



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC PETITION NO. E004 OF 2020

MOHAMED OKASHI MOHAMED.....PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

THE HON. ALI IBRAHIM ROBA, THE GOVERNOR

COUNTY GOVERNMENT OF MANDERA.....2ND RESPONDENT

THE COUNTY GOVERNMENT MANDERA.....3RD RESPONDENT

JUDGMENT

1. The Petitioner herein filed a petition dated 14th December 2020 seeking the following orders:

a) A declaration that the 1st Respondent has violated Article 35 of the Constitution on access to information in failing to apprise the Petitioner on the outcome of the investigations into the complaints lodged on 9th March, 2018 and 2nd August, 2018.

b) A declaration that the 1st Respondent has violated Article 47 as read together with Article 252 of the Constitution in failing to conduct and conclude its investigations in a timely, prompt, efficient and expeditious manner.

c) A declaration that the 1st Respondent has violated Article 47 of the Constitution in failing to provide written reasons for the delay in conducting and concluding the investigations, despite being allowed more than two years to do so.

d) An Order of Mandamus be issued against the Ethics and Anti-Corruption Commission to compel it to forward the report on their investigations to the Office of the Director of Public Prosecutions within 30 days from the date of issuance of the Order.

e) An Order of Mandamus be issued against the Ethics and Anti-Corruption Commission compelling it to provide written reasons to the Petitioner for its decisions, whether to recommend prosecution of culpable parties or not, immediately upon lapse of the 30 days in prayer (d) above.

f) A declaration that the 2nd and 3rd Respondents have violated the provisions of Article 201(d), 232 (1) (b) of the Constitution and Section 45 (a) (i) of the ACEC Act in permitting payments to M/s Green County Construction Limited in a manner contrary

to law.

g) A declaration that the 2nd and 3rd Respondents have violated Article 232(1) (b) of the constitution as read together with Section 147 of the Public Finance Management Act 2012 by failing to ensure proper management, control of and accountability for the monies paid to M/s Green County Construction Limited and further by failing to realize the value for money paid for the construction.

h) A declaration that the 2nd and 3rd Respondents violated Article 73(2) of the constitution by failing to take legal action against M/s Green County Construction Limited for breach of contract and or to recover funds paid for the unrendered services.

i) A declaration that the 2nd and 3rd Respondents violated Article 232 (1) and 227 of the Constitution in failing to conduct a valuation of the work done by M/s Green County Construction Limited before permitting the contract to Bami Investments at the exaggerated cost of Kshs.450,000,000/-.

j) A declaration that the 2nd and 3rd Respondents breached the provisions of Article 227 of the Constitution as read together with Section 45 (2) (b) of the ACEC Act as well as Section 103 of the Public Procurement and Asset Disposal Act of 2015 by issuing a direct tender to Bami Investment Services Limited for the construction of the County Headquarters.

k) A declaration that the 2nd and 3rd Respondents violated the provisions of Article 232 (1) (b) of the Constitution, Section 45 (2) (a) of the ACEC Act by authorizing full payment of the contract price for the construction of the Governor's residence.

l) A declaration that the 2nd and 3rd Respondents violated Section 47 of the Public Procurement and Disposal Act and Section 45(2) (b) of the ACEC Act through the illegal price variations made on the contract for construction of the Governor's residence

m) A declaration that the 2nd and 3rd Respondents violated Article 73(2) of the Constitution in failing to enforce the first contract for the construction of the governor's residence and or instituting recovery proceedings for the contract price.

n) A declaration that the 2nd and 3rd Respondents violated Article 73 (1) and (2), 201(d) and 232 (1) in purporting permitting payments and or making payments for the Regional Livestock Market and the Juice Factory.

o) A declaration that the 2nd and 3rd Respondent violated Section 125 (1) as read together with Section 149 of the Public Finance Management Act hiring ambulances or issuing a contract in relation thereto without the requisite approvals.

p) A declaration that the 2nd Respondent violated and abused his mandate under Section 30 (3) of the County Government Act of Kenya as pertains to the 5 projects enumerated herein.

q) A declaration that the 2nd Respondent has violated Article 181 of the Constitution by directing and approving the use of public funds contrary to law.

r) A mandatory order directing the 2nd Respondent to bear personal liability and or pay for the funds lost, misappropriated and or embezzled in the contracts for construction of: the County Headquarters of Mandera, the Governor's Residence, the Regional Livestock Market and the Juice Factory.

s) A mandatory order directing the 2nd Respondent to bear personal liability and or pay for funds lost, misappropriated and embezzled in the contract for hiring of ambulances awarded to the Kenya Redcross Society.

t) That costs of the suit be provided for.

u) Such other order(s) as this Honourable Court shall deem just.”

2. The petition is supported by the affidavit of Petitioner dated 14th December 2020 where he states that he is a constituent of Mandera County and a former chairman of Mandera town council and is quite vested in the affairs of the County Government of Mandera. He states that the 1st Respondent was established under Article 79 of the Constitution as read with **Section 3(1) of the**

Ethics and Anti-Corruption Commission Act (EACCA) and, that pursuant to its mandate that it is empowered under Article 252 of the Constitution as read with **Section 13(2) of Ethics and Anti-Corruption Commission Act** to conduct investigations either on its own initiative or on a complaint by a member of the public. Further, he states that under **Article 47 and 232 of the Constitution** the commission is bound to execute its duties in a responsive, prompt, effective, impartial, equitable, expeditious, efficient, lawful, reasonable, and fair manner and provide written reasons for administrative actions. Additionally, that under **Article 35 of the Constitution** a member of the public who lodges a complaint to the commission is entitled to make enquiries on the status of the investigation and be appraised of the outcome.

3. The Petitioner avers that he lodged a complaint with the commission through his advocates on record on 2nd August 2018 vide a letter dated 31st July 2018 outlining various acts of embezzlement and misappropriation of funds, abuse of office and maladministration, and violation of procurement laws by officials and staff of the county government of Mandera. He also addressed the commission on an earlier complaint letter, lodged with it on 9th March 2018 by several constituents of Mandera County including himself on a number of corruption related activities within the County. The Petitioner further states that he lodged the complaints with the Office of the Auditor General, Office of the Controller of Budget and the Office of the Director of Public Prosecutions, all of which referred him back to the Commission as the proper body to investigate the issues raised vide the letters dated 28th August 2018.

4. According to the Petitioner vide a letter dated 7th August 2018 the commission undertook to conduct the necessary investigations into the matters raised in his complaints. The Petitioner contends that he wrote two further letters dated 23rd August 2018 and 20th September 2018 requesting for an update on the status of the investigations on the complaints raised. The commission only replied to the letter of 23rd August 2018 stating that they would investigate the allegations raised, through their North Eastern Regional Office. The Petitioner deposes that through his advocates he sought a further status update from the commission vide a letter dated 17th December 2018 but which elicited no response from the Commission compelling him to resend the letter to Mr. Mahiva of the Commission vide email on 14th January 2019 and to the Commission's regional head office at Garissa an email on 20th February 2019 through email. The commission replied by a letter dated 22nd March 2019 affirming that it was in receipt of the complaint lodged on 2nd August 2018 stating that the investigations were at an advanced stage and that appropriate recommendations would be made to the Director of Public Prosecution and further that the commission promised to notify him upon conclusion of its investigations. On 4th February 2020, the Petitioner wrote a letter to the commission and copied to the Office of the Director of Public Prosecutions seeking an update on the investigations and complaining of the laxity of the investigations. In response, the commission in a letter dated 10th February 2020 stated that the investigations were complex and required more time, a shift from its previous position in its letter dated 22nd March 2019. The Petitioner avers that in a last attempt to follow up on investigations, he wrote a letter dated 11th June 2020 which has never being answered.

5. The Petitioner states that the delay of almost three years in concluding the investigations on his complaints is outrageous, unreasonable, unjustifiable and completely unfair to him and other complainants/constituents of Mandera County and that no plausible reason has been given by the commission to explain why the said investigations are still incomplete to date. He argues that he has exhausted all local remedies available to him under the Constitution or statutory law, by engaging all investigative bodies as provided under **Article 252 of the Constitution**. He contends that he is entitled under **Article 35 of the Constitution** to know the outcome of the said investigations and that the commission must provide the information on the investigations that it has been conducting for the past three years.

6. With regard to the 2nd and 3rd respondents, the Petitioner avers that they commissioned various projects in Mandera, which have been used to steal, misappropriate and or embezzle public funds without any form of accountability in total abuse of their mandate. On the construction of the 3rd respondent's County headquarters, the Petitioner contends that the 3rd Respondent in the financial year 2013/2014, allocated and approved a sum of Ksh. 300,000,000/- and it contracted M/s Green County Construction Limited to undertake the said construction at a consideration of Ksh. 290,000,000/- with a completion date on 30th October 2015. That in the Auditor General's report published on 30th June 2016, it is reported that the 3rd Respondent paid a total of Ksh. 166,976,728/- to the contractors which was more than half of the consideration and which was not commensurate with the work done. It was also confirmed that the construction had totally stalled and the contractors had completely abandoned the site despite having been paid a substantial portion of the contract price. He contends that the payments made in respect of the aforesaid project were all illegal, fraudulent and in contravention of Section 45 (2) (a) (iii) of the ACEC Act which prohibits the excessive payment from public revenues for services not rendered or not adequately rendered

7. It is the petitioner's disposition that the 3rd Respondent purported to amend the aforesaid contract by providing for a price variation of Ksh. 79,692,748/- to further fund this project without seeking the approval or advise of the County Tender Committee in contravention of **Section 47 of the Public Procurement and Disposal Act of 2005**. Further, the 3rd Respondent made

unwarranted budgetary allocations for the said project, to wit: Kshs. 92,500,000/- as provided in the development budget of 2015/2016; Kshs. 72,550,292/- as provided in the Mandera County Government 2016/2017 development budget; and finally, Kshs. 40,174,818/- as provided in the Mandera County Government 2017/2018 development budget. The Petitioner also avers that the 2nd and 3rd Respondent failed to take any action against the said M/s Green County Construction Limited to recover the funds paid for the unrendered services and instead awarded a subsequent tender to a new contractor, Bami Investments Limited, in the year 2018 to finish the project at a cost of Ksh. 450,000, 000/-. Additionally, the County Executive Committee terminated the initial contract to M/s Green County Construction Company and proceeded to issue a new contract to Bami Investments without following the laid down procurement process as required under **Article 227 of the Constitution** and further without satisfying the provisions of **Section 103 of the Public Procurement and Asset Disposal Act 2015**.

8. The Petitioner asserts that the 2nd and 3rd Respondent commissioned the construction of the Governor's residence in the financial year 2013/2014 and paid the contractors in charge the full sum of a total sum of Ksh. 107,532,593/- which amount was in excess of the actual contractual sum capped at Ksh. 107,481,060/-. He deposes that the project had stalled and contractors had completely abandoned the construction site despite full payment and that the 2nd and 3rd Respondent failed to take any action against the original contractors for failing to meet their contractual obligations under the contract. That the 2nd Respondent together with the CEC Finance and CEC Public Works and Transport for Mandera County failed to account or give explanations why they authorized payment of the entire contractual sum for services that were neither fully or substantially rendered.

9. It is the petitioner's contention that the 2nd and 3rd Respondent commissioned the construction of the Regional Livestock Market which project was valued at Ksh. 120,000,000/- and made and authorized budget allocations for the sum of: Ksh. 79,000,000 in Fy 2013/2014, Ksh. 21,980,000/- in Fy 2015/2016, Ksh. 92,428,641/- in Fy 2016/2017 and, Ksh. 76,725,527/- in Fy 2017/2018 which allocations were disproportionate to the actual value of the project and that cannot be accounted for. Additionally, the 2nd and 3rd Respondent never constructed a Juice Factory despite making numerous budgetary allocations for the same, to wit, an allocation of Ksh. 200,000,000/ in the Fy 2013/2014, Ksh. 36,260,000/- in the Fy 2014/2015, and a further Ksh. 55,000,000 and Ksh. 60,500,000 in the Fy 2016/2017 and 2017/2018 respectively despite advertising a tender for the engineering and consulting services on 7th October 2013 and subsequently awarding the tender to M/s Radial Engineering Contractor Limited at Ksh. 16,298,580/-.

10. Furthermore, the Petitioner avers that the 2nd and 3rd Respondent awarded a tender for hiring of ambulances for use within the 3rd Respondent County instead of purchasing despite making an allocation of Kshs.37,000,000/- in the financial year 2014/2015. Moreover, the 2nd and 3rd Respondent irregularly varied the allocation of Ksh. 37,000,000/- for purchase of ambulances to Ksh. 50,400,000/- for hiring of ambulances, without seeking the authorization and approval of the County Assembly. It is the petitioner's averment that the failure, refusal and or neglect to seek the relevant authorization for the aforesaid variation was in total contravention the provisions of **Section 125(1) (f) of the Public Finance Management Act**. That the 2nd and 3rd Respondent illegally opted for direct tendering process contracting the Kenya Red Cross Society to lease of six ambulances for 12 months at a consideration of Kshs.43,200,000/- instead of going through a fair, competitive, transparent and cost effective open tendering process in violation of **Article 227 of the Constitution** as well as **Section 91 and 103 of the Public Procurement and Asset Disposal Act 2015**.

11. The Petitioner avers that based on the foregoing the inaction of 1st Respondent violated his rights under **Article 35, 47, 73(1)(a) and 252 of the Constitution**. Further, he asserts that the acts of the 2nd and 3rd Respondent violated: **Article 73(2), 201(d), 227, 232(i)(b), of the Constitution** as well as **Section 45 (2) of the Anti-Corruption & Economic Crimes Act, Sections 125, 147 and 149 of the Public Finance Management Act** and, **Sections 47, 93 and 103 of the Public Procurement and Asset Disposal Act**. The Petitioner urges that in the interest of justice and entire constituents of Mandera the court makes the declarations and or issues the prayers as particularized in the petition.

1st respondent's case

12. The 1st Respondent in response to the petition filed a replying affidavit sworn on the 28th April 2021 by Emmanuel Arunga, the regional manager North Eastern Regional Office – Garissa with the commission. He acknowledged that the commission received a complaint from the Petitioner and others in relation to allegations of corruption and economic crimes against the 2nd and 3rd Respondent and, that the commission undertook to conduct investigations. Mr. Arunga avers that four inquiry files were opened and assigned to different investigators so that each allegation was investigated independently and that investigations had progressed substantially. He contends that the commission is in the process of evaluating the evidence and making inferences based on the information gathered whereafter the findings and appropriate recommendations shall be forwarded to the **Office of the Director of Public Prosecutions (ODPP)** for its independent review and concurrence or otherwise.

13. Mr. Arunga deposed that the commission has limited resources resulting in a backlog and that the complaints by the Petitioner are in the category of embezzlement/misappropriation which are complex in nature and require time, expertise and financial and human resources and account for 13% of all complaints the commission is handling. He asserts that the subject complaints must be subjected to the commission's internal **Standard Operating Procedure (SOP)** for purposes of quality control and that the complaints received and documents furnished are treated as allegations and intelligence information respectively until they are substantiated through an objective process. Further, Mr. Arunga states that the investigation process can be protracted depending on intervening factors such as co-operation during the information gathering especially since the suspects in corruption cases are the ones who generate and keep documentary evidence. The deponent asserts that there is no statutory timeline within which the commission must conclude investigations and given the nature of the offences, it would be impractical to require the commission to undertake investigations within a specific timeline.

14. Mr. Arunga deposed that the orders of mandamus sought against the commission are misconceived as the commission being established under **Section 3** of the **Ethics and Anti-Corruption Commission Act** pursuant to **Article 79** of the **Constitution** is independent and the subject to control by any person or authority guaranteed under **Article 249** of the **Constitution** and; that the court has a duty pursuant to **Article 3** of the **Constitution** to uphold and defend the **Constitution** by safeguarding and securing the independence of constitutional commissions.

15. Further, it is his contention that the commission is not in breach of **Articles 35 and 47** of the **Constitution** and that the rights may be limited in circumstances set out under **Article 24** of the **Constitution**. He avers that by dint of **Section 29 (2), (3) and (4)** of the **Ethics and Anti-Corruption Commission Act**, the commission exercise discretion in divulging information that is confidential and under active deliberations and it is not required to divulge its findings nor give updates on progress of the investigations and its conclusions to complainants. That under **Section 35** of **Anti-Corruption & Economic Crimes Act** the commission is required to forward its report on investigations and its recommendations to the Office of the Director of Public Prosecutions. Additionally, under **Section 36** of the **Anti-Corruption & Economic Crimes Act** the commission furnishes a quarterly limited report to the Attorney General to presentation to the National Assembly and publication to the Kenya Gazette. Moreover, the commission has a duty in the course of investigations to afford persons under investigations their right to privacy and dignity under **Articles 31 and 28** of the **Constitution** respectively by keeping information confidential.

16. Mr. Arunga asserts that there ought to be a degree of qualification of the applicability of **Article 47** of the **Constitution** in regards to criminal investigations as criminal investigations cannot be deemed to be administrative actions within the meaning of the **Fair Administrative Actions Act, 2015 (FAAA)** as they falls within the ambit of criminal justice and therefore procedure outlined under **Section 4** of the **Fair Administrative Actions Act, 2015 (FAAA)** is inapplicable to processes in a criminal investigation. Furthermore, he contends that written reasons for any administrative action is a right afforded to a person who the decision is taken against and not to a complainant. He depones that the inquiries into the complaints made by the Petitioner are on course and that the commission has not declined nor discontinued its investigations thus **Section 25** of the **Anti-Corruption & Economic Crimes Act** is inapplicable. Mr. Arunga urges that the petition as is against the commission lacks merit and should be dismissed with costs.

2nd and 3rd respondent's case

17. The 2nd and 3rd Respondent opposed the petition by way of a replying affidavit sworn on 9th July 2021 by Abdinur Maalim Hussein, the county secretary of the 3rd respondent, on behalf of the 2nd and 3rd respondent. He states that the petition is an attempt to interfere with the 1st respondent's mandate and independence in violation of **Article 249** of the **Constitution** and is an attempt to influence the investigations.

18. With regard to the construction of the county headquarters, Mr. Maalim affirms that budget for the construction was approved in the financial year 2013/2014 and that Green County Construction Ltd was awarded the contract to construct in consideration of payment of Ksh. 290,230, 790.00 and that the contract was to be completed on 30th May 2015. He depones that the 3rd Respondent took action against Green County Construction Ltd when it terminated the contract on 10th November 2017 pursuant to clause 34.1 of the contract due to non-performance and failure to complete the works as agreed. He contends that the contract to complete the works was re-advertised and bids considered by the Tender Committee and an evaluation report compiled and thereafter awarded to Bami Investment Ltd on 5th March 2018 therefore the award of tender to Bami Investments Limited was lawfully done. Mr. Maalim contends that the budget appropriations and the development plan were duly approved by the County Assembly pursuant to its mandate under **Section 8** of the **County Governments Act** and he faults the Petitioner for failing to plead with specificity the illegality that arises from the further budgetary allocations for the financial years 2015/2016 and 2016/2017 and development plan.

19. Mr. Maalim asserts that the construction of the Governor's residence was appropriated in the budget for the financial year 2013/2014 and pursuant to the tendering process, Ms Seo & Sons Ltd were awarded the contract in consideration of payment of Ksh. 107,401,060.00. That the 3rd Respondent terminated the contract on 10th November 2017 pursuant to clause 34.1 of the contract due to non-performance and failure to complete the works as agreed. That the contract was re-advertised and was awarded to Takbir General Trading Ltd on 18th April 2019 in consideration of payment of Ksh. 258,051,400/- with a completion date of 31st May 2022, which period is yet to lapse.

20. Mr. Maalim further avers that the construction of the regional livestock market was appropriated in the budget for the financial years 2013/2014, 2015/2016, 2016/2017 and 2017/2018 and that Lakole Building Construction Company Ltd were awarded the contract for a sum of Ksh. 169, 922,855.00. That the 3rd Respondent took action against that Lakole Building Construction Company Ltd by terminating the contract on 10th November 2017 pursuant to clause 34.1 of the contract due to non-performance and failure to complete the works as agreed. The contract was re-advertised and awarded to Pioneer Engineering Ltd by a notification of award dated 1st April 2019 to complete the works. Further, with respect to the complaint relating to the juice processing factory, it was approved in the budget for the financial years 2013/2014, 2014/2015, 2016/2017 and 2017/2018 and was awarded to Golbo Construction Company Ltd on 5th June 2015 for a sum of Ksh. 228, 591,560./-. However, the same was cancelled due to inconsistencies between the design and Bill of Quantities and no money has ever been paid to the contractor.

21. It is Mr. Maalim's further averment that the 3rd Respondent intended to purchase new ambulances and was approved and provided for in the budget for financial year 2014/2015. That the county ambulances were in poor state and there was a need to fast track procurement to respond to maternal mortality rates and on 26th February 2014, the County Executive comprising of County Executive Members, deliberated and agreed that the best option would be to hire the ambulances owing to the urgency of the crisis. It is deposed that on 7th March 2014, the Tender Committee resolved that the ambulances would be hired from a single source through direct procurement and that Kenya Red Cross Society, E-plus was awarded the contract to provide six (6) ambulances. Moreover, the increase of the number of ambulances was approved in Cabinet meeting of 21st October 2014. Mr. Maalim asserts that **Section 74 of the Public Procurement and Disposal Act** provides for direct procurement where there is an urgent need for the goods, works or services being procured and that it does not require approval by the County Assembly.

22. It is Mr. Maalim's contention that the Petitioner admitted that all the projects subject matter of this Petition were planned, and funds appropriated in the 3rd respondent's budget as approved by the County Assembly; that the contractors who failed to perform the contracts were terminated and the projects are now at the completion stage and; in any event the failure to complete the projects provided for does not create any offences under the **Anti-Corruption and Economic Crimes Act** as alleged. He further avers that the 2nd and 3rd Respondent have co-operated with the 1st Respondent investigations and provided them with all documentation in relation to the projects in questions. He urges that the petition is premature as the 1st Respondent should be allowed to undertake its investigations without control or any interference and seeks that the petition be dismissed with costs.

Submissions

23. The court directed that the petition be heard by way of written submissions. Rachier & Amollo LLP advocates for the Petitioner filed their submissions dated 13th September 2021, while Jackie Kibogy advocate for the 1st Respondent commission filed her submissions dated 18th November 2021 and Issa & Company Advocates, advocates for the 2nd and 3rd Respondent filed their submissions dated 19th November 2021.

Petitioner's submissions

24. The Petitioner identified 8 issues for determination namely:

a) Whether the 1st Respondent violated Article 35 of the Constitution by failing to apprise the Petitioner on the progress and/or outcome of the investigations into the complaints of 9th March 2018 and 31st July 2019;

b) Whether criminal investigations can be deemed as administrative action within the meaning of Article 47 of the Constitution;

c) Whether the procedure outlined under Section 4 of Fair Administrative Action Act is inapplicable to processes in a criminal investigation;

d) Whether written reasons for an administrative action is a right afforded to a person who the administrative action is taken against only and not a complainant;

e) Whether this petition is a violation of Article 249 (2) of the Constitution of Kenya;

f) Whether the 2nd and 3rd respondents violated the Constitution, Public Finance Management Act and Public Procurement and Asset Disposal Act;

g) Whether the 2nd and 3rd respondents violated and abused his mandate under Section 30 (3) of the County Government Act of Kenya by engaging in the alleged acts;

h) Whether the court has jurisdiction to entertain this petition

25. The Petitioner submits that the 1st Respondent has violated his rights under **Article 35(1)(a) and (b) of the Constitution** as read together with **Section 4(b) (1) of the Access to Justice Act** for failing to provide information on the progress and status of investigations he had lodged against the 2nd and 3rd Respondent over three years ago. He contends that the commission's argument that the right to access justice is limited by **Article 24 of the Constitution** as read together with **Section 29 of the Ethics & Anti-Corruption Commission Act** seeks to muzzle the petitioner's right to question its delay, refusal, neglect and or lethargy in investigating his complaints. It is his submission that the court in interpreting **Section 29 of the EACCA** must do so in a manner that promotes the spirit, purport and object of **Article 35 of the Constitution** which gives effect to the provisions of **Article 10 (2) (c) of the Constitution** that obligates all state offices and officers to practice good governance, integrity, transparency and accountability as part of the national values and principles. He relies on the case of **The Orange Democratic Movement Party (ODM) Vs Independent Electoral And Boundaries Commission (2019) eKLR; Famy Care Limited v Public Procurement Administrative Review Board & Another [2013] eKLR** and **James Humprey Oswago Vs Ethics And Anti-Corruption Commission [2014] eKLR** where the court stated that:

"again, this is an undisputed right, to which all citizens are entitled as of right with regard to information held by the state and all state organs, and with respect to information held by any other person if such information is required for the enjoyment or protection of a fundamental right or freedom. Indeed Section 29 of the Ethics and Anti-Corruption Commission Act recognizes the right to information by providing, at Section 29 thereof .."

26. Further, it is the Petitioner's submission that limitation of the right to access to information under **Article 35** must pass the test under **Article 24 of the Constitution** as read together with **Section 29 of the Ethics & Anti-Corruption Commission Act**. The burden of proving that the information affects the integrity of the investigations and violates the rights of persons under investigations under **Articles 28 and 31 of the Constitution** lies with the 1st respondent. He contends that the petitioner's letters merely sought to know the status and or progress made on the investigations into the complaints and the unreasonable delay in pursuing and concluding investigations which are legitimate that do not affect the investigations and therefore are not within the limitations under **Section 29 of the Ethics & Anti-Corruption Commission Act**. He relied on the case of **Nairobi Law Monthly vs Kengen and Another, High Court Petition No. 278 Of 2011** and cited the case of **Nelson O Kadison Vs Advocates Complaints Commission & Another [2013] eKLR** where the court stated that:

"I therefore find that a blanket refusal to provide information of any kind in relation to the subject matter totally negates the right to access to information and is therefore disproportionate to meeting the need to protect the rights of third parties. In my view the commission ought to consider whether it is possible that some information relating to the complaints could have been provided, for example the number of complaints, whether they have been determined and the results thereof. The commission could also consider whether to give the applicant redacted information in order to protect the third parties. Such an approach would be consistent with giving effect to the right to access information while taking into account the rights of third parties as required by Article 24 of the Constitution."

27. On whether criminal investigations are administrative within the meaning of **Article 47 of the Constitution**, the Petitioner submits that since the promulgation of the 2010 Constitution, there is no reason why actions, omissions and decisions by private and public bodies that can adversely affect the fundamental human rights and freedoms of a person should not be subjected to the dictates of **Article 47** and the **Fair Administrative Actions Act**. He contends that the commission is a state agency exercising administrative authority through its investigations and that its omissions have affected the petitioner's rights and interest in the complaints lodged. He quoted the case of **Judicial Service Commission v Mbalu Mutava & Another (2015) eKLR** where the

Court of Appeal highlighted the importance of **Article 47** of the **Constitution** being a reflection of national values under **Article 10** and in subjecting the administrative actions of state organs under the Constitution. He also cited the case **Tom Ojienda T /A Tom Ojienda & Associates Advocates V Ethics and Anti-Corruption Commission & 5 Others** [2016] eKLR and the subsequent appeal in **Director Of Public Prosecution vs Tom Ojienda T/A Prof Tom Ojienda & Associates Advocates & 3 Others** [2019] eKLR where the Court of Appeal pronounced that:

"It is clear that the learned Judge accepted the contention that EACC, as a creation of Article 79 of the Constitution is governed by the dictates of Article 47 in executing its mandate. Its actions as we have outlined earlier in this judgement do affect the rights or interests of the persons it investigates. Parliament in its wisdom defined administrative action in very broad terms and it is the duty of courts to interpret statutes for what they say and not to rewrite them, we think, with respect that the learned judge properly directed his mind and arrived at a proper conclusion of law we have no basis for interfering with his decision. It is worth recalling that Article 2 of the Constitution declares its supremacy and binding nature on all state organs."

28. On the third issue, the Petitioner contends that having established that criminal investigations constitute administrative action under **Article 47**, the processes under the **Fair Administrative Actions Act**, particularly **Section 4** thereof, are applicable to criminal investigation. It is argued that the investigations have delayed unreasonably for almost four years and there is an outright neglect or refusal to conduct and complete the investigations deliberately to defeat the complaints claiming that the investigations were complex. He relies on the case of **Rachel Auma Owiti vs Municipal Council of Kisumu** [2021] eKLR where the court stated that statutory bodies have a duty to serve its constituents with utmost care, speed and diligence. The Petitioner further submits that **Article 47** further mandates an administrative authority to provide written reasons for its actions, omissions and decisions and placed reliance on **Kenya Human Rights Commission v Non Governmental Organizations Co-Ordination Board** [2016] eKLR. He urges that he had a legitimate expectation that he would be given reasonable updates on his complaint and written reasons for failure, delay and or neglect to conduct investigations. In support of his case, he cites the matter of **Republic vs. The Commissioner Of Lands Ex Parte lake Flowers Limited Nairobi HC-Misc. Application No. 1235 Of 1998** where the court stated it would intervene in situations where authorities or persons acted in bad faith in decision making contrary to legitimate expectation. He also cites the case **Keroche Industries Limited V Kenya Revenue Authority & 5 Others Nairobi** [2007] eKLR where the in explaining the doctrine of legitimate expectation the court stated that:

"...stated simply, legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him a different way...public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

29. On the fourth issue, the Petitioner cites the definition of administrative action in **Section 2** of the **Fair Administrative Action Act** also entails an omission to take action and that **Article 47** of the **Constitution** as read together with **4** of the **Fair Administrative Action Act** applies to any person whose legal rights or interests are affected by an action, omission or decision of an administrative authority. He submits that having initiated a complaint under **Article 22** and **252** of the **Constitution**, he is owed written reasons why there has been little to no progress in conducting and concluding investigations into the complaints and that it is not enough for the commission to state that the investigations are complex. In support of his submission he cited the case of **Republic vs Retirement Benefits Appeals Tribunal & 5 Others Ex-Parte Kenya Airports Authority Staff Superannuation Scheme** [2015] eKLR where it was stated that:

"The giving of written reasons where a right to a person is adversely affected by administrative action is now a constitutional imperative- see Article 47(2) of the Constitution. Decisions should be backed by reasons. In the circumstances of this case, I find that the 1st Respondent failed to give reasons for its decision. This amounts to procedural impropriety as the applicants were left to speculate on the reasons behind the decision."

30. On whether the petition is a violation of **Article 249(2)** of the **Constitution**, the Petitioner contends that holding the commission accountable to its functions and mandate under the Constitution does not in any way infer or amount to interference with its mandate. He submits that the court has a right to intervene where there is an obvious illegality and violation of the Constitution that where rights are threatened or violated any citizen is clothed with the right to invoke **Article 22** and **258** of the **Constitution** in moving the court for remedies. He cites **Article 252(1)(a)** of the **Constitution** and **Section 11** of the **Ethics & Anti-Corruption Commission Act** that the commission is obligated to investigate complaints submitted to them and contends that the commission having violated **Article 35** and **47** of the **Constitution** the Petitioner is well within his constitutional rights to approach this Honourable Court.

31. On the violations of the Constitution, the **Public Finance Management Act** and, the Public Procurement and Asset disposal Act by the 2nd and 3rd respondent, it is the petitioner's submission that they failed to follow the laid down procedure for competitive and transparent procurement of the construction services as required under **Article 227** as read together with **Section 74 and 96** of the **Public Procurement and Assets Disposal Act**. That there were no records supplied by the 2nd and 3rd Respondent indicating how they advertised the tenders in question. Further, he contends that in conducting direct procurement for the ambulances, the 2nd and 3rd Respondent failed to demonstrate that Kenya Red-cross Society was the only institution that could hire out ambulances and that there was no reasonable alternative or substitute for goods, works or services. It was further submitted that the requirements under **Section 74(3)** must be read and applied together and not in isolation. In addition, the Petitioner argues that contrary to **Article 227** of the Constitution that procurement must be cost-effective, the 2nd and 3rd Respondent irregularly varied the initial allocation of Ksh. 37,000,000/- for purchase of ambulances to Ksh. 50,400,000 for hiring of ambulances, without the approval of the County Assembly as required under **Section 125(1) (f)** of the **Public Finance Management Act**. He submits that in failing to observe the processes laid down in the **Public Procurement and Assets Disposal Act**. with regards to advertisement and inviting bids the contracts purportedly entered into between the 2nd and 3rd respondents and all contractors are void as held in the case of **Blue Sea Shopping Mall Ltd vs City Council Of Nairobi & 3 Others [2015] eKLR**.

32. According to the petitioner, the contracts entered into between the 2nd and 3rd respondents and the contractors had defects in structure contrary to **Regulation 29 of the Procurement Regulations 2006** which provides that the standard tender documents for purposes of **Section 29(4)** of the **Procurement Act 2005** shall be as set out in the Third Schedule to the Regulations. He submits that firstly there was no contract between the county and M/s Green County Construction Limited. Secondly, that all the contracts between the county and contractors was missing clause 27 of the standard tender document on liquidated damages that states that the contractor shall pay liquidated damages to the employer at the rate stated for each day that the actual completion date is later than the Intended completion date.

33. The Petitioner contends that the 2nd and 3rd respondents failed to exercise remedies against contractors for non-performance and breach of contract having paid colossal figures not commensurate for works that had stalled and that the 2nd and 3rd respondents response that they terminated the contracts does not equate to taking action against the contractors. That **Regulations 21 of the Public Procurement & Disposal (Private Public Partnerships) Regulations, 2009** and the clause 27 of the standard tender documents, the contractor is liable to pay liquidated damages at the rates specified. The Petitioner states that failure to sanction the contractors for breach of the contract is a direct violation of **Article 201** of the **Constitution** that public money shall be used in a prudent and responsible way and, **Sections 102 & 104 of the PFM Act** calling for accountability and efficient use of public resources.

34. The Petitioner further faults the 2nd and 3rd Respondent for paying the contractors without doing the work contrary to **Section 45(2)(a)(iii)** of the **Anti-Corruption and Economic Crimes Act** and a violation of **Article 201 of the Constitution**. He submits that for the construction of the county headquarters, the respondents paid Ksh. 166,976,728 more than half of the full contractual work while, for construction of the governor's residence the county paid the full contractual sum. The Petitioner further contends that a procuring entity is supposed to take into consideration the prevailing Market Price Indexes at the time so that the entity is not paying inflated prices for goods or services and, that before any procurement is undertaken, the procuring entity is obligated to carry out a valuation to establish the cost of the project. He submits the value of the contracts for completion of construction of three projects were almost double the value of the original contracts without valuation being done that shows the highest level of mismanagement of public funds, with contracts being handed to specific people without proper procedures being followed and at prices which cannot be justified. Moreover, the Petitioner submits that the 2nd and 3rd Respondent unlawfully varied prices and issued further budgetary allocations to the same projects without approvals by the tender committee contrary to **Section 47** of the **Procurement Act, 2005(repealed)**.

35. Whether the 2nd Respondent violated and abused his mandate under **Section 30 (3)** of the **County Government Act**, the Petitioner submits that the governor colluded with the CEC he appointed to allocate close to a billion shillings to fictitious projects, construction of his own residence and to pay contractors for doing nothing breached **Section 30(3)** of the **County Government Act** and violated **Article 10, Article 184, Chapter 12 of the Constitution**. He cites **Council of Governors & Others vs The Senate: Petition No. 413 Of 2014 eKLR** and **Kyalo Kamina V Senate & 3 Others [2017] eKLR** where the court stated that the governor was accountable for utilization of county resources and are bound by the national values under **Article 10** of the **Constitution**. He also contends that under **Article 226 (5)** the 2nd Respondent is enjoined to pay for the funds lost, misappropriated and or misused under his leadership together with the CEC-Finance and Health.

36. On the jurisdiction of the court, it is the petitioner's submissions that he has demonstrated that the violation of Constitution by the respondents and that under **Article 165(3)** of the **Constitution** the court has the mandate to interpret the provisions of the

Constitution and determine the question of violation of the Constitution. He cites the case of **Okiya Omtatah Okiiti & 2 Others v Attorney General & 3 Others [2014] eKLR**, where the respondents challenged the jurisdiction of the court on the ground that the petitioners had not exhausted the procedures under the **Ethics and Anti-Corruption Commission Act** and the **Public Procurement and Disposal Act** and therefore the petition was premature. The court in answering the question stated that:

"The Constitution is thus clear and grants every citizen a right of access to the High Court where there is an allegation of infringement of the Constitution. That is why the Court of Appeal in the case of TONONOKA STEELS LIMITED VS EASTERN AND SOUTHERN AFRICA TRADE DEVELOPMENT BANK- CIVIL

APPEAL NO. 255 OF 1998 stated as follows regarding access to Courts;

"The right of access to courts can only be taken away by clear and unambiguous words of the Parliament of Kenya'

Similarly, in Davies & Another vs Mistry- 1973 EA 463 Spry V-P quoting the case of Pyx Granite & Co. vs Ministry of Housing- 1960 AC 260 stated that:

"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Court for the determination of his rights is not to be excluded except by clear words."

37. The Petitioner further contends that the petition is not meant to frustrate the operations of the 3rd Respondent and that the two independent petitions pending before competent courts are unrelated to this petition, and have never even been consolidated and which are against different parties. The Petitioner urges that having proved its case against the respondents the court should grant the prayers sought to not set a good precedent on protection of public resources and encourage other people to stand up for the protection of public resources.

1st Respondent's submissions

38. The commission identified five issues for determination namely:

- a) Whether the Commission has violated Article 35 of the Constitution in failing to apprise the Petitioner of the progress and/or outcome of the investigation*
- b) Whether the Commission can be compelled to provide written reasons to the petitioner*
- c) Whether the Commission has violated Article 47 as read with Article 252 of the Constitution by failing to conduct and conclude its investigations in a timely, prompt, efficient and expeditious manner*
- d) Whether criminal investigations can be deemed to be as administrative within the meaning of Article 47 of the Constitution and the Fair Administrative Actions Act*
- e) Whether the Commission can be compelled to forward its report to the DPP*

39. On whether the commission has violated **Article 35** of the **Constitution**, the commission submits that the right to information is not a non-derogable and can be limited under **Article 24(1)** of the **Constitution** as held in **JNN (a minor) MNM suing as next friend v Naisula Holdings Limited T/A N school [2018] eKLR**. It is contended that the nature of information sought by the Petitioner falls within the exempt information defined in **Section 6 (1)(d)(g) and (h)** of the **Access to Information Act (ATIA), 2016** enacted by parliament to give effect to **Article 35** of the **Constitution**. It is submitted that the complaints by the Petitioner are still under investigations and that the findings and recommendations are yet to be appraised by the **Office of the Director of Public Prosecutions** pursuant to **Section 5(4)(e)** of the **Office of the Director of Public Prosecutions Act, 2013** and therefore the information in its possession is preliminary which the commission is entitled to withhold in accordance to **Section 6(1)(g) of the ATIA**. Further, it is submitted that **Section 29(3) EACCA** empowers the commission to withhold information that is at the deliberative stage, for reasons that disclosure of information in the course of an investigation may prejudice the investigations and the integrity of the commission's intended legal proceedings. The commission relies on the case of **Nelson Havi & 8 others v**

Inspector General of Police & 5 Others [2016] eKLR where the court held that:

“61. Section 6 of the ATIA also exempts from disclosure any information which could undermine the public or private entity’s ability to give adequate and decision consideration to a matter in which the final decision has been taken and which remains the subject of active consideration. Additionally, any information which if disclosed would damage a public entity’s position in actual or contemplated legal proceedings is also exempt from disclosure under Section 6, as is information which would infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.”

40. Additionally, the commission contends that disclosure of primary findings of an investigation violates suspects right to dignity and privacy guaranteed under **Articles 28 and 31 of the Constitution** and is therefore exempt under **Section 6(1)(d) of ATIA** until a suspect is arraigned before court as held in **Henry Namiti Shitanda v Inspector General of Police & 2 Others H.C. Const. Pet. No. 441 of 2018**. The commission submits further that it is under no obligation in law to disclose its findings in the course of an investigation or apprise a complainant on the progress of and/or the conclusion of an investigation as **Section 35 of ACECA** mandates it to forward results of investigations to the **Office of the Director of Public Prosecutions**. Additionally, it is contended that the non-disclosure by the commission cannot be interpreted to mean that it has refused, neglected and failed to exercise its mandate in pursuing the investigation and that under **Section 25 of the ACECA**, the requirement to notify a complainant is only where the commission declines to investigate or discontinues an investigation. It is the commission’s submission that an order of mandamus compelling it to provide written reasons to the Petitioner in the course of investigations will be contrary to **Section 29(3) of the EACCA** and will be contrary to exemptions under **Section 6 of the ATIA**.

41. On the allegation of breach of **Article 47** as read of **Article 252** of the **Constitution** for failing to conduct investigations in a timely, prompt, efficient and expeditious manner, the commission submits that there is no provision in law that sets a timeline within which to conclude investigations. It is contended that in criminal inquiries especially corruption investigations suspects are the ones who generate and are custodians of documentary evidence and therefore investigations are complex, secretive and collusive in nature requiring time and expertise. In support of its submission, the commission relies on **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR** where the court stated that reasonable delay was not capable of mathematical definition but dependent on the facts and the circumstances of the case. It also places reliance on **Rose Owira & 23 Others v Attorney-General & another; Kenya National Commission on Human Rights & 4 others (Interested Parties) [2020] eKLR** where the court refused to give timelines for ongoing investigations.

42. On whether criminal investigations can be deemed administrative within the meaning of **Article 47** and the **Fair Administrative Action Act**, the commission submits that criminal investigations are not administrative action within the realm of administrative law but falls in the criminal justice system and is regulated by criminal law statutes including **Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)** and **ACECA**. It is contended that procedures in criminal investigations and its outcomes are totally different to those in an administrative action as they coercive in nature and carries the threat of loss of liberty. It is further submitted that the **Fair Administrative Action Act** was not enacted to amend and regulate criminal law statutes that govern criminal investigations and that the **Section 4** of the **Fair Administrative Action Act** is not for general application to criminal investigation. It relies on the case of **JNN (a minor) MNM suing as next friend v Naisula Holdings Limited T/A N school [2018] eKLR** where the court stated that:

“18. Fair administrative action broadly refers to administrative justice in public administration and 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 and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.”

43. The commission also submits that the question as to whether investigations is an administrative function subject to the provisions of **Article 47** of the **Constitution** is pending before the Supreme Court in **Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others; Law Society of Kenya (Amicus curiae) Civil Application No. 21 of 2019** and that the Supreme Court in a ruling dated 7th February 2021 barred the reliance of decisions of the High Court and Court of Appeal on the subject matter until the appeal before it is determined.

44. In regards to whether the commission can be compelled to forward its report to the DPP, the commission submits that it has not neglected its mandate to investigate the allegations by the Petitioner as evidenced by its letters to the Petitioner and therefore an order of mandamus cannot be issued. It quoted the case of **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others Civil Appeal 266 of 1996 [1997] eKLR** where the Court of Appeal stated that mandamus can only

be issued where the person concerned has refused to perform public duty. The commission urges the court to dismiss the petition with costs for being devoid of merit.

2nd and 3rd Respondents submissions

45. The 2nd and 3rd respondents identified four issues for determination namely:

I) Whether the petition is premature and properly before this Honourable Court''

II) Whether the Petitioner can direct the Ethics and Anti-Corruption Commission the 1st Respondent herein, on how to conduct its investigations''

III) Whether the 2nd and 3rd respondents violated the Constitutional and Statutory provisions in awarding the construction contracts set out in paragraphs 72-108 of the petition''

IV) Whether the 1st Respondent in conducting investigations has violated the petitioner's rights under Articles 47 and 252 of the Constitution as alleged''

46. The respondents submit that the petition is premature as the **Ethics & Anti-Corruption Commission** is yet to complete its investigations and that the Petitioner acted rashly in filing the petition under **Article 22 and 258** of the **Constitution** despite lack of evidence premised on speculation. Reliance is placed on the case of **Wanjiru Gikonyo & 2 Others vs. National Assembly of Kenya & 4 others [2016] eKLR** and **Samuel Muigai Ngang'a vs. The Minister for Justice, National Cohesion & Constitutional Affairs & Another [2013] eKLR** where the courts stated that they were guided by the doctrine of ripeness and would not adjudicate on a matter prematurely based on apprehension and speculation. It is contended **Section 33 of ACECA** prohibits the disclosure of details of an investigation.

47. On the independence of the 1st Respondent commission, it is the respondents submission that the 1st Respondent is an independent commission as provided for under **Articles 79 and 249** of the Constitution and **Section 28 of the EACCA**. It is stated that the Petitioner cannot direct the commission on how to conduct its investigations and further that the court lacks jurisdiction to compel the commission to conclude its investigations within specific timelines. In support of their submission, the respondents quoted the Court of Appeal decision in **Michael Sistu Mwaura Kamau vs. Ethics & Anti-Corruption Commission & 4 Others [2017] eKLR** where the court held that the president's directive to the **Ethics & Anti-Corruption Commission** to present a report to the DPP within a specific timeline was inconsistent with the constitution and statutory independence of the **Ethics & Anti-Corruption Commission**

48. On the alleged violation of **Articles 47 and 252 of the Constitution**, the respondents submits that the Petitioner is not entitled to a copy of the report as it would be tantamount to interfering with the mandate and independence of the commission and he is only entitled to be notified that a report has been made.

49. On whether there are violations of Constitution and procurement laws the 2nd and 3rd Respondent submit that under **Section 7 (1) of the Public and Procurement and Disposal Act regulations (County Governments) 2013** the 2nd Respondent is not a member of the Tender Committee which is responsible for procurement and therefore the petition against him is non-suited. It is contended that the contracts issued were compliant with **Regulation 29 of the Public Procurement and Disposal Regulations, 2006** that provides standard tender documents shall be as set out in the Third Schedule that provides an exhaustive list on the contents of a standard tender document. Further, it is submitted that all documents in respect to the tendering process were submitted to the 1st Respondent upon a formal request under **Section 27 of Ethics & Anti-Corruption Commission Act**. Additionally it was contended that the 2nd and 3rd Respondent have no constitutional or statutory obligation to provide documents to the Petitioner as he did not participate in the tenders and also he did not comply with the provisions of the **Access to Information Act, 2016**. On termination on the contracts of companies due to non-performance, the 3rd Respondent submits that it complied with the provision of **Section 32 of the PPDA**

50. On direct procurement of ambulances, it is the 2nd and 3rd respondents submission that there was a looming crisis that posed a dire situation and required urgent attention prompting the respondents to use direct procurement as contemplated under **Section 74(3) of the PPDA**. Reliance is placed on the case of **IEBC vs. NASA & others [2017] eKLR** where the Court of Appeal stated

that for direct procurement not to be unconstitutional, a procurement entity need only satisfy **Section 103 and 104** of the as read with **Article 227 (1) of the Constitution**. It is urged that in opting for direct procurement, the procedure set out under **Section 75 of the PPDA** was followed and the contracts awarded to Kenya Red Cross Society E-Plus approved in a cabinet meeting. It is submitted that in direct procurement some principles of procurement will not be afforded the same threshold as other methods of procurement as held in the case of **William Ole Ntimama & 2 Others vs. Governor, Narok County & 2 others [2014] eKLR** where the court stated that:

“In fact, due to the requirements of transparency and accountability, no procuring entity would comply with the requirements of PPDA Act if the invitation to tender or to submit Expressions of Interest (EOI’s) were not made to the general public. The only exception to this general rule is where the procuring entity applies restricted tendering or direct procurement which methods were not applied and was inapplicable in this case. ”

51. The 2nd Respondent submits that he did not violate **Section 30** of the **County Government Act** as he diligently performed his functions and exercised his authority according to the Constitution and the County Government Act as all projects were planned for and funds appropriated in the 3rd respondent’s budget approved by the County Assembly. That the Petitioner has failed to plead with specificity the illegality of the further budgetary allocations for the financial years 2015/2016 and 2016/2017 which were duly approved by the County Assembly pursuant to **Section 8 of the County Government Act**. It is the 2nd and 3rd Respondent’s submission that the issues raised in the petition are not ripe for determination and that the court lacks jurisdiction to hear the determine the issues and they therefore urge the court to dismiss the petition with costs.

Analysis and determination

52. I have carefully considered this petition, the rival submissions of learned Counsel for the parties, the cases cited thereat and the law. The Petition contains 21 prayers itemised as (a) to (u). Prayers (a) to (e) are what relate to the **Ethics and Anti-Corruption Commission** (1st Respondent) while prayers (f) to (u) touch on the 2nd and 3rd Respondent.

53. In Prayers (a) to (e) the petition seeks declarations in regard to investigations which the 1st Respondent was expected to carry out following a report to it concerning various procurement breaches at the 3rd Respondent County. It is the Petitioner’s contention that he reported those breaches to the 1st Respondent on 9th March, 2018 and 2nd August, 2018 but the 1st Respondent has never informed him whether it carried out the investigations, hence violating his right to access to information under **Article 35 and 47 of the Constitution**. He therefore seeks an order of mandamus first to compel the 1st Respondent to forward its report to the Directorate of Public Prosecutions within 30 days from the issuance of the order and secondly to compel the 1st Respondent to provide him with written reasons within 30 days for its decisions, whether to recommend prosecution of culpable parties or not. Counsel for the 1st & 3rd Respondent have however argued that this court does not have jurisdiction to hear this case. It is trite that jurisdiction is a fundamental issue which if raised should be disposed at the earliest stage of the proceedings. (see the case of the **Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR** and also the Supreme court decision in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank and others [2012] eKLR**).

54. The 2nd and 3rd respondent have challenged the jurisdiction of the court based on the doctrine of ripeness which was exhaustively discussed by a three judge bench of this court in **Kiriro Wa Ngugi & 19 others v Attorney General & 2 others [2020] eKLR** where the judges stated that:

“107. The doctrine focuses on the time when a dispute is presented for adjudication. The Black’s Law Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:

The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made

108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.

*109. The Court of Appeal in **National Assembly of Kenya & another v Institute for Social Accountability & 6 others Nairobi Civil Appeal 92 of 2015 [2017] eKLR**, faulted the Constitutional Court for adjudicating upon hypothetical matters. The court held:*

[72] *The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the Constitution stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.*

[74] *Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.*

110. In *National Assembly of Kenya & Another v The Institute for Social Accountability & 6 others* [supra] the Court of Appeal held:

[73] *Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDF.*

111. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR, Onguto J stated:

[27] *Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.”*

55. Further discussing the doctrine of ripeness in the case *Republic v. National Employment Authority & 3 Others Ex-parte Middle East Consultancy Services Limited* (2018) eKLR the court stated: -

*“45. This brings into focus the principle of ripeness which prevents a party from approaching a Court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful. None of the parties deemed it fit to address this pertinent legal point. The principle of ripeness was aptly captured by Kriegler J in *In Ferreira vs Levin NO & others; Vrynhoek v Powell No & others* 1996(1) SA 984 (CC) at paragraph [199] in the following words:-*

“The essential flaw in the applicants; cases is one of timing or, as the Americans and, occasionally the Canadians call it. “ripeness” ... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air.The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.”

46. Lord Bridge of Harwich put it more succinctly when he stated in the case of *Ainsbury vs Millington*[1987] 1 ALL ER 929 (HLR), which concluded at 930g:13.:-

“It has only always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce an abstract questions of law when there is no dispute to be resolved.”

It is perfectly true that usually the Court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in equation in such action have actually been infringed. The requirement of a dispute between the parties is a general limitation to the jurisdiction of the Court. The existence of a dispute is the primary condition for the Court to exercise its judicial function. On the other hand, mootness involves the situation where a dispute no longer exists. Ripeness asks whether a dispute exists, that is, whether it has come into being.

47. Ripeness refers to the readiness of a case for litigation; “a claim is not ripe for adjudication if it rests upon contingent further events that may not occur as anticipated, or indeed may not occur at all. The final decision was yet to be made, hence, there is no decision to be quashed. The goal of ripeness is to present premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action.

48. The U.S. Supreme Court fashioned a two-part test for assessing ripens challenges in Abbott Laboratories vs. Gardner(39) as follows:

“without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”

56. It is clear that the petitioner made a complaint to the 1st respondent against the 2nd and 3rd respondent, it is not in dispute that the investigations by the commission is still pending, the question is whether the investigations having not being completed whether the petition is ripe before the court. A mindful reading of the petition, the supporting affidavit and submissions shows that the petitioner’s contention is that the 1st respondent has not completed investigation for over 3 years in contravention of Article 47 and further, that the 1st respondent failed to respond to his request for information and updates on the investigations contravening Article 35 of the Constitution. It is evident that the petitioner is not challenging the investigation but rather the delay it has to complete the investigations and have invoked this court’s jurisdiction under Article 165 (3) to determine the issues of violations. Violations of the Constitution can only be adjudicated by the High Court and to decide otherwise is to do a great injustice to the petitioner as they would have no other recourse as stated by the court in **Okiya Omtatah Okoiti & 2 Others v Attorney General & 3 Others** (*supra*) cited by the petitioner where the court stated that:

72. That being so, and seeing that the Petitioners have invoked this Court’s jurisdiction to interpret the Constitution and determine whether the acts of the Respondent in regard to the SGR project are in violation of the Constitution, then this Court has jurisdiction to address that issue, the merits or otherwise, notwithstanding. To find otherwise would leave the Petitioners without an avenue to ventilate their grievances and in any event, Article 258 (1) of the Constitution also grants the Petitioners the right to institute the consolidated Petitions. This Article provides thus;

“Every person has the right to institute court proceedings, claiming that this Constitution has been violated, or is threatened with contravention”.

73. The Constitution is thus clear and grants every citizen a right of access to the High Court where there is an allegation of infringement of the Constitution. That is why the Court of Appeal in the case of Tononoka Steels Limited vs Eastern and Southern Africa Trade Development Bank- Civil Appeal No. 255 of 1998 stated as follows regarding access to Courts;

“The right of access to courts can only be taken away by clear and unambiguous words of the Parliament of Kenya”.

Similarly, in **Davies & Another vs Mistry- 1973 EA 463 Spry V-P** quoting the case of **Pyx Granite & Co. vs Ministry of Housing- 1960 AC 260** stated that:

“It is a principle not by any means to be whittled down that the subject’s recourse to Her Majesty’s Court for the determination of his rights is not to be excluded except by clear words.”

74. I am duly guided and with that clarification in mind, I find that save for the matters raised at the beginning of the determination of this issue, this Court has jurisdiction to entertain the Petitioner’s claim and so I will.”

57. Similarly the court in **Okiya Omtatah Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) [2021] eKLR** held that:

“38. The Petitioner is in essence alleging contravention of the Constitution by the 3rd Respondent in not fulfilling the calling under Article 169(2) of the Constitution. The Petition raises serious constitutional issues and their resolution is not mere

bootstraps. Further, the Petition is not merely framed in Bill of Rights language as a pretext to gain entry to the Court. In other words, the Petition is ripe for Court's determination. As such, the exception to the principle of non-justiciability must be upheld.

39. This Court will, therefore, not lend a deaf ear to a party who knocks on its legal doors alleging infringement or threat to infringement of its rights and fundamental freedoms as guaranteed under the Bill of Rights or contravention or threats of violation of the Constitution unless the applicability of the principle of non-justiciability is otherwise proved.

40. In the circumstances of this case, there are valid and holding exceptions to the principle of non-justiciability and the doctrine of exhaustion. This Court is, hence, vested with the requisite jurisdiction to deal with the Petition.”

58. That said it is evident from the submissions of the Learned Counsel for the 1st Respondent that the 1st Respondent is still in the process of carrying out the investigations as is its mandate under **Section 13 (2) (c)** of the **Ethics & Anti-Corruption Commission Act**. While the Act does not indicate the time limited for carrying out of such investigations it is expected that the Commission should do so within a reasonable time. The report/complaint by the Petitioner having been lodged in the year 2018 only two years had lapsed before this petition was filed. I am not persuaded that two years would amount to an unreasonable delay. It is expected that once the Commission concludes its investigations it shall inform the Petitioner of the outcome and if need be forward the report to the office of the Director of Public Prosecutions. Moreover, the **Ethics and Anti-Corruption Commission Act** has provisions to give effect to the right to information under **Article 35** of the **Constitution** and to that end **Section 29(2)** of the Act states:-

“29. (2) A request for information by a citizen—

(a) shall be addressed to the Secretary or such other person as the Commission may for that purpose designate;

(b) may be subject to the payment of a reasonable fee; and (

c) may be subject to confidentiality requirements of the Commission.

59. It is not clear whether the Petitioner approached the 1st Respondent using the procedure set out in **Section 29(2) of the Act**. What is clear is that by a letter dated 10th February, 2020 the 1st Respondent did assure the Petitioner's Advocate that the investigations though complex were underway and that it would endeavour to forward the files to the Director of Public Prosecutions for further action. The Petitioner filed this petition despite that assurance and I am not therefore satisfied that he is entitled to the declarations sought. Moreover this court would be hesitant to grant these declarations as the 1st Respondent is an independent commission and this court can only interfere where there is cogent evidence that the 1st Respondent has exercised its powers other than is provide in the law. In the case of **In Re The matter of Interim Independent Electoral Commission [2011] eKLR** the Supreme Court stated:-

“[59] It is a matter of which we take judicial notice, that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the “independence clause”.

60. In the case of **Communication commission of Kenya & 5 Others v Royal Media Services limited & 5 others [2014] eKLR** the Supreme Court pronounced itself as follows in regard to independence contemplated by the Constitution pronounced itself thus:

“[I]ndependence’ is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free

of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.

How is the shield of independence to be attained" In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain 'independence' in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these 'other safeguards' can singly guarantee 'independence'. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence. "

61. The Ethics and Anti-Corruption Commission being an independent commission is not under the control of any person and or organ including this court and cannot therefore be compelled to take any action except where there it is demonstrated that it has acted in violation of Constitution. As stated earlier, the commission is mandated to carry out investigations either on its own volition or a complaint by a member of the public pursuant to Article 252 and section 13 of the EACC Act. Additionally, section 35 of the ACECA mandates the commission to send a report on investigation including its recommendations to the ODPP. As such the court cannot direct that the commission to send its report to the ODPP within a set period as sought by the petition as this has the risk of having the investigation hurried and conducted in a poor manner. I am fortified by the decision of the Court of Appeal in **Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others [2017] eKLR** where it stated -:

"Subject to the foregoing, however, the appellant has a genuine grievance that the President not only directed the EACC to present its report to the DPP, but also set specific deadline within which that was to be done. Well meaning as the directive may have been, it gave the impression, and we believe any reasonable person would have perceived it as such, that the President was directing the EACC on how and within what period to discharge its mandate. The setting of the deadlines, by the President rather than by the EACC itself, within which to conclude investigations and submit report to the DPP can reasonably be perceived as undue interference with the EACC in the discharge of its mandate, much as it is not the only institution which is concerned with the fight against corruption. Such deadlines also have implications for the quality of investigations, the focus being shifted more to the deadline itself rather than careful consideration of all the evidence for or against the person being investigated."

62. Similarly, in **Rose Owira & 23 others v Attorney-General & another; Kenya National Commission on Human Rights & 4 others (Interested Parties) [2020] eKLR** the court stated that:

"88. It is my final determination that the 2nd Respondent has not failed in investigating the instances where the use of force by police officers led to death as each case is at different stages of investigation or under inquest. However, there are delays in the conclusion of the investigations. Giving timelines to the 2nd Respondent within which to conclude the ongoing investigations may result in rushed investigations that may be detrimental to the interests of the petitioners. In the circumstances of this case, I find a declaratory order will add impetus to the ongoing investigations. An order of mandamus is therefore issued directing the 2nd Respondent to promptly and impartially conclude the investigations into the cases still pending investigation in respect of the deaths of 1st to 15th and 17th to 23rd petitioners' kin."

63. Accordingly, prayers (a), (b), (c), (d) and (e) of the petition must fail.

64. In regard to Prayers (f) to (u) The declaration against the 1st and 2nd Respondent cannot be granted in the absence of evidence that they are culpable. It would be a travesty of justice to hold that the 1st and 2nd Respondents violated the cons and the Public Procurement and Assets Disposal Act [PPDA] when there is no evidence before me to that effect. The investigations sought by the Petitioner would have to be completed first and evidence would have to be gathered and brought to this court for it to make such a determination.

65. Secondly, the procedure for lodging complaints of breaches of the public procurement process is set out in **Part IV of the Public Procurement & Assets Disposal Act** and more specifically in **Sections 35, 36, 37 and 38** which state: -

"35. Investigations

(1) The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and

accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.

(2) An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.

(3) Investigation shall be conducted by an investigator appointed for the purpose by the Authority.

36. Powers of investigators

(1) For the purpose of carrying out an investigation of procurement or asset disposal proceedings an investigator has the following powers—

(a) with prior notification to the procuring entity, the investigator shall have access to all relevant premises, books, records, returns, reports and other documents of the procuring entity or a person who participated in the procurement or asset disposal proceedings, including electronic documents;

(b) the investigator may remove or make copies of any documents the investigator has access to under paragraph (a);

(c) where an investigator removes a document from the premises, the investigator shall certify a copy of the document to be left with the procuring entity; and

(d) the investigator may require any of the following to provide explanations, information and assistance—

(i) an employee or officer of the procuring entity; or

(ii) an employee or officer of a person who participated in the procurement or asset disposal proceedings.

(2) In addition to the powers under subsection (1), an investigator shall have such other powers as may be prescribed by Regulations.

(3) The powers of an investigator are subject to such conditions and limitations as may be prescribed by regulations.

37. Report of investigation

After completing his or her investigation, an investigator shall prepare and submit a report to the Authority”

66. Section 38 of the Act requires that a report arising from the investigations shall be submitted to the authority meaning the Public Procurement Regulatory Authority established under **Section 8 of the Act** and it is only once the Director General of the Authority has considered the report of the investigator and he is satisfied that there has been a breach of the Act, the regulations or any directions of the Authority that he /she may by order do the following:-

“38. Order by the Director-General

(1) If, after considering the report of an investigator, the Director-General is satisfied that there has been a breach of this Act, the Regulations or any directions of the Authority, the Director-General may, by order, do any one or more of the following—

(a) direct the procuring entity to take such actions as are necessary to rectify the contravention;

(b) terminate the procurement or asset disposal proceedings;

(c) prepare and submit a summary of the investigator's findings and recommendations to the relevant authorities for action; or

(d) require the procuring entity to transfer procuring responsibilities of the subject procurement to another procuring entity.”

67. My understanding of **Section 38** is that the Ethics & Anti-Corruption Commission (the 1st Respondent herein) would be one of the relevant authorities referred to in **Section 38 (c)**, which states: -

(1) This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.

(2) A provision of an Act that provides for a person or body to approve any work or expenditure shall not be construed as giving that person or body any power with respect to the entire procurement proceedings.

It would seem therefore that the petitioner did not invoke the correct procedure in seeking the information the subject of this petition.

68. In the upshot, I find that the declarations sought by the Petitioner are untenable.

Signed, Dated and Delivered Virtually this 31st day of March, 2022.

E.N MAINA

JUDGE

In the presence of:

Ms Adunga for the Petitioner

Ms Kibogu for the 1st Respondent

Ms Maina for the 2nd & 3rd Respondent

Court Assistant - Potishoi



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