issuance of notice by the Commission is also dependent on the opinion of the Secretary.
71. Section 23(4) of [ACECA](#), on the other hand confers upon the secretary to the Commission and investigators under the Act, powers, privileges and immunities of a police officer in so far as the same are not inconsistent with the provisions of the Act or any other law. Therefore, there is no doubt that the 1<sup>st</sup> appellant's secretary and Investigators are given police powers, which they may exercise in the course of their duties under the relevant provisions of other applicable laws. Such laws include the Police Act, the [CPC](#), the [Evidence Act](#), among others. It is clear that the 1<sup>st</sup> appellant is not limited to the provisions of [ACECA](#), in carrying out its investigative mandate. We however hasten to add that, where the provisions of the [ACECA](#) are clear and unambiguous, the 1<sup>st</sup> appellant's first resort must be to this enabling statute.
72. What conclusions can we derive from the foregoing analysis? First and foremost, it must be acknowledged that the 1<sup>st</sup> appellant has a wide and critical mandate under the [Constitution](#) and the law to combat Corruption and Economic Crime in our society. In executing this mandate, the 1<sup>st</sup> appellant assumes different postures depending on the nature of the specific function it is carrying out. Thus, on the one hand, the Commission may assume a non-confrontational and largely facilitative role when for example, it is educating the public on the nature and vices of corruption, or conducting research into the nature of corruption, or when undertaking a systems' review of a specific agency with a view to sealing corruption loopholes. On the other hand, the Commission may assume a law enforcement posture, when conducting investigations into suspected corrupt conduct, effecting arrests



- of corruption suspects, disrupting corruption networks, and through the Office of the Director of Public Prosecutions, arraigning suspects before courts of law. Lastly, the Commission may assume an intelligence gathering posture, when for example it is tracing the proceeds of crime (asset tracing) with a view to recovering the same.
73. In all these, the Commission will apply different sets of laws and strategies. Regarding investigations, it all depends on what is at stake, the nature of the evidence required, and the urgency with which the said evidence must be acquired. In the circumstances, it cannot be said that the Commission must always give prior notice to those it intends to investigate before commencing an investigation. We have elaborately interrogated the provisions of sections 26, 27 and 28 of ACECA. The said provisions set out very specific circumstances in which the Commission may issue Notice. If the conditions so specified obtain, then the Commission may issue notice in writing to the affected parties. If the Commission is carrying out a police operation or an intelligence gathering or asset tracing exercise, it cannot be required to issue a prior mandatory notice to the intended targets. In such a situation, the provisions of section 23 of ACECA, the Evidence Act, the CPC, and any other enabling legislation come into play. It is however worth emphasizing that, at all times, whatever the nature of the investigations the Commission may be undertaking, it must do so within the confines of the Constitution and the law.
74. It is now time to apply these conclusions to the issue at hand, that is whether the 1<sup>st</sup> appellant acted unlawfully by obtaining warrants ex-parte from court, which would have enabled it access to an advocate client bank account operated by the 1<sup>st</sup> respondent. On the one hand, the 1<sup>st</sup> appellant maintains that it acted lawfully under the relevant provisions of the Constitution, the Evidence Act and the CPC. It further submits that it was conducting a law enforcement operation, as opposed to an administrative action, to warrant conformity with the requirements of article 47 of the Constitution and the FAA Act. On his part, the 1<sup>st</sup> respondent submits that the 1<sup>st</sup> appellant acted unlawfully by obtaining the warrants without prior Notice, in violation of article 47 of the Constitution, and the provisions of article 26, 27 and 28 of the ACECA.
75. We have already held that the 1<sup>st</sup> appellant is not required to give written notice prior to commencing an investigation in all situations. We have also held that where circumstances obtain under sections 26, 27 and 28 of ACECA, the 1<sup>st</sup> appellant has to issue written notice in accordance with the stipulations therein. Having held so, we cannot state with certainty that the 1<sup>st</sup> appellant ought to have moved to court under section 26 because we have no information on record showing that the secretary had formed an opinion that the information sought was to aid or expedite the on-going investigation. Neither can we state that the 1<sup>st</sup> appellant ought to have moved to court under section 27 since it was not investigating the 1<sup>st</sup> respondent as an associate of a person suspected of corruption or economic crime. That leaves us with section 28 which is confined to notices requiring the production of records or property as the case may be. Can it be said that the 1<sup>st</sup> appellant ought to have moved to court under section 28? We think not, because in this instance, the investigations had already commenced (See paragraph 69 above).
76. In view of the foregoing, we find it difficult to sustain the declaration by the Court of Appeal to the effect that, the 1<sup>st</sup> appellant is inflexibly bound to issue notice in the conduct of its investigations. Where the 1<sup>st</sup> appellant is acting under its police powers, it is bound by the laws pursuant to which the police conduct their investigations and connected purposes. Where it conducts investigations in circumstances where the law requires it to issue written notice, then it has to issue the notice. At the end of the day, the people expect that the law enforcement agencies established under the Constitution and the law are effective enough to protect them from crime and related dangers. By the same token, the people expect that such agencies will carry out their mandates in accordance with the Constitution and the law.



77. The foregoing conclusions and findings, lead us to make the following orders.

**F. Orders**

78. Having considered the issues as framed by this court for determination, the final orders are as follows:

- i. The Petitions of Appeal dated July 30, 2019, and July 31, 2019, as consolidated, are hereby allowed.
- ii. The judgment of the Court of Appeal dated June 28, 2019 is hereby overturned.

**G. On Costs**

79 Each party shall bear its own costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.**

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**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**

