



Republic v Ethics and Anti Corruption Commission & another; Sand Transporters & Environmental Conservation Group (Interested Party); Mutinda & another (Exparte Applicants) (Judicial Review Miscellaneous Criminal Application 1 of 2023) [2024] KEHC 2177 (KLR) (28 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
JUDICIAL REVIEW MISCELLANEOUS CRIMINAL APPLICATION 1 OF 2023**

RK LIMO, J

FEBRUARY 28, 2024

BETWEEN

REPUBLIC APPLICANT

AND

THE ETHICS AND ANTI CORRUPTION COMMISSION 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

AND

SAND TRANSPORTERS & ENVIRONMENTAL CONSERVATION GROUP INTERESTED PARTY

AND

MUYUMA MUTINDA EXPARTE APPLICANT

JACKSON MUTAI WAMBUA EXPARTE APPLICANT

JUDGMENT

1. The Exparte applicants herein Muyuma Mutinda and Jackson Mutai Wambui have sued the Ethics and Anti-corruption Commission and the Director of Public Prosecution (the 1st and 2nd Respondents respectively) and their major complaint is that the 1st Respondent applied for search warrants directed at a 3rd party (the offices and officers of Kitui county Government) but acted in excess of the limits of the search warrants by intercepting and harassing the 1st ex-parte applicants who claim were going about their work of collecting transport fees (cess) from sand transporters for payment to the County Government of Kitui and in the process, the 1st Respondent confiscated a total of Kshs. 174,000/= in cash and a mobile phone.



2. The ex parte applicants contend that they are not employees of Kitui County Government but members of Sand Transporters and Environmental Conversation Group, The Interested party herein.
3. The 1st Respondent on the other hand deny the ex parte applicants' allegations and insist that the ex parte applicants were involved in suspicious activities of collecting some money from lorries transporting sand from Mwingi and only issuing receipts of Kshs. 1000/= yet they collected 6000/= from each lorry. It further contends that they will carry out investigation to establish why the ex parte applicants were working in a County Cess point and where the proceeds of the unreceipted money were going.
4. The ex parte applicants' case

The ex parte applicants have instituted these Judicial Review proceedings vide substantive motion dated 8th May 2023 invoking Articles 3, 22(1), 23(1), 27 (1), 47 (1) &2 and 165(b) of *the Constitution* of Kenya and section 7, 8, 9, 10, &11 of the fair Administrative Actions Act and Section 3(1) of Judicata Act.

They seek the following orders/reliefs namely;

- i. That there be orders of certiorari to call for and remove to the High Court the administrative action or decision to arraign the ex-parte (applicants) herein before a court of law to answer a charge of corruption and economic crime.
 - ii. That there be orders of prohibition against arraigning the ex-partes (applicants) herein before a court of law to answer charges of corruption and economic crime.
 - iii. That there be a declaration that the 1st Respondent acted in abuse, misuse and ultra vires the limits and the extent of the search warrants issued on 3/4/2023 in CMC Misc. Application No.E112 of 2023-Machakos, Ethics and Anti-corruption Commission vs County Government of Kitui.
 - iv. That there be a declaration that the action by the 1st Respondent to intercept, stop and search and impound cash money and mobile phone belonging to the ex-parte (applicants) herein were in violation of the freedom and fundamental rights and fair administrative action as per article 47 (1) and (2) of *the Constitution*.
 - v. That there be a declaration that the 1st Respondent is obligated by law to refund cash sum of Kshs 174,000/- and mobile phone confiscated from the applicants (ex-partes) herein.
 - vi. That the 1st respondent to pay costs of the application.
5. This Motion is supported by grounds set out on the statutory statement of facts dated 8th May 2013 and the supporting affidavit of Muyama Mutinda the 1st ex parte applicant herein. The grounds are summarized on here below (a) to (g) as in para 2.
 - a. This court has the supervisory jurisdiction over bodies commission, persons, institution, tribunals among others who exercise powers which may affect the rights and interests of any persons(s). such jurisdiction is granted as per article 165(6) as read with (7) of *the Constitution*.
 - b. The court has jurisdiction as per article 165 (3), (a), (b) (d) to determine any issue relating to violation of any freedom and fundamental rights to any person complaining about the same and also the jurisdiction to interpret *the constitution*.



- c. The 1st Respondent acted in excess or ultra vires in limit of search warrants issued by court on 3/4/2023.
 - d. The 1st Respondent acted in a manner in violation of the rule of law, the rules of natural justice, the due process and the law.
 - e. The 1st Respondent acted in abuse, misuse and unjust manner by roping in or extending the search warrants to affect the transporters, interested party and the applicants, (ex-partes)
 - f. The 1st Respondent acted in violation or breach of the right to an administration action that is lawful, reasonable, fair, just and procedural.
 - g. The 1st Respondent acted in violation or breach of the fundamental rights of the ex-partes (applicants) herein to the protection of the law.
6. In his supporting affidavit, the 1st ex-parte applicant depones that he is an employee of the 1st Interested Party who is involved in sand transportation among other businesses and that the 1st Interested Party operates as a registered self-help group. He further avers that the 1st Interested Party pays cess and transportation fees to the County Government of Kitui. He proceeds that on 13/4/2023, some of the 1st Interested Party's lorries were intercepted at Mwingi Shell filling station by officers from EACC, the 1st Respondent herein on the strength of a search warrant dated 3/4/2023. That the 1st Respondent's officers harassed and manhandled the two ex parte applicants and, in the process, confiscated a sum of Kshs 174,000/-. The deponent avers that the money consisted of proceeds from deliveries done to some of their customers and that the money belonged to the 1st Interested Party. The deponent denied being an employee of the County Government of Kitui and further denied collecting cess fees on behalf of the County Government of Kitui. He proceeds that the 1st Respondent bonded them to appear in court on 27/3/2023 to answer to charges of corruption and economic crime.
7. The deponent swore a Supplementary Affidavit on 23rd June 2023 where he avers that the 1st Respondent overstepped its mandate as its obtained orders to investigate cess collection officers working for the County Government of Kitui but in turn investigated the two ex-parte applicants and further had its officers' storm into their employers' premises (the 1st Interested Party) at Tyaa river. He avers that there is no county cess collection point at Tyaa river and points out that the same was confirmed in the affidavit of Caroline Kilunya, a cess collection officer from the county. The deponent further denies the allegation that the 1st Interested Party collects Kshs 6,000/- and avers that they only collect Kshs 1,000/- from members and thereafter make payment to the County Government of Kitui. The deponent also faults the manner in which the 1st Respondent's investigation officer went about his investigations and avers that he should have obtained search warrants against the ex-parte applicants or their employer, the 1st Interested Party if they had reasons to suspect them.
8. The ex-parte applicants filed an affidavit sworn by James Rukuru Wanyoike on 23rd June 2023 who averred that he was the driver of motor vehicle registration number KDL 247K Isuzu make lorry. He also averred that he gave his turn boy Kshs 1000/- to pay sacco fees at Tyaa River.
9. The ex-parte applicants also placed reliance on the affidavit of Stephen Ngangi Maluki sworn on 16th June 2023 who averred that he worked for the 1st Interested Party and reiterated that the County Government cess collection point is located at Ngutani and Kanyonyo and not at Tyaa river. He also averred that the Interested Party collects money from each lorry for its Sacco and not on behalf of the County Government of Kitui.



10. In their written submissions dated 16th September 2023 done through their learned Counsel A.M.Kilonzi and Co. Advocate the ex parte applicants submit as follows in summary;
- a. That the ex-parte applicants are seeking orders of certiorari and prohibition to remove the administrative (investigative) action or decision to arraign them before court to answer to a charge of corruption and economic crime founded upon investigations and seizure of exhibits and evidence obtained using search warrants dated 3/4/2023.
 - b. The ex-parte applicants are also seeking declaratory prayers that the 1st Respondent abused the limits and extent of search warrants dated 3/4/2023 by intercepting, stopping, searching and impounding cash money and mobile phones belonging to the ex-parte applicants which resulted in a violation of their fundamental rights of fair administrative action.
 - c. That the 1st Respondent sought prayers for a search warrant specific to Kitui County Government cess collection points for purposes of investigating commission of corruption and economic crimes suspected to have been committed by cess collection officers working for Kitui County Government. That despite the search warrant being specific, officers from the 1st Respondent's office impounded the Interested Party's private business premises at Tyaa searched and confiscated property belonging to the ex-parte and Interested Party without following due procedure. Counsel has cited the case of *Philomena Mbete Mwilu v Director of Public Prosecution & 3 Others* [2019] eKLR where the Court of Appeal granted orders of certiorari quashing proceedings instituted against the Petitioner after making a finding that the evidence underpinning the intended prosecution had been obtained in a manner that was detrimental to administration of justice. In reaching that determination, the appellate court found that the DCI had illegally obtained evidence against the Petitioner by gaining access to her accounts through the use of a court order that had no bearing on her accounts- hence misusing the court order.
 - d. In relation to violation of the rule of law, counsel submits that the ex-applicants are specifically challenging the process that was used to initiate the investigations. That the search warrants were obtained to investigate and most probably charge the cess collection officers of the county government of Kitui but were instead used against the ex-parte applicants who were ultimately issued with notices to appear before court to answer to charge of corruption and economic crimes. Counsel submits that the 1st Respondent ought to have followed the law in executing its mandate by complying with the provisions sections 26,27 and 28 of the *Anti-corruption and Economic Crimes Act* (ACECA). Specifically, counsel submits that the 1st Respondent was required to issue notices to the suspects and accord them an opportunity to furnish a statement and follow the procedure provided for access of records and information from suspects. For failing to do that, counsel submits that the 1st Respondent abused and misused the search warrants. Counsel has placed reliance on the cases of *Philomena Mbete Mwilu vs Director of Public Prosecution & 3 Others* (supra), *R v Anti-counterfeit Agency, Ex-*



parte Caroline Mangala t/a Hair Works Salon [2019]eKLR and Maina & 4 Others vs Director of Public Prosecutions & 4 Others [2022]. The three decisions discussed the element of public officers defending their actions by citing that their duties were performed in good faith. It was however held that statutory immunity cannot stand where there is a demonstration that an act was performed in bad faith and has placed reliance on Stanley Munga Githunguri v Republic [1986] eKLR that “[a] prosecution is not to be made good by what it turns up. It is good or bad when it starts.”

- e. On violation of fair administrative action counsel submits that investigative actions are administrative actions hence subject to article 27 of *the Constitution* as read with Part II of the Fair Administrative Actions Act. He proceeds that sections 26, 27 and 28 of the ACECA were breached because of the following;
 - i. There was no notice issued to the suspects for a demand of a statement, records and information as provided under section 26.
 - ii. There was no application to court for orders requiring the ex-parte applicants to supply information to the 1st Respondents as provided under section 27 & 28
- f. On the right to equal protection of law, counsel submits that the same way that the 1st Respondent moved to court to procure search warrants against Kitui County Government Cess collection officers, they should have been applied in relation to the ex-parte applicants and the Interested Party.

11. The interested party’s case.

The Interested Party filed a Replying Affidavit through its Chairman Peter Kalungu sworn on 16th May 2023 who averred that the Interested Party is a business group involved in the business of transporting sand, quarry, stones, ballast, hardcore and other building and construction materials within Kitui County. That the Interested Party collects money from each of its lorries which is later collectively paid to the County Government as transportation levy. He avers that the 1st ex-parte applicants collect the money with the assistance of the 2nd ex-parte applicant who works for the Interested Party and not the County Government of Kitui.

The interested Party insists that the 1st ex-parte applicant is mandated to receive the money from sand transporters and deposit the same with County Revenue Account while the 2nd ex-parte applicant is a multi-task person assisting the interested party’s drivers and the 1st ex-parte applicant. It insists that they only collect Kshs. 1000/= from each lorry and not Kshs. 6,000/= as alleged by the 1st Respondent adding that the cess collection point is at Ngutani and Kanyonyoo and not at Tyaa River or near shell Petrol Station Mwingi. They have exhibited some deposit slips from KCB claiming that the same demonstrates payments or deposits to the County Government Revenue Account. The exhibited payslips are however not legible but I will get back to that issue later in this judgement.

12. The 1st Respondent’s Case

The 1st Respondent opposes this application vide the Replying Affidavit of Amos Ole Tiren, an investigator with the Ethics and Anti-Corruption Commission sworn on 9th June 2023. The officer avers that the commission received a complaint on 17th November 2022 from members of the public that Kitui County Government Revenue Collection officers in collaboration with employees of the Interested Party were illegally collecting cess from trucks ferrying sand along the Thika-Garissa



- Highway. That it was further alleged that the trucks paid Kshs 6,000/- but were issued with a receipt of Kshs 1,000/- leaving a balance of Kshs 5,000/- unaccounted for.
13. The officer averred that based on the above complaint, the commission embarked on investigations which revealed that trucks ferrying sand from Mwingi made a stop at an area called Tyaa where the turn boys would alight from the truck and proceed to the cess collection point/shed located next to Mwingi Shell Petrol Station where they would pay Kshs 6000/- but were issued with a receipt of Kshs 1,000/-. The deponent averred that the persons who the money was paid to were employees of the Interested Party and that it was not clear why they purported to collect cess on behalf of the County Government of Kitui. The officer further avers that the investigations revealed that upon reaching the next cess point situated at Ngutani area, the receipt would be verified by revenue officers manning the cess point. That the third stage was Mwingi-Kanyonyo junction (Kanyonyo) cess collection point where the receipts would be collected by revenue officers. He averred that the 1st Respondent also established that there was a Kitui County vehicle registration number KCA 417 F which was parked next to a shed where illegal cess collections were taking place.
 14. It is averred that based on the outcome of the investigations, the 1st Respondent obtained a court order to search the three revenue collection Centers at Tyaa, Ngutani and Mwingi-Kitui junction (Kanyonyo) which was executed on 13/4/2023 at two areas, Tyaa and Kanyonyo. The deponent averred that the ex-parte applicants were found at Tyaa area cess collection point/shed where they informed the 1st Respondent's officers that they were employees of the Interested Party and that they were collecting cess fees on behalf of the Interested Party and County Government of Kitui. That the 1st Respondent's officers conducted a search at the scene and recovered receipts books, stamps and stamp pads, one mobile phone and Kshs 174,000/-. That as the operation was happening, a truck registration No. KDL 247 K Isuzu Make stopped along the road and the officers asked the ex-parte applicants to attend to him. The deponent averred that the 2nd ex-parte applicant received Kshs 6000/- from the vehicles' turn boy and issued a receipt for Kshs 1,000/- That the second ex-parte applicant then told the investigators that all the money collected was to be handed over to a Mr. Stephen Ngangi who would then hand it over to a Mr Peter Kalungu who was the Interested Party's chairperson. That the investigators escorted the ex-parte applicants to Kanyonyo Police Station where they recorded their statements and were thereafter released on a Kshs 20,000/- cash bail. He averred that the team then proceeded to Mwingi-Kitui junction (Kanyonyo) where they found three revenue officers. That they conducted a search and recovered eight receipts (issued by the Interested Party), Kitui County Invoices among other items. That the officer in-charge at Mwingi-Kitui junction (Kanyonyo), Caroline Kilungya was also escorted to Kanyonyo Police Station where she recorded a statement, was processed and released on a cash bail of Kshs 20,000/-. The deponent avers that investigations were still ongoing and that upon conclusion, the commission would forward the inquiry file with its recommendations to the 2nd Respondent. It contends that the applicants have not met the threshold of grant of Judicial Review orders as they have not placed material before the court demonstrating that the commission's decision was unconstitutional, discriminatory, irrational, unlawful unreasonable, procedurally unfair or contrary to the dictates of article 47 (1) of the constitutional, ultra-vires or contrary to the law.
 15. In its written submissions dated 26th September 2023 done through learned counsel M/S Ebby Kashindi, the 1st Respondent submits that it executed the search warrants properly by accessing the Kitui County Cess points at Tyaa and Kanyonyoo as permitted by the court issuing the search warrants. The 1st respondent contends that it is investigating the circumstances under which a private person was collecting revenue on behalf of a public body.
 16. Counsel takes issue with the affidavit sworn by James Rukuru Wanyoike on 23rd June 2023 and submits that the deponent is a stranger to the proceedings. She submits that the affidavit should be struck from



the record. I have noted that leave was granted by the Deputy Registrar during pre-trial on 13/6/2023). The affidavit is therefore properly on record.

17. On whether the commission violated provisions of sections 26,27 & 28 of the *Anti-Corruption and Economic Crimes Act*, counsel contend that the warrants were obtained procedurally and that the ex parte applicants have only raised claims at submissions stage.
18. The 1st Respondent submits that the orders sought in these Judicial Review proceedings are unobtainable against the 1st Respondent insisting that it acted within its mandate. It contends that the Judicial Review are premature at this stage adding that the ex parte applicant's should be condemned to pay costs.
19. The 2nd Respondents case.
The 2nd Respondent also opposes the application vide the affidavit of Pauline Karimi Mwaniki sworn on 7th August 2023 who avers that the application is pre-mature as investigations by the 1st Respondent are still ongoing.
20. The 2nd Respondent avers that under Article 157 (6) (a) its office is mandated to institute Criminal proceedings against any person in court (other than a court martial) in respect to any offence and that in executing its mandate it does not require the consent of any person or authority from anyone.
21. It contends that it is yet to receive a file in respect to the complaints raised by the ex parte applicants.
22. In its view, the applicants have not demonstrated any un-constitutional, unlawful, irrational or any wrong doing directed at them. It contends that the motion herein is frivolous only aimed at preventing the 1st respondent from carrying its mandate in order to circumvent Justice.
23. This court has highlighted the ex parte applicant's case as well as the interested party's position. I have also highlighted the first and second respondent's respective responses.
24. The center of the dispute before the court revolves around a search warrant that was issued on 3rd April 2023 vide Machakos CM's Court Misc Cri. App No. E112 of 2023 where the 1st Respondent sought an order allowing its officers to gain access into cess collection points situated at Tyaa, Nguutani and Kitui-Mwingi junction. The 2nd Respondent through its investigator Amos Ole Tiren averred that the 2nd Respondent had received a complaint from members of the public that Kitui County Government Revenue Collection officers in collaboration with employees of Sand Transporters and Environmental Conservation Group (the Interested Party) were illegally collecting cess from trucks ferrying sand along the Thika-Garissa Highway. Further, that the trucks were paying Kshs 6,000/- and were being issued a receipt of Kshs 1,000/-. It was averred that it was against this backdrop that the 1st Respondent applied for issuance of a search warrant which would enable them access the aforementioned cess points. The operation occurred on 13th April 2013 leading to the arrest of the two ex-parte applicants herein. On their part, the Interested Party together with the ex-parte applicants aver that the 1st Respondent overstepped its mandate and expanded the scope of the search warrant when it arrested the ex-parte applicants yet the search warrant was in relation to cess points operated by Kitui County Government. They aver that they were in their ordinary cause of business in the 1st Interested Party's employ and that they are not employees of the County Government of Kitui and further, that they were not collecting cess fees on behalf of the County Government. The ex-parte applicants now want the court to issue an order of certiorari quashing the administrative action or decision to arraign them before court to answer to a charge of corruption and economic crime. The ex-parte applicants aver that their right to fair administrative action as well as their right to equal protection of law were violated.



25. The main issue for determination in this matter is whether the 1st respondent overstepped its mandate while executing the search warrants dated 3rd April 2023 and whether or not the ex parte applicant's constitutional rights were violated as a result.

(i) Whether the 1st Respondent overstepped its legal mandate.

26. The 1st Respondent contention is that it properly executed the search warrant by accessing the Kitui County Cess Collection Points situate at Tyaa and at Kitui-Mwingi junction. The scene in contention in this matter is Tyaa where the ex-parte applicants were arrested. As stated above, the ex-parte applicants contend that the warrant was restricted to the Kitui County Government cess points and by arresting them at Tyaa, which they described as their place of work at the Interested Party's premises their constitutional rights under articles 27 (1) & (2) and 47 of *the Constitution* were violated. Did the actions of the 1st Respondent in execution of the search warrant infringe on the rights of the ex-parte applicants? It was submitted by the ex-parte applicant's counsel that in the spirit of maintaining equality, the 1st Respondent ought to have taken out search warrants specifically against the ex-parte applicants or the interested party and in failing to so, the 1st Respondent violated procedures provided for under Sections 26 and 27 of the *Anti-Corruption and Economic Crimes Act*. The 1st Respondent on this score faults the ex parte applicants for raising the matter at submissions stage. It insists that it followed due process in its actions.

27. The ex parte applicants have invoked inter alia Article 27(1) & (2) and 47 of *the Constitution*.

28. Article 27 (1) & (2) of provides for equality as follows;

- i. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- ii. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

29. Article 47 provides for the right to fair administrative action as follows;

- i. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- ii. 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.

30. Section 2 of the Fair Administrative Act defines an '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.

31. The question posed herein is whether the 1st Respondent's action in carrying out investigations against the reported activities at Kitui County cess point at Kanyonyoo and Tyaa rivers and any other area was an administrative action within the meaning of section 2 of the Fair Administrative Act. This court in answer to the above questions finds that strictly speaking the 1st Respondent's action cannot be termed as an administrative action.

32. The finding of this court is guided by the following Supreme Court's decisions that dealt with the same question.



In the Ethics and Anti-Corruption Commission & anor- v Tom Ojienda SC T/A as Tom Ojienda & Associates advocates and 2 others [2002] Eklr the Supreme Court made the following observations;

“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”.

Does the 1st appellant’s investigative powers fall within the corners of this definition? Part IV of the ACECA specifically provides for the 1st 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.

33. The Supreme Court however further to observe that the EACC must operate within the confines of *the Constitution*. It observed;

The Supreme Court in Ethics and Anti-Corruption Commission & another v Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 others (supra);

“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”.

34. The 1st Respondent avers that it applied and obtained search warrants to conduct searches on cess points at Kanyonyoo & Tyaa River after receiving a complaint about malpractices in the said areas. The exparte applicant’s appear to be conflicted on exactly what their business entailed at those cess points because on one hand, they claim that they were not collecting any levy on behalf of Kitui County Government and on another they claim that they were collecting transport levy for onward transmission to accounts held by the same County Government.



35. The power to obtain warrants is provided for under Section 23 of the *Anti-Corruption and Economic Crimes Act* (ACECA) in the following terms;

- “(1) The Director or a person authorized by the Director may conduct an investigation on behalf of the Commission.
- (2) Except as otherwise provided by this Part, the powers conferred on the Commission by this Part may be exercised, for the purposes of an investigation, by the director or an investigator.
- (3) For the purposes of an investigation, the Director and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Director or investigator has under this Part.
- (4) The provisions of the Criminal Procedure Code (Cap. 75), the *Evidence Act* (Cap. 80), the Police Act (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Director and an investigator as if reference in those provisions to a police officer included reference to the Director or an investigator.”

36. Section 118 of the Criminal Procedure Code under which the warrants were issued provides as follows;

“Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.”

37. The power to enter and search a premises is provided for under Section 29 of the *Anti-Corruption and Economic Crimes Act* which is headed “Search of Premises” is in the following terms:

- (1) The Commission may, with a warrant, enter upon and search any premises for any record, property or other thing reasonably suspected to be in or on the premises and that has not been produced by a person pursuant to a requirement under the foregoing provisions of this Part.
- (2) The power conferred by this section is in addition to, and does not limit or restrict, a power conferred by section 23(3) or by any other provision of this part.

38. The 1st Respondent applied to court and an order was issued by the Magistrates’ court in Misc App No. E112 of 2023 is as follows;

Now therefore, I authorize Amos Ole Tiren an investigator with Ethics and Anti-Corruption Commission or any other investigator duly appointed by the applicant, by this warrant to have access and/or gain entry into your cess collection points situated at Tyaa, Nguutani and Kitui-Mwingi junction areas along Garissa-Mwingi road within Mwingi Sub-County in Kitui County and/or wherever they may be situated within the Republic of Kenya and use is necessary reasonable force for that purpose and search the



said premises including vehicles and the compound believed to contain useful information and documents that may assist the Commission to carry out full investigations in the commission of corruption and economic crimes and other related offences that are suspected to have been committed at Kitui County Government and search, seize and carry away all documents, records and information including documents, records and information held in electronic form or other things necessary and relevant for the conduct of the subject investigations”.

39. The order gave the investigators from the 1st Respondent’s office power to have access and/or gain entry into your cess collection points situated at Tyaa, Nguutani and Kitui-Mwingi junction areas along Garissa-Mwingi road within Mwingi Sub-County in Kitui County and/or wherever they may be situated within the Republic of Kenya...
40. The question posed at this point was did the 1st Respondent action in carrying out the actions it is reported to have taken, acting ultra vices?
41. The 1st Respondent investigator averred at paragraph 8 (a) of this affidavit that;
- “Trucks ferrying sand from Mwingi area made a stop over at a place /area known as Tyaa where the truck helper (turn boys) would alight from the truck and proceed to a cess collection point/shed next to Mwingi Shell Petrol Station”
42. It is apparent from the evidence placed before me that the 1st respondent impugned actions occurred either at the places mentioned in the search warrants or in the vicinity. This part is conceded by the exparte applicants to some extent.
43. At paragraph 9 of the ex-parte applicants supporting affidavit, it is averred as follows;
- “That on 13/4/2023, some of our lorries were intercepted at Mwingi Shell filling station by officers claiming to be from the 1st Respondent who claimed to have a search warrant and search our lorries...”
44. At paragraph 17 it is averred;
- “That so, at one point, the officers from the 1st Respondent took us near a stalled and grounded county government pick up packed for a long time in the yard and”
45. There is also no dispute therefore that the exparte applicants were found in possession of some money in cash which was Kshs. 174,000/= as conceded by the exparte applicants. They have stated that the kshs. 174,000/= was money collected from lorries transporting sand and registered with the interested party. That fact is however contested by the investigator of the 1st Respondent who claims that the money seized was un receipted and were suspected to be proceeds of either crime or money meant to foster corruption. In view of the contested issue, this court finds it premature to determine the issue because it is an issue of fact to be determined on the evidence to be presented. As I have observed above, the exhibits annexed by the exparte applicant through the affidavit of one Stephen Ngangi Maluki sworn on 16th June 2023 and 1st exparte affidavit sworn on 8.5.2023 are not legible making it hard for this court to determine what deposits are all about.
46. What is more significant however is that there are issues that on a prima-facie basis raises a number of questions that seem to justify the investigations carried out by the 1st respondent. What for example were the exparte applicants doing in a County motor vehicle parked near or stalled near a petrol station



and further to this in what capacity or arrangement's were they collecting cess fees from a county cess point which is a public facility and paying the same into the County Accounts at Kenya Commercial Bank? The applicants are also a bit eager on whose exactly were the money seized belonged to. Was it County government money or their money?

47. The ex parte applicants have submitted that is was collecting kshs. 1000/= from every lorry for transporting sand but they have not shown this court the receipts issued for kshs. 1000/= and given the huge amounts of money found with them, they have not shown the number and registration details of the lorries who paid a total of kshs. 174,000/=. Those questions and perhaps more justified the investigations carried out by the 1st Respondent.

48. The Purpose of Judicial Review was set out in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Limited*, [2002] eKLR where the Court of Appeal stated:

“The court would duly be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of Judicial review is concerned with; and such court is not entitled to act as a court of appeal over the decider acting on appeal would involve going into the merit of the decision itself such as whether there was or there was not sufficient evidence to support the decision and that, as we have said, is not the province of judicial review”.

49. Justice Kasule elaborated circumstances under which orders of Judicial Review can be issued in the Uganda case of *Pastoli v Kabale District Local Government Canal & Others* [2008] 2 EA 300

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----.

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidswi v Secretary of State for the Housing Department* (1990) AC 876”.

50. The actions taken by the 1st Respondent can only be challenged for illegality, irrationality and procedural impropriety. The exparte applicants claims that the 1st respondent overstepped its mandate by over extending the search warrant to cover them yet it was directed at County offices of Kitui but



as I have found out above, the ex parte applicants were found operating within County cess points which is not denied because they were employed by Interested party to collect funds (transport cess) for onward transmission to the County Government of Kitui. Now if that is the position, then the 1st respondent was within its mandate to carry out investigations because it avers that it carried out investigations following a complaint regarding embezzlement of Public (County) funds.

51. The ex parte applicants ought to have and have not demonstrated that the decision by the 1st Respondent to conduct searched on cess points and seize the items seized was illegal ultra vires and outside its functions. The grant of prerogative orders of certiorari, mandamus & prohibition is discretionary. A court is entitled to take into account the nature of process against which Judicial review is sought and justify itself that there is a reasonable basis to justify the orders sought. The basis for suing the 2nd respondent for example has not been shown because the investigative process undertaken by the 1st Respondent is still on going. The decision to charge or not to charge has not yet crystallized because the 1st Respondent has not even made up its mind about recommending the two ex-parte applicants for prosecution by the 2nd respondents. To that extent this court finds that the Judicial Review proceedings herein are pre-emptive and speculative which is not in the interest of administration of justice. I am not persuaded that the 1st Respondents actions violated the constitutional rights of the applicants. A Court of law should always in such circumstances be reluctant to issue prerogative orders that may in the end obstruct or subvert the course of justice. A party alleging violations of any of his Constitutional rights must demonstrate with specificity which impugned actions violated or threatened to violate any of the rights.
52. In the premises and for the aforesaid reasons this court finds no merit in the Notice of motion dated 8th May 2023 and the same is dismissed with costs to the Respondents.

Before I pen off, I must appreciate the industry and extensive work done by the ex parte applicants learned counsel A.M. Kilonzi advocate despite being on the losing side. The work put in and the elaborate submissions complete with authorities clearly marked stood out and deserves a mention albeit in obiter.

DATED, SIGNED AND DELIVERED AT KITUI THIS 28TH DAY OF FEBRUARY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

