



**Wamukota & 5 others v Ethics & Anti-Corruption Commission  
& 4 others (Petition E111 of 2023) [2025] KEHC 1196 (KLR)  
(Constitutional and Human Rights) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1196 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E111 OF 2023  
LN MUGAMBI, J  
FEBRUARY 27, 2025**

**BETWEEN**

**ANTONY TAWAYI WAMUKOTA ..... 1<sup>ST</sup> PETITIONER  
ALICE NAFULA ..... 2<sup>ND</sup> PETITIONER  
RACHEL EMITEKWA ..... 3<sup>RD</sup> PETITIONER  
CHRISPUS WANYONYI ..... 4<sup>TH</sup> PETITIONER  
GEORGE LALA INDAKWA ..... 5<sup>TH</sup> PETITIONER  
PATRICK WASIKE ..... 6<sup>TH</sup> PETITIONER**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
INSPECTOR GENERAL, NATIONAL POLICE SERVICE ..... 2<sup>ND</sup> RESPONDENT  
DIRECTORATE OF CRIMINAL INVESTIGATION ..... 3<sup>RD</sup> RESPONDENT  
DIRECTOR OF PUBLIC PROSECUTIONS ..... 4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 9<sup>th</sup> April 2023 is supported by the 1<sup>st</sup> Petitioner’s affidavit in support of even date.



2. The gist of this Petition as supported by deposition in the 1<sup>st</sup> Petitioner's affidavit is that the Respondents' investigation and intended prosecution against the Petitioners is in abuse of office as it is maliciously driven by the politics of state corporations with the sole objective of barring the 1<sup>st</sup> Petitioner's potential appointment as the Chief Executive Officer of Kenya Electricity Transmission Company (KETRACO) hence is unlawful exercise of power and violation of the Petitioners constitutional rights.
3. In view of the foregoing, the Petitioners seek the following reliefs:
  - a. A declaration do hereby issue that the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondent were under a constitutional obligation to inform the 1<sup>st</sup> Petitioner of the reason of the impugned arrest, to inform him of his right to remain silent and the consequences of not remaining silent during his impugned arrest and detention on the March 23, 2023 as decreed under Article 49(1)(a) of the Constitution.
  - b. A declaration do hereby issue that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and/or its officers were under a constitutional obligation to allow the 1<sup>st</sup> Petitioner access to his phones and/or to offer him an alternative means of communicate with his advocates and other person whose assistance was necessary.
  - c. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are/were duty bound to inform the 1<sup>st</sup> Petitioner of the reasons of his detention at the 1st Respondents detention cells on the March 23, 2023 and to disclose the reasons for his continued detention through to the March 24, 2023.
  - d. A declaration do hereby issue that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's arrest and detention of the 1st Petitioner herein was inhuman, in dignifying, a threat to his life, illegal and unconstitutional as it contravened Articles 10,28 and 49 of the Constitution.
  - e. An order of prohibition do issue prohibiting the Respondents either by themselves, or their servants or employees from arresting, arraigning and/or charging/prosecuting the 1<sup>st</sup> Petitioner herein Antony Tawayi Wamukota, his mother (2<sup>nd</sup> Petitioner), wife (3<sup>rd</sup> Petitioner), brother (4<sup>th</sup> Petitioner) and his two friends (5<sup>th</sup> and 6<sup>th</sup> Petitioners) over the events of between 2018 to 2023 being the events of around Loiyangalani-Suswa project.
  - f. An order directing the Respondents to refund the 1<sup>st</sup> Petitioner herein the sum of Kenya Shillings, Six Hundred Thousand (Kshs. 600,000) illegally taken from his South C home in Nairobi on March 23, 2023.
  - g. An order directing the Respondents to compensate the Petitioner herein for the violation of his right to dignity as enshrined under Article 28 and for the violation of his rights as an arrested person under Article 49 of the Constitution.
  - h. Costs of the Petition and interests arising therefrom.
  - i. Any other order that this court will deem fit to grant in the circumstances.

#### **Petitioners' Case**

4. The 1<sup>st</sup> Petitioner states at the time of filing this suit he was the General Manager, Design and Construction at KETRACO.
5. For context, he depones that in 2017 he was appointed to head a project called Loiyangalani-Suswa. The contacting parties were Isolux Engineers Limited (Spain) as the main contractor, DNV Engineering (Netherlands) as the consultant, KETRACO as the employer, and the Government



- of Spain (through a loan to the Government of Kenya) as the financier. The project was valued at 142,038,152 Euros.
6. He avers that the purpose of the project was evacuation of electricity from Loiyangalani to Suswa. He informs that since the electricity was to be generated from wind, Lake Turkana Wind Power (LTWP) agreed with Kenya Power and Lighting Company (KPLC) that if LTWP completed its generating plant and the transmission line was not ready, KPLC would pay LTWP a sum of 10,000,000 Euros per month of delay in what was called Deemed Generated Energy (DGE).
  7. He depones that when he took over the project in 2017, the transmission line project was behind schedule and thus KPLC was already paying the mentioned penalties. He noted that the delay was being caused by the Consultant impeding progress. Further a lack of financial cash flows from Isolux which soon after became bankrupt forcing KETRACO to get a new contractor.
  8. He informs that the Isolux Contract with KETRACO was terminated in August 2017. Subsequently, KETRACO engaged the Consortium of NARI and Power China to complete the Project for USD 94,541,188.42. He notes that KETRACO also directly hired sub-contractors being Nyikaland, Global Engineers, Zeko, EGMF, Elemech, Vanqo, and Tamani to continue with the Project. Under his supervision the project was successfully completed in August 2018.
  9. He states that thereafter on 20<sup>th</sup> October 2020, he was appointed by the Managing Director to lead a Committee that was tasked to re-evaluate the outstanding invoices. In their proposal presented to the Board on 20<sup>th</sup> October 2020 they recommended a budgetary allocation of USD 16,244,123.77 to settle the outstanding invoices. He avers that in July 2021, the Managing Director informed him that the National Treasury had approved and issued money for part payment to NARI for the outstanding invoices.
  10. Referring to the Loiyangalani-Suswa Project, he avers that the 3<sup>rd</sup> Respondent in its investigations conducted in 2021 found no culpability in an alleged claim of misappropriation of funds. A similar report was also issued to the Parliament by the Auditor General.
  11. He additionally avers that in 2021, the Parliamentary Investment Committee commenced an investigation into alleged irregular payments to LTWP in the form of DGE penalties. As the other prior investigations conclusions, no fault was found on the part of KETRACO. The then Managing Director then left the organization in 2022. With his departure, the 1<sup>st</sup> Petitioner was appointed as the acting Managing Director. He asserts that it is at this point that his woes begun.
  12. He postulates that there are external forces that are seeking to bar his appointment to the substantive post. He claims that the Respondents are being used to tarnish his name and paint him as a corrupt individual unfit to hold this public office.
  13. In this regard, he avers that on 21<sup>st</sup> March 2023 while on a trip to Mombasa, he was informed by the General Manager, Human Resource and Development that he had been shortlisted for an interview for the position of Chief Executive Officer set for 4<sup>th</sup> April 2023.
  14. He states that soon after on 23<sup>rd</sup> March 2023, the 1<sup>st</sup> Respondent called and informed him that they were searching his office at Nairobi and thus required him to return to Nairobi so that they can also search his house. His wife at the same time alerted him that the 1<sup>st</sup> Respondent's officers were also searching their home in Webuye.
  15. He claims that as soon as he arrived at home that day he was arrested and detained in the 1<sup>st</sup> Respondent's cells at Nairobi. He asserts that he was not been informed of his offense neither supplied



- with a search warrant by the 1<sup>st</sup> Respondent before the searches were conducted. He avers that this caused him and his family untold sufferings and embarrassment.
16. He states that instead of being arraigned in Court the following day being 24<sup>th</sup> March 2023, the 1<sup>st</sup> Respondent's officers took him back to his house to commence their search. He informs that during the search the officers took Kshs.600,000/- without offering any explanation or what his offense was.
  17. It is stated that afterwards the Petitioners alongside his mother, brother, wife and two friends (Directors at Luanda Concrete & Earth Movers Limited) were summoned to the 1<sup>st</sup> Respondent's office. They were then interrogated without having their Counsel present and directed to write their statements.
  18. He contends that during the interrogation he together with the other Petitioners were shown several documents that were unrelated to the Loiyangalani-Suswa Project which was subject of the investigation. The documents were: a letter of introduction for the Directors of Luanda Concrete and Earth Movers to the Development Bank of Kenya; bank transfers from his account to Luanda Concrete and Earth Movers; documents of purchase of construction equipment where Luanda paid on behalf of a company his mother, and himself are shareholders; and a rough book where a rubber stamp for Luanda had been used for testing purpose.
  19. It is asserted that the 1<sup>st</sup> Respondent's allegations in this regard were false as no actual business was ever conducted between these parties and neither was money transferred as alleged. He however informs that he owns a company called Civil Build Developers that works with Luanda as its clients and another called Aliceson where they are shareholders with his mother. That notwithstanding he asserts that these three companies have never entered into a contract with KETRACO neither were they part of the subject Project.
  20. He believes that the 1<sup>st</sup> Respondent's involvement is aimed at interfering with KETRACO's recruitment process where he is a strong contender for the substantive post.
  21. The 1<sup>st</sup> Petitioner further avers that he has worked professionally during his tenure at KETRACO for the last 12 years and has never been involved in any form of financial impropriety. He also points out that right before he sat for his interview for the substantive post, he had been issued with Clearance Certificates from the 1<sup>st</sup> and 3<sup>rd</sup> Respondent.
  22. On this premise, he asserts that the Respondents' unlawful actions are geared towards the Petitioners malicious prosecution owing to the politics of state corporations. The Petitioners are further apprehensive that their constitutional rights will continue being violated if this Court does not intervene.

### **1<sup>st</sup> Respondent's Case**

23. In reaction to the Petition, the 1<sup>st</sup> Respondent through its Investigator, Danso Sia, filed a Replying Affidavit sworn on 17<sup>th</sup> May 2023.
24. He disclosed that he is part of the team that is investigating allegations of corruption, procurement irregularities, misappropriation of funds and conflict of interest concerning the Loiyangalani – Suswa Transmission Interconnector line Project by KETRACO.
25. He states that this investigation conducted under Section 11(1)(d) of the [Ethics and Anti-Corruption Commission Act](#), involves the Petitioner herein and other persons.



26. Contrary to the Petitioner's allegations surrounding the circumstances of his arrest and detention, he asserts that the 1<sup>st</sup> Respondent under Section 23 of the *Anti-Corruption and Economic Crimes Act* is empowered to make an arrest like a police officer.
27. Further, he informs that prior to the search of the 1<sup>st</sup> Petitioner's office and homes, the 1<sup>st</sup> Respondent obtained search warrants that were issued on 23<sup>rd</sup> March 2023 vide Miscellaneous Criminal Application No.E829 of 2023.
28. He avers that on the material day, the 1<sup>st</sup> Petitioner was informed of the intended search. The 1<sup>st</sup> Petitioner arrived at 18:45pm and found the 1<sup>st</sup> Respondent's officers waiting outside his house as they could not gain access inside. Due to the extensive nature of the search, the same could not be conducted that day. To prevent any likelihood of destruction of evidence, the 1<sup>st</sup> Petitioner was detained for the night. He states that the 1<sup>st</sup> Petitioner was well informed of the reason for his detention.
29. The intended search would thus to be conducted the next morning, 24<sup>th</sup> March 2023. The Petitioner's booking was recorded at the police station at the 1<sup>st</sup> Respondent's holding chamber under OB No. 09/23/3/2023. Moreover the Petitioner's return and release was also recorded under OB No.8/24/3/2023. The search commenced the next day at his house at 06:30am.
30. He asserts that the search, seizure, arrest and detention were solely done for the purpose for which it was intended and further conducted in a professional manner a fact that was admitted by the 1<sup>st</sup> Petitioner in his statement recorded on 24<sup>th</sup> March 2023. He further avers that the Search Warrant was acknowledged by the 1<sup>st</sup> Petitioner's at the bottom of the document.
31. He for this reason avers that the 1<sup>st</sup> Petitioner's allegations are a sharp contrast to what occurred on the material day and against his own statement. The Petition is hence argued to lack merit and so should be dismissed.

## **2<sup>nd</sup> to 5<sup>th</sup> Respondents' Case**

32. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents responses and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

## **Parties Submissions**

### **Petitioners' Submissions**

33. The firm of Sikuta and Associates Advocates for the Petitioners' filed submissions dated 2<sup>nd</sup> May 2023 and further supplementary submissions dated 26<sup>th</sup> February 2024.
34. Counsel in the first set identified the issues for determination as: whether the arrest and detention of the 1<sup>st</sup> Petitioner was illegal and unconstitutional; whether an Order of prohibition should be issued; whether the Petitioners are entitled to compensation for violation of their rights and whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent must be compelled to refund the 1<sup>st</sup> Petitioner Kshs 600,000 and all his Land title deeds and documents unlawfully taken from him.
35. On the first issue, counsel recapping the facts of the case as articulated in the 1<sup>st</sup> Petitioner's affidavit submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's actions were unlawful and unconstitutional contrary to Article 25, 26 and 49 of the *Constitution* and Section 49(4) and (10), 52,59 and the Fifth Schedule of the *National Police Service Act*. Counsel stated that these Respondents in making the search, seizure of the documents, arrest and detention, failed to adhere to the dictates of the law in handling the matter.



36. Consequently, as a result of the unlawful arrest Counsel argued that the 1<sup>st</sup> Respondent had violated the Petitioners constitutional rights by subjecting them to inhuman and undignified treatment whilst denying them their right to liberty. Reliance was placed in *M W K v another v Attorney General & 3 others* [2017] eKLR where it was held that:

“ Article 1 of the Universal Declaration of Human Rights, 1949 provides:-

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

37. Like dependence was placed in *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* [2018] eKLR, *Republic v Minister of State for Provincial Administration & Internal Security, ex-parte Emma Wanjiru Mbiyu* [2016] eKLR, *George Munene v Attorney General & Another* [2017]eKLR, *Hussein Ali v Republic* [2019] eKLR, *Joel Kilonzo Mwalili v Inspector General of Police & 2 Others* [2020] eKLR and *Republic v Stephen Kinyua Gikonyo* [2017] eKLR among others.
38. On the second issue, Counsel relied in *Dr. Willy Mutunga & another v. Attorney General & another* [2015] eKLR where it was held that:

“ The court has inherent jurisdiction to issue an order of prohibition in appropriate cases. It is an order that forbids the doing of an act which is contrary to law and can cause irreparable harm. The effect of an order of prohibition is to maintain the status quo ante, that is, to preserve the last uncontested status which preceded the act to be prohibited.”

39. Comparable dependence was placed in *Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003*[2007] 2 EA 170, *Republic v CS, In Charge of Internal Security & 3 others Ex-Parte Jean Eleanor Margaritis Otto* [2015] eKLR and *Kenya Revenue Authority v. E. A. Breweries Limited & 2 others* [2018] eKLR.
40. Counsel in this regard submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had adopted a flawed and unlawful process in the circumstances of this case thus justifying grant of this order.
41. Turning to the third issue, Counsel answered in the affirmative. This is in light of the constitutional violations that are made manifest in this matter as a result of the Respondents actions. Reliance was placed in *Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae)* [2019] eKLR where it was held that:

“It is well settled that an award of compensation against the state is an appropriate and effective remedy for redress of an established infringement of a fundamental right under



the *Constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case. In principle, constitutional damages as a relief separate and distinct from remedies available under private law is competent. This is because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.”

42. Equal dependence was placed in *Jamlik Muchangi Miano v Attorney General* [2017] eKLR, *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR, *Edwin Kariuki Waweru v Attorney General* [2019] eKLR, *Kevin Oduor Omwenga v Inspector General of Police & Another* [2019] eKLR and *Musa Amin & 5 Others v Attorney General & 2 Others* [2018] eKLR among others.
43. On the fourth issue, Counsel submitted that the *Constitution* guarantees the right to privacy, which includes the right not to have one's home entered or searched without consent or without a valid warrant. He noted that the Court in *Osman vs Director of Public Prosecution* [1999] ALL E.R stressed that for a search to be valid the police must identify himself, state the grounds for search, state the object of it and inform the subject of their right to a record of search findings.
44. It was asserted that in this case, this was not done by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Further that the officers went ahead and took Ksh.600, 000 that was found in the 1<sup>st</sup> Petitioner's house. Counsel as such urged that it was necessary that the Court order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents return this amount as was seized illegally.
45. To buttress this point Counsel relied in *Peter Wakaba Musyimi v Ethics and Anti-Corruption Commission* [2018] eKLR where it was held that:

“The search of an individual's residence without a warrant is a serious violation of the constitutionally protected right to privacy. The seizure of property not linked to any offence is also a violation of an individual's property rights. The courts have a duty to ensure that such violations are not allowed to go unpunished.”
46. Comparable dependence was placed in *Samuel Onyango Oduor v Director of Public Prosecutions & 3 others* [2021] eKLR, *William Kabogo Gitau v Director of Criminal Investigations & another* [2019] eKLR, *Daniel Ndambuki v Inspector General of Police & 4 Others* [2019] eKLR, *Fredrick Kiiru Githua & 4 others v Inspector General of Police & 4 others* [2018] eKLR and *David Mwangi Gitau v Inspector General of Police* [2018]eKLR among others.
47. In the supplementary submissions, Counsel informed that the 1<sup>st</sup> Respondent had on 6<sup>th</sup> June 2023 gone further and seized Ksh.1,075,000/-; copies of land sale agreements and title deeds from the 1<sup>st</sup> Petitioner. Additionally, that the 2<sup>nd</sup> Respondent had issued additional summons to the Petitioners alongside the 1<sup>st</sup> Petitioner's mother and the directors of Luanda Concrete and Earth Movers Limited. During the interrogation it was made known that they were being summoned for their purported involvement leading to a loss of Ksh.18.5 billion.
48. Counsel in the supplementary submissions argued that the Petitioners had not been granted a fair hearing by the 1<sup>st</sup> Respondent. Moreover, further stressing the Petitioners' case as supported by various caselaw, Counsel submitted that the 1<sup>st</sup> Respondent having concluded its investigations ought to be compelled to refund the 1<sup>st</sup> Petitioner's Kshs 1,675,000 in total, all his land ownership title documents and sale agreements that were seized.
49. It was further stressed that the 1<sup>st</sup> Respondent had withheld these beyond the stipulated legal time limit and failed to render a proper record of the seized documents and money to the Court as required



under Section 121 of the [Criminal Procedure Code](#) and Regulation 26 of the Leadership and Integrity Regulations, 2015.

### 1<sup>st</sup> Respondent's Submissions

50. Counsel, Joram Wambugu on behalf of the 1<sup>st</sup> Respondent, filed submissions dated 26<sup>th</sup> May 2023. The key issues for discussion were set out as: whether the 1<sup>st</sup> Petitioner's arrest, detention and seizure of evidentiary material was justified and whether the Court can interfere with the powers of the 4<sup>th</sup> Respondent.
51. Counsel in the first issue relying and reiterating the contents of the 1<sup>st</sup> Respondent's affidavit submitted that a lawful search warrant had been issued before the searches were conducted. Counsel stressed that the 1<sup>st</sup> Petitioner's allegations were refuted by his own statement which details that he was informed of the search and the reasons why the same could not be conducted on the material day of the arrest.
52. Counsel further urged the Court to appreciate that the 1<sup>st</sup> Respondent's mandate to search, seize evidence, arrest and detain is expressly granted under Section 23 and 32 of the [Anti-Corruption and Economic Crimes Act](#) and Section 121 of the [Criminal Procedure Code](#).
53. Reliance was placed in *Standard Newspapers Limited & another vs. Attorney General & 4 others* [2013] eKLR where it was held that:

“First, what the provision makes clear is that prior to conducting a search and seizure, police officers were required to obtain a search warrant; and that such warrant was then, as is the case now, to be issued by a judicial officer upon proof on oath that there is reasonable suspicion of commission of an offence. Police officers or other state agents could not, and cannot now, without such warrants, lawfully enter upon and search any premises, nor can they carry away any property without the authority of the Court.

Secondly, as is also clear from the provisions of the [Criminal Procedure Code](#) set out above, the onus is on the person seeking the search warrant to prove the necessity for such warrant. In *Vitu Limited -vs- The Chief Magistrate Nairobi & Two Others*, B.C. Misc. Criminal Application No. 475 of 2004 the court (Osiemo J.) remarked that:

It is therefore expected that when a police officer or any other investigator approaches the Court for a warrant, there must be reasonable suspicion of an offence being about to be committed or having been committed...”

Thirdly, the section contemplates that any evidentiary material that may be obtained from the place in respect of which the warrant has been issued is to be placed before the Court, and it is the Court to determine the mode of disposal thereof. In the words of Ojwang J. (as he then was) in the case of *William Moruri Nyaldba & Another vs- Chief Magistrate Nairobi & 2 Others*, Misc Crim Appli 414 of 2006 [2006] eKLR:

I would not consider the word "application" always to mean a formal, written application set for service upon interested parties. For the purpose of Police investigation of crime, an application made is likely in the first instance to be informal - and this, in the light of both S.19 of the Police Act and S.118 of the [Criminal Procedure Code](#), only needs to be accompanied by a statement on oath. Any evidentiary material retrieved on that basis is required under the law to be



part of a responsible criminal-investigation process which links up with criminal prosecution."

54. Referring to prayer 'e' in the Petitioners' prayers in the second issue, Counsel submitted that the 1<sup>st</sup> Respondent under Article 252 of the *Constitution* and Section 11(1) (d) of the *Ethics and Anti-Corruption Commission Act* is allowed to carry out investigations and thereafter make recommendations to the 4<sup>th</sup> Respondent for prosecution of suspected corrupt conduct. Further under Section 35 of the *Anti-Corruption and Economic Crimes Act* to issue a report on the results of the investigations.
55. Counsel submitted thus that once this is done, the 4<sup>th</sup> Respondent under Article 157 (6)(a) of the *Constitution* is mandated to institute criminal proceedings and in doing so is not under the direction or control of any person or authority as provided under Article 157(10) of the *Constitution*.
56. Considering this, Counsel argued that this relief was an invitation by the Petitioners to the Court to not only interfere with the 4<sup>th</sup> Respondent's power but to do so prematurely.
57. Reliance was placed in *Joshua Owour vs. Director of Public Prosecutions & another* [2019] eKLR, where it was held that:
- "...the power to prosecute or not to prosecute solely belongs to him. The recommendations of the investigating officer are not binding on the DPP. The DPP can reject a recommendation to prosecute. He can also decide, upon independent review of the evidence, to prosecute a person that the investigator has not recommended for prosecution."
58. Comparable reliance was placed in *Stephen Oyugi Okero vs. Chief Magistrate's Court at Milimani Law Courts (Criminal) & another* [2018] eKLR and *Republic vs. Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others* [2016] eKLR.

### **Analysis and Determination**

59. In my view, the issues that arise for determination are as follows:
- i. Whether the Respondents' abused their constitutional and statutory mandate in carrying the investigation against the Petitioner and thus violated the Petitioners' constitutional rights.
  - ii. Whether the Petitioners are entitled to the reliefs sought.

### **Whether the Respondents' abused their constitutional and statutory mandate in carrying the investigation against the Petitioner and thus violated the Petitioners' constitutional rights.**

60. In order to determine the question as to whether the Respondents abused their mandate or power, first, it is necessary to lay bare the mandate of the 1<sup>st</sup> Respondent since it is apparent that the Petitioner's grievances are apparently exclusively directed against the 1<sup>st</sup> Respondent. Indeed, based on the facts relied on, it is manifest that the Petitioner's primary complaint is against the 1<sup>st</sup> Respondent. The other respondents are secondary or peripheral. I will thus dwell majorly on grievance against the 1<sup>st</sup> Respondent which I consider to be the gravamen of this Petition.
61. The *Constitution* makes reference to the 1<sup>st</sup> Respondent under Chapter 6 under of the *Constitution*, in particular, Article 79. It stipulates thus:

Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter



Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

62. Article 79 is then operationalized through the enactment of the Ethics and Anti-Corruption Act, (EACC Act) which at Section 3 of the *Ethics and Anti-Corruption Commission Act* (EACC) establishes the 1<sup>st</sup> Respondent as commanded by Article 79 of the *Constitution*.

63. The functions of the 1<sup>st</sup> Respondent under Section 11(1) of the EACC Act are stipulated as follows:

In addition to the functions of the Commission under Article 252 and Chapter Six of the *Constitution*, the Commission shall—

- (a) in relation to State officers,—
  - (i) develop and promote standards and best practices in integrity and anti-corruption;
  - (ii) develop a code of ethics;
- (b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;
- (c) receive complaints on the breach of the code of ethics by public officers;
- (d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the *Constitution*;
- (e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
- (f) oversee the enforcement of codes of ethics prescribed for public officers;
- (g) advise, on its own initiative, any person on any matter within its functions;
- (h) raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes (Cap. 65) as to confidentiality;
- (i) subject to Article 31 of the *Constitution*, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and
- (j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.

64. Under Section 13 of the Act, the powers of the 1<sup>st</sup> Respondent include:

1. The Commission shall have all powers generally necessary for the execution of its functions under the *Constitution*, this Act, and any other written law.



2. Without prejudice to the generality of subsection (1), the Commission shall have the power to—
    - a. educate and create awareness on any matter within the Commission’s mandate;
    - b. undertake preventive measures against unethical and corrupt practices;
    - c. conduct investigations on its own initiative or on a complaint made by any person, and
    - d. conduct mediation, conciliation and negotiation.
    - e. hire such experts as may be necessary for the performance of any of its functions.
65. In *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2018] eKLR the Court held as follows:
- “73. The EACC is the only constitutional Commission that is not specifically located in Chapter Fifteen of the *Constitution*. [48] Its composition and aspects of its mandate are specifically statutory. [49] Subject to the provisions of Article 79 of the *Constitution*, the EACC was established by the EACC Act...
  78. The EACC is mandated under Section 11(1)(d) of the ACECA to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to Chapter Six of the *Constitution*. Further, under the provisions of Section 35 of ACECA as read with the provisions of Section 11(1) (d) of EACC Act, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not...”
66. In addition, the *Anti-Corruption and Economic Crimes Act* gives EACC Investigators similar powers and privileges as those of the police officers. Section 23 of the Anti-Corruption and Economic Crimes provided thus:
23. Investigators
    - (1) The Secretary or a person authorized by the Secretary 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 Secretary or an investigator.
    - (3) For the purposes of an investigation, the Secretary and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Secretary or investigator has under this Part.
    - (4) The provisions of the *Criminal Procedure Code* (Cap. 75), the *Evidence Act* (Cap. 80), the *National Police Service Act* (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to



the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator.

67. The Petitioner complained that that the 1<sup>st</sup> Respondent abused its powers of arrest to maliciously harass, intimidate and oppress him, his family and friends for extraneous reason linked to state corporations' politics that was unconnected with upholding of the rule of law. According to the Petitioner, it aimed at ensuring he did not ascend to the helm of KETRACO as the Managing Director.
68. Courts exercise restraint in matters that involve investigations and only interfere when it is crystal clear that an investigation is actuated by bad faith or malice. This finds support in the case of Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR where it stated as follows:

“24. It is trite that the Court ought not to usurp the Constitutional mandate of the Respondents to investigate any matter that, in the Respondents' view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the Respondents since the purpose of a criminal investigations conducted bona fide is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid... However, if the applicant demonstrates that the investigations that the investigators intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are conferred.”

69. The Court of Appeal in Commissioner of Police & the Director of Criminal Investigation Department & another (supra) reiterated the same position. The Court held:

“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged... It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process.”



70. Whereas the Petitioner alleges bad faith on the part of the investigator, it is the responsibility to tender evidence malice or bad faith as was held by the Court in Leonard Otieno vs Airtel Kenya Limited [2018] eKLR, where the Court stated thus:

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues.

Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses...”

71. The question that I now need to answer is whether the allegation of abuse of power by the Respondents has been established.

72. The Petitioner deponed that the investigations by the 1st Respondent related to Loyangalani-Suswa power line that was to evacuate electricity from Lake Turkana Wind Project to Suswa in which he became project Manager in 2017 at a time when the project was 57% complete. Before that, Engineer Fanuel Tsuma had been the project manager. He claimed he supervised the project professionally until it was completed successfully in September, 2018. He later participated in a committee that was re-evaluating outstanding invoices to ensure accuracy of invoices which task they also completed and a report with proposed budgetary allocation of \$16,244,123.77 handed over to the Board. He stated that the investigations by the National Police (3<sup>rd</sup> Respondent) and the Parliamentary Committee did not find any wrongdoing in regard to that project.

73. The Petitioner believes that his tribulations at the hands of the 1<sup>st</sup> Respondent are linked to this quest to succeed the former Managing Director who left the Organization and the Petitioner was appointed the Acting Manager Director. That the investigations commenced after the interviews for the substantive position of the CEO of KETRACO were confirmed. He stated that when he put in his application on 21<sup>st</sup> March for the interview scheduled to take place in April 2023; he was called by an EACC Officer on 23<sup>rd</sup> March, 2023 to inform him they were searching his office. The wife also called and informed him that they were searching his Webuye home. He states thus:

“...These simultaneous instances were orchestrated to trample upon my constitutional rights as had not been informed by the 1<sup>st</sup> Respondent what offence I had committed prior to the said searches and no search warrant had been shown to me...”

74. The Petitioner arrived at his office later that evening, 1800 hours to find they had left with a pile of documents and reaching his Nairobi home, he found EACC Officers at the gate who arrested him and without informing him the reason for his arrest or giving him a chance to speak his advocate. He was locked up until the following day when he was taken to his Nairobi Home where he was held between 6.00 a.m. to 8.00 P.M. The Petitioner believes what he taken through is witch hunt that is connected to state corporation politics.

75. The 1<sup>st</sup> Respondent denied allegations of malice and stated that it was exercising its mandate under Section 11 (d) (i) of investigating corruption, procurement irregularities, and misappropriation of public funds and conflict of interest on Loyangalani - Suswa Transmission Interconnector. That prior to carrying out the search; the 1<sup>st</sup> Respondent applied for warrants of search in Misc Application E829



of 2023. That the Petitioner concedes that he was informed about the impending search of his residence in Nairobi at 1845 hours where EACC Officers had been on standby but had been unable to access. That since it was past sun-set, the Petitioner was informed the search could not take place and to ensure evidence was not tampered with, they informed him of his rights under Article 49, 50 and 51 and had him in custody to avoid possible tampering with the material and thus went back early in the morning, on 24<sup>th</sup> march, 2023 with the Petitioner to carry out the search. He was booked under OB 09/23/3/2023 at 2023 hrs and the following day removed and escorted to his residence for the search under 08/24/3/2023 on 24<sup>th</sup> March, 2023 at 0630 hrs. That the arrest was only meant to secure the purpose for which it was intended and not meant to punish him. That the Petitioner concedes in his handwritten statement of 24<sup>th</sup> March 2023 the search was carried out professionally.

76. With due respect, I find it unconvincing for the Petitioner's to claim that the purpose of this investigation is to tarnish his name so as to spoil his chances of becoming the Managing Director of KETRACO. The fact that there was an impending interview that he was to attend does not shield or protect him from undergoing an investigation process. It is not bar to the 1<sup>st</sup> respondent from exercising its legal mandate as empowered by the law. Further, the fact that the 3<sup>rd</sup> Respondent and the Parliamentary Committee had done and completed investigations on the same subject matter that yielded nothing does not stop the 1<sup>st</sup> Respondent who has an independent mandate from investigating corruption and economic crimes.
77. Moreover, despite the Petitioner claiming in his affidavit that he was not allowed an opportunity to speak to his Advocate, in the handwritten statement which he does not deny having authored, he acknowledges that before going to EACC; he met with his Advocate for legal advice. In the said written statement, that he does not say he was denied to see his advocate, or that he required the presence of his advocate before writing his statement and was denied or that the advocate came and was denied audience with him.
78. The Petitioner further states he was arrested without just cause but the existence of the search warrant issued by a competent Court allowing a search into his house to be done in connection with investigation of the named offence(s) is prima facie proof that prior to issuing the search warrant, the Court was satisfied on oath as to the existence of reasonable suspicion about the commission of the offence either by him or was connected to their commission.
79. In fact, the Petitioner acknowledges that the search warrant was shown to him and he appended his signature on it before the search in his house was conducted.
80. The Petitioner further complained he had not been given notice in advance about the impending search. A search pursuant to warrant can only be done discreetly otherwise it would lose its objective as prior publication can lead to concealment of the information hindering collection of evidence dealing a blow to the pursuit of justice. Article 47 on fair administrative action on the issuance of notice cannot be invoked as an investigation is not an 'administrative action'. It is regulated by their special procedures that govern investigations. This was the holding of the Supreme Court in Ethics and Anti-Corruption Commission & Anor v Tom Ojienda, Sc T/A Prof. Tom Ojienda and Associates Advocates and 2 Others Petition 30 & 31 of 2019 (Consolidated) [2022] KESC 59 (KLR) the Court stated thus:

“ 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 Ed) defines “administrative action” to mean “a decision or an implementation relating to the government’s executive function or business management.” Burton’s Legal Thesaurus (4<sup>th</sup> Ed) defines the adjective “administrative” to mean among others, “directional, guiding, managerial, regulative, supervisory.

58. Does the 1<sup>st</sup> Appellant 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 among 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 specific legal regime, to be exercised for a special purpose...”

81. Indeed, it has been held that the application of the fair hearing principle under Article 50 only applies in trials or quasi-judicial proceedings where a conclusive resolution has to be made as was held in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR where the Court observed thus:

“(22) .... Although on the surface, the three principles appear to refer to the same thing, on deeper examination they are of different legal character and their application may not be necessarily the same. Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. “Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.

It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.”

82. Moving on, I have also considered the justification given for arresting the Petitioner that night and releasing him the following day. It was to ensure the integrity of the intended search and preservation of the possible evidence. I do not think that there was any sinister motive or abuse of power on the part of the 1<sup>st</sup> Respondent. I find the explanation given by the Respondent justifiable.



83. The Petitioner's claims in his affidavit filed before this Court and in the statement, he recorded with the 1<sup>st</sup> Respondent on 24<sup>th</sup> March 2023 clearly exposes great inconsistency and dents his credibility. Annexure DS-1 in the 1<sup>st</sup> Respondent's affidavit which comprises the Petitioner's handwritten statement confirms that he had prior to going to EACC sought legal advice and was in company of his brother all along. He states he was treated with respect during the entire episode. He says:

“...That in January, 2023, I was in Mombasa heading to Airport when I was called that I had some officers from EACC at my offices at Kawi House in South. I had a problem with my phone, and therefore informed the officer from EACC that once in Nairobi I will present myself at our offices. When I arrived at around 1.00 P.M.; the first thing was to seek the legal advice which it took some time. Further, I had to wait for my brother Chris Omoyo who had my house keys. Upon receiving legal advice, I proceeded to our office at around 1745 hrs. At that time, the EACC Officers had left KETRACO offices. Together with my brother, we proceeded to my house in five star road where we met police officers who served me with compellance (sic) to appear at Integrity Centre Police Station and where I spent the night as I was informed that the search warrant cannot be executed past 1800 hours. Today, on 24<sup>th</sup> March, 2023, at around 0625 hours, we left in company of EACC Officers to my house, I was served with the Court order E829/23 which I acknowledge by way of signing at 0632 hours.

The Officers proceeded to search my house in my company and recovered documents among them Kshs.600,000/-. Upon completion, I signed all the inventories of documents retained by officers and remained with copies.

I wish to state that the search was carried out in a professional manner and with actual respect...”

84. This petition lacks merit and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**L N MUGAMBI**

**JUDGE**

