REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(*Coram: Mwilu; DCJ & V-P, Ibrahim, Wanjala, Njoki & Ouko, SCJJ)*

PETITION NO. 30 OF 2019

(*Consolidated with)*

PETITION NO. 31 OF 2019

–BETWEEN–

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

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND APPELLANT

–AND–

PROF. TOM OJIENDA, SC
T/A PROF. TOM OJIENDA & ASSOCIATES
ADVOCATES ..... 1ST RESPONDENT
CHIEF MAGISTRATE, KIBERA LAW COURTS ..... 2ND RESPONDENT
LAW SOCIETY OF KENYA..... 3RD RESPONDENT

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

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before this Court are two Petitions, Nos. 30 and 31 of 2019 dated 30th July, 2019 and 31st July, 2019 respectively. The appeals are brought pursuant to Article 163 (4) (a) of the Constitution, Section 15 (2) of the Supreme Court Act, 2011 and

Rules 9 (1) and 33 (2) of the Supreme Court Rules, 2012 *(now repealed)*. They challenge in part the Judgment and Orders of the Court of Appeal (*Nambuye, Kiage & Kantai, JJ.A*) in Civil Appeal No. 109 of 2016, consolidated with Civil Appeal No. 103 of 2016. By an Order of this Court issued on 21st September, 2021 the appeals were consolidated with Petition No. 30 of 2019 as the lead file.

B. BACKGROUND

(i) At the High Court

[2] A complaint was lodged before the 1st appellant, the Ethics and Anti-Corruption Commission (EACC) alleging Kshs. 280 million had been fictitiously paid into the 1st respondent's advocate-client bank account by Mumias Sugar Company Limited. Based on this allegation, the 1st appellant filed *ex-parte* CMC Misc. Criminal Application No. 168 of 2015 seeking warrants to investigate and inspect the said bank account. On 18th March, 2015 the Chief Magistrate's Court allowed the *ex-parte* application.

[3] Aggrieved by this Order, the 1st respondent filed Constitutional Petition No. 122 of 2015. He contended that the warrants had been issued *ex-parte* and had been obtained and enforced secretly without Notice. He therefore urged that the 1st appellant's actions amounted to an infringement of his right to privacy, property, fair administrative action, and fair hearing enshrined in Articles 31, 40, 47 and 50 of the Constitution.

[4] Moreover, it was his contention that the 1st appellant's actions contradicted Sections 28(1), 28(2), 28(3) and 28(7) of the Anti-Corruption and Economic Crimes Act (ACECA), which require the Commission to issue a Notice to the 1st respondent informing him of its intended application and affording him an opportunity to be heard before a court could legitimately issue any warrants. In any event, the 1st respondent argued that payment of legal fees was privileged

communication under Sections 13(1), 134 and 137 of the Evidence Act, which in the absence of voluntary waiver by a client, a public body could not, without justifiable basis, ignore.

[5] On their part, the appellants contended that they did not act *ultra-vires* their lawful mandate as the warrants were obtained pursuant to the provisions of the ACECA, Sections 118 of the Criminal Procedure Code (CPC) and 180 of the Evidence Act. They further urged that, in so doing, they did not violate any of the 1st respondent's constitutional rights.

[6] Consequently, the 1st respondent sought the following summarized reliefs*:*

(a) A declaration that the warrants to investigate an account granted on the 18th day of March 2015, breached the petitioner's rights and fundamental freedoms protected under Articles 27(1), 27(4), 27(5), 31, 40(1), 40(2), 47(1), 47(2) and or 50(1) of the Constitution of Kenya, hence void for all intents and purposes.

(b) Judicial Review by way of an Order of ***certiorari*** *to remove into the Court and quash warrants to investigate an account granted on the 18th day of March, 2015;*

(c) Judicial Review by way of an Order of prohibition directed to the Ethics and Anti-Corruption Commission, its agents and or associates from investigating or further investigating, inspecting or further inspecting and or lifting or further lifting copies of account opening documents, statements, cheques, deposit slips, telegraphic money transfers, client instructions, bankers books and or any other information in respect the 1st respondent's identified account, or any other account held by the 1st respondent.

(d) Judicial Review by way of an Order of ***Mandamus*** *compelling the Director of Public Prosecutions to direct the Inspector General of the*

National Police Service to investigate Michael Kasilon, EACC herein, for possible commission of the offence of perjury; and

(e) A declaration that the appropriate forum to hear and determine any dispute regarding advocate-client relationship at the first instance is the Advocates' Complaints Commission and or the Advocates Disciplinary Tribunal.

[7] The High Court framed three key issues for determination: whether warrants to investigate the 1st respondent's Bank Account were issued in violation of his fundamental rights and freedoms protected under Articles 27, 40, 47 and 50 of the Constitution; whether the advocate/client privilege was applicable and consequently, whether the prayers sought could be granted; and whether there was another forum for determining the issue in dispute.

[8] In a Judgment delivered on 5th February, 2016 the Court (*Lenaola, J,* as he then was), granted the following declarations:

(a) A declaration that the warrants to investigate an account granted on the 18th March 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015, breached the 1st respondent's rights and fundamental freedoms under the provisions of Articles 47(1), 47(2) and 50(1) of the Constitution of Kenya, hence void for all intents and purposes;

(b) A Judicial Review order by way of an order of Certiorari to remove into the Court and quash warrants to investigate an account granted on the 18th March 2015 in Kibera Chief Magistrate Miscellaneous Criminal Case No.168 of 2015;

(c) Michael Kasilon and Eustace Waweru are struck off the proceedings; and

(d) Each party to bear its own costs.

(ii) At the Court of Appeal

[9] Aggrieved by this Judgment, the appellants lodged Civil Appeals Nos. 103 and 109 of 2016, which were consolidated on 19th May, 2017. The 1st respondent also filed a cross appeal against part of the Judgment. The consolidated appeal was premised on the grounds summarized as follows, that the learned Judges erred in:

(i) Failing to uphold that warrants to investigate the 1st respondent's bank account was lawfully obtained under the provision of Section 180 of the Evidence Act;

(ii) Failing to uphold that the Chief Magistrate's Court had jurisdiction to issue warrants under Section 118 of the Criminal Procedure Code;

(iii) Failing to appreciate that the provisions of Section 23 of ACECA, Section 180(1) of the Evidence Act and Section 118 of the Criminal Procedure Code were available to EACC in the discharge of its mandate;

(iv) Holding that the 1st respondent's right to due notice prior to an application for warrants violated Section 28 of ACECA and Article 47 of the Constitution;

(v) Failing to uphold that the 1st respondent's rights were limited by Article 24 of the Constitution in favour of the protection of public interest;

(vi) Failing to appreciate that the investigative process by EACC was not administrative but a constitutional process; and

(vii) Failing to appreciate that issuance of prior notice grants a suspect an opportunity to conceal evidence otherwise necessary in the prosecution of crimes.

[10] The cross appeal on the other hand, was premised on grounds that the learned Judge erred in law and fact by:

(i) *Failing to hold that the 1st respondent's fundamental right to privacy, to property and against discrimination were violated;*

(ii) *Holding that EACC had a factual basis which necessitated the issuance of impugned search warrants;*

(iii) *Failing to hold that the bank account was confidential communication covered by client-advocate privilege;*

(iv) *Failing to award him damages based on the violation of his right to fair administrative action; and*

(v) *For failing to find that EACC lacks constitutional mandate to investigate any alleged criminal conduct, which is the exclusive role of the National Police Service.*

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

(iii) At the Supreme Court

[12] Aggrieved by the entire Judgment, the appellants filed the instant appeal, citing several grounds of appeal. The lead appeal raises the following summarized grounds, that the Judges of Appeal erred in law in:

(a) *Adopting a narrow interpretation of Article 47 of the Constitution consequently rendering the 1st appellant ineffective in the performance of its constitutional functions;*

(b) *Failing to hold that the warrants to investigate the 1st respondent's bank account were lawfully issued pursuant to Sections 23 of the ACECA as read with Section 118 and 121 of the Criminal Procedure Code;*

(c) *Making an omnibus finding that the 1st appellant is inflexibly bound by the provisions of Sections 26, 27 and 28 of the ACECA;*

(d) *Failing to appreciate that the investigation process, including obtaining of the warrants was undertaken by the 1st appellant in line with the provisions of Article 10 of the Constitution;*

(e) *Failing to find that the 1st appellants investigative function is not an administrative action hence the provisions of Article 47(1) and (2) of the constitution and the Fair Administrative Act are not applicable;*

(f) *Failing to find that Section 23 of the ACECA, Section 118 of the Criminal Procedure Code and Section 180 of the Evidence Act are in tandem with the provisions of Article 24 of the Constitution;*

(g) *Failing to appreciate the element of surprise in criminal investigations envisaged under Section 118A of the CPC; and*

(h) *Failing to hold that Section 30 of the ACECA is in tandem with Article 50 (1) of the Constitution.*

[13] It seeks the following reliefs, that:

> *(a) The appeal be allowed with costs;*
>
> *(b) The Decision of the Court of Appeal delivered in Civil Appeal No. 103 of 2019 (Consolidated with No. 109 of 2016) beset aside and in lieu the appeal be allowed;*
>
> *(c) The High Court Judgment delivered in Petition No. 122 of 2015 be set aside and in lieu thereof the petition be dismissed with costs;*
>
> *(d) A declaration that an application for warrants to investigate accounts before the Subordinates Courts is I tandem with Article 24(3) of the Constitution; and*
>
> *(e) Declaration that investigations by the EACC as a law enforcement agency are not an administrative action envisaged under Article 47 of the constitution;*

[14] The second appeal raises similar grounds, which though not articulated in the body of the Petition, were listed in its written submissions. It seeks the following Orders, that:

> *(i) The appeal be allowed with costs;*
>
> *(ii) The Decision of the Court of Appeal be set aside and in lieu of the appeal be allowed with costs; and*
>
> *(iii) The decision of the High Court in Petition No. 122 of 2015 be set aside and in lieu, the Petition be dismissed with costs.*

C. PARTIES RESPECTIVE SUBMISSIONS

(i) 1st Appellant's Case

[15] The 1st appellant filed its submissions, dated 29th October, 2019, 7th September, 2019, 3rd September, 2019 and supplementary submissions dated 27th February, 2020. It raises three issues for determination, that is, whether an investigation within EACC's constitutional mandate under Article 79 and 252 of the Constitution is an administrative action; whether a restrictive interpretation of Articles 47, 79 and 252 of the Constitution renders EACC's ineffective in the discharge of its constitutional mandate; and in the alternative, whether the judicial process in Section 118 of the CPC and Section 180 of the Evidence Act meets a constitutional threshold for limitation of right under Article 24 of the Constitution.

[16] The 1st appellant contends that investigations within its constitutional mandate is a preliminary step that does not pose any adverse threat to the rights of a person who is under investigation. It argues that under Article 47 as read with Section 2 of the FAA Act, the element of adverse effect is a prerequisite to ascertaining whether an action is an administrative action or not. To determine whether the 1st appellant's investigative function is an administrative action which inflexibly binds it to the provisions of Article 47 of the Constitution, the Court is invited to first ascertain whether EACC's actions violated or threatened to violate any of the 1st respondent's fundamental rights and freedoms.

[17] Consequently, it is the 1st appellant's submission that in view of the findings by the two Superior Courts that none of the 1st respondent's rights had been violated, the investigative powers of the 1st applicant cannot be categorized as administrative action within the ambit of the Constitution and the applicable law. To further persuade the Court, it relies on the Supreme Court of South Africa's Decision in the ***Competition Commission v. Yara (South Africa) (Pty)***

Ltd. & Others (784/12) [2013] ZASCA 107 and Section 33 of the South African Constitution.

[18] Alternatively, it is asserted that issuance of prior Notice in an application under Section 23 (4) of the ACECA is not a mandatory requirement. It is argued that any contrary finding would amount to loss of exigencies of investigations and obliteration of vital evidence. The 1st appellant cites the Court of Appeal's Decision in ***Kenya Anti-Corruption Commission v. Republic & 4 Others;*** Civil Appeal No. 284 of 2009; [2013] eKLR, to sustain this argument. It also urges that in the impugned decision, the appellate court insouciantly departed from this position without distinguishing it.

[19] The 1st appellant urges that the Court of Appeal usurped Parliament's legislative mandate in finding that Notice under Section 26 of the ACECA was a mandatory requirement. On the contrary, it contends that the Section is limited in its reach and application. Whether to issue Notice or not, is left to the discretion of the Commission's Secretary. It is therefore contended that in so far as the Secretary did not deem it necessary to issue a Notice, the 1st appellant's actions were lawful and fair.

[20] The 1st appellant further submits that ACECA has no special procedure for obtaining warrants. Rather, it is argued, the procedure applicable is as set out under Sections 180 of the Evidence Act and118 and 121 of the CPC. In view of the, foregoing Sections, the 1st appellant argues that the Court of Appeal in its impugned finding, went against its own decision in ***Samuel Muriithi & Another v. Republic***, Nairobi criminal Appeal No. 2 of 2013 [Unreported], in which it held that the limitation in Section 180 of the Evidence Act, read together with Sections 118 and 121 of the CPC are in consonance with Article 24 of the Constitution. Similarly, the 1st appellant submits that Section 13 of the Ethics and Anti-Corruption Act vests in upon it powers necessary to exercise its functions under the Constitution and any other written law. It argues that the doctrine of

generalia specialibus non derogant is inapplicable in this case. Consequently, it maintains that the provisions of the Evidence Act and the CPC are necessary legal tools which it must periodically deploy to effectively carry out its mandate under the Constitution and the ACECA.

[21] The 1st appellant further submits that the Court of Appeal's interpretation of Article 47 of the Constitution renders it ineffective in the discharge of its constitutional mandate. It contends that an omnibus application of Article 47 of the Constitution denies it flexibility to the detriment of its objects under Articles 79 and 252 of the Constitution. On the contrary, it maintains that Section 13 of the Ethics and Anti-Corruption Commission Act permits the 1st appellant to invoke provisions of any other law where necessary to exercise its functions. It argues that the appellate court ought to have been guided by the provisions of Article 191 (5) of the Constitution to arrive at a reasonable interpretation that avoids conflict between the said legislations and its constitutional mandate.

[22] It relies on the Court of Appeal decision in ***Teachers Service Commission (TSC) v. Kenya Union of Teachers (KNUT) & 3 Others***; Civil Appeal No. 196, 195 and 203 of 2015 (Consolidated), [2015] eKLR, to further the argument that an interpretation that renders a constitutional provision idle and an Independent Commission ineffective is unconstitutional. It further relies on the Supreme Court of South Africa decisions in ***Simelane NO & Others v. Seven-Eleven Corporation SA (Pty) Ltd & Another*** (480/01) [2002] ZASCA 141 and ***Chairman Board on Tariffs & Trade & Another v. Brenco Incorporated & Another*** (BRENCO) (No. 285/99) to urge for flexibility in the application of the principles of natural justice.

[23] In conclusion and without prejudice, it is submitted that even if this Court were to find that the 1st appellant's investigations amounted to an administrative action, the warrants were obtained through a judicial process in terms of Section 180 of the Evidence Act and 118 of the CPC and could only be quashed upon a

finding that there were no reasonable grounds for granting them. It cites ***Manfred Walter Schmitt & Another v. Republic & Another;*** Criminal Revision 469 and 2326 of 2012, [2013] eKLR (***the Manfred Case***), to support this submission. It is urged that the right to fair administrative action is not absolute but can be limited in terms of Article 24 of the Constitution. It maintains that in any event, criminal processes including investigations, do not in themselves constitute a violation of the rights and freedoms of the person under investigation. The process is not only constitutional, but is also clothed with safeguards against the danger of infringement of one's rights and freedoms.

(ii) 2nd Appellant's Case

[24] The 2nd appellant addresses the Court on the following issues; whether this Court has jurisdiction; whether warrants to investigate a bank account can be lawfully issued in public interest; whether an application for warrants to investigate is in tandem with Article 24 (3) of the Constitution; whether an application for warrants to investigate before the Chief Magistrate's Court is a safeguard or a violation of constitutional rights; whether EACC is inflexibly bound to issue prior Notice before applying for warrants; and whether investigations by EACC is an administrative action subject to Article 47 of the Constitution.

[25] As regards this Court's jurisdiction, it is the 2nd appellant's submission that the appeal raises issues of constitutional interpretation and application, which have been litigated through the judicial hierarchy. It relies on this Court's decisions in ***Erad Suppliers & General Contractors Ltd v. National Cereals & Produce Board;*** SC Petition No. 5 of 2012, [2012] eKLR and ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others;*** SC Petition No. 10 of 2013 [2014] eKLR.

[26] On substantive issues, the 2nd appellant submits that the 1st appellant's application for warrants was in accordance with the principles set out under Article 24 of the Constitution. To this end, it is submitted that the 1st appellant

reasonably demonstrated to the 2nd respondent that an offence had been committed or was about to be committed, necessitating the grant of warrants. It cites the ***Manfred Case*** and urges that the obligation imposed on the Judiciary to issue warrants for search and seizure is a constitutional safeguard to protect the rights and freedoms of an individual.

[27] On the issue as to whether the 1st appellant is inflexibly bound to issue Notice before applying for warrants, the 2nd appellant answers in the negative. It relies on the provisions of Articles 79, 252, 259 of the Constitution, Sections 11 and 13 of the Ethics and Anti-Corruption Commission Act (EACC Act) and Sections 23, 26 to 30 of the ACECA, to urge that the Appellate Court misinterpreted the provisions of Sections 23(4) *vis- à -vis* the provisions of Section 26, 27 and 28 of the ACECA.

[28] On the issue as to whether investigations by EACC is an administrative action subject to Article 47 of the Constitution, it is the 2nd appellant's submission that Section 2 of the Fair Administrative Action Act No. 4 of 2015 (FAA Act), defines "an administrative action" as an action that determines the culpability of a person. An investigation and the process thereof, including an application for a warrant, argues the 2nd appellant, does not entail the determination of one's culpability within the meaning of Section 2 of the FAA Act. Such a process cannot be said to constitute an infringement of the rights and freedoms of the person under investigation. It is the 2nd appellant's further argument that an administrative action refers to the powers, functions and duties exercised by authorities or quasi-judicial tribunals, as opposed to law enforcement agencies. Consequently, it is submitted that the Appellate Court mis-applied the provisions of Article 47 of the Constitution to the constitutional mandate of the 1st appellant, while ignoring Articles 79 and 252 of the Constitution, and the ACECA and EACC Act.

[29] It is the 2nd appellant's case that the Appellate Court erred in departing from its own decision in ***Kenya Anti-Corruption Commission v. Republic & 4***

Others (Supra) in which it had held that; there was no requirement for issuance of prior Notice in an application under Sections 23 of the ACECA as read with Section 180 of the Evidence Act and Sections 118 and 121 of the CPC; and that failure to issue such Notice does not constitute infringement of the rules of natural justice. Additionally, it is contended that the impugned decision is contradictory to the Appellate Court's decision in ***CACRA 2/2013 Samuel Mureithi Watatu & Another v. Republic*** (unreported) where the court found that every citizen has the right against arbitrary search which extends to one's property including their bank account but that right is not absolute, and can be limited under Article 24 of the constitution on reasonable grounds.

(iii) 1st Respondent's Case

[30] In response, the 1st respondent filed a Notice of preliminary objection, challenging the Court's jurisdiction and a replying affidavit reproducing the arguments before the High Court. He also filed submissions and supplementary submissions dated 24th October, 2019 and 17th February, 2020 respectively. The 1st respondent submits on three issues; this Court's jurisdiction; whether the 1st appellant's investigations must align with the provisions of ACECA; whether the 1st appellant was bound by law to issue prior Notice before seeking the *ex-parte* warrants; and whether the 1st appellant is an Administrative Commission bound by the principles of fair administrative action.

[31] He contends that the Court lacks jurisdiction under Article 163(4) (a) of the Constitution as the appeal do not raise any issues involving the interpretation or application of the Constitution or raise any cogent issues of constitutional controversy. But rather, seek the interpretation of Section 23 of the ACECA, Section 118 of the CPC and Section 180 of the Evidence Act. He relies on this Court's decisions in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others;*** SC Application No. 5 of 2014, [2014] eKLR ***(Munya Case)***; ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another;***

SC Petition No. 3 of 2012, [2012] eKLR (***Lawrence Nduttu Case***); ***Peter Ngoge v. Francis Ole Kaparo & 5 Others (Peter Ngoge Case);*** SC Petition No. 2 of 2012, [2012] eKLR; ***Rutongot Farm Ltd. v. Kenya Forest Service & 3 Others***; SC Petition No. 2 of 2016, [2018] eKLR; ***Musa Cherutich Sirma v. Independent Electoral & Boundaries Commission & 2 Others;*** SC Petition No. 13 of 2018, [2019] eKLR; and ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others;*** SC Application No. 2 of 2011, [2012] eKLR, to support his arguments on jurisdiction.

[32] Similarly, it is the 1st respondent's argument that the subject matter of the appeal is moot and is an abuse of the court process. He relies on grounds that the impugned warrants were sought, issued and enforced in 2015, hence there is no justiciable controversy between the parties. He cites the United States of America case of ***Mills v. Green***, 159 U.S 651, 653 (1895) in support of this assertion.

[33] On the substantive issues, it is submitted that the 1st appellant's powers are limited to the Constitution and statute and must align with the provisions of its enabling statute, specifically Sections 26 to 28 of the ACECA. It is contended that the 1st appellant cannot rely on general provisions to wit Sections 118 of the CPC and 180 of the Evidence Act, to avoid express obligations created under its enabling statute. He urges the Court to give Sections 26 to 28 of the ACECA their plain and ordinary meaning. He cites the decisions of ***Republic v. Cabinet Secretary Ministry of Information and Communication & 8 Others*** *Ex-parte* ***Adrian Kamotho Njenga & 2 Others;*** Misc. Application No. 401 of 2014, [2014] eKLR; and ***Republic v. National Environment Tribunal & 2 Others*** *Ex-Parte* ***Abdulhafidh Sheikh Ahmed Zubeidi***; Misc. Application No. 155 of 2012, [2013] eKLR.

[34] On the issue as to whether the 1st appellant is bound by principles of fair administrative action under Article 47 of the Constitution, the 1st respondent submits that EACC is a state organ by virtue of Article 260 of the Constitution,

discharging a public administrative function and therefore bound by the provisions of Article 47 of the Constitution, FAA Act and Sections 23 (4) as read with Sections 27 to 28 of ACECA. Moreover, it is urged that all Chapter 15 Commissions, are clothed with general investigative functions, which though constitutional, are carried out in an administrative capacity. He relies on this Court's decision in ***Judicial Service Commission v. Mbalu Mutava & Another;*** Civil Appeal No. 52 of 2014, [2015] eKLR, to support the contention that the investigative function of constitutional Commissions as embodied under Article 252(1) of the Constitution, though forming part of their constitutional mandate is an administrative function subject to the provisions of Article 47 of the Constitution and its enabling statute.

[35] It is the respondent's further case that any decision, action or omission by the 1st appellant in the conduct of its investigations under Sections 11(1) (d) and Part IV of the ACECA, has adverse effects on the legal rights or freedoms of the subject under investigations. Furthermore, it is argued that Sections 26 and 28 of the ACECA calls for respect of Article 47 of the Constitution, by requiring the issuance of prior Notice. The 1st respondent argues that EACC must conduct its duties and functions under the ambit of the Constitution, while upholding the right to fair administrative action. Consequently, it is submitted that any action by the 1st appellant that is divorced from constitutional principles and the Bill of Rights is unconstitutional.

[36] He asserts that administrative action flowing from statutes must meet the constitutional test of legality, reasonableness and procedural fairness. He relies on the Court of Appeal's decisions in ***County Government of Meru v. Ethics & Anti-Corruption Commission***; Civil Appeal No. 193 of 2014, [2014] eKLR and ***Kenya Human Rights Commission & Another v. Non-Governmental Organizations Co-Ordination Board & Another;*** H.C Petition No. 404 of 2017, [2018] eKLR, to urge his case. In conclusion, the 1st respondent asserts that

ACECA takes precedence over general provisions in the Evidence Act and the CPC, with regard to the conduct of investigations. Likewise, he submits that public interest is not a sufficient ground for limiting the right to fair administrative action. On the contrary, it is submitted that the Constitution embodies the supreme public interest and its provisions must be upheld by the courts, sometimes to the annoyance of the public. He relies on the Court of Appeal's decision in ***Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another;*** Misc. Civil Application No. 54 of 2006, [2006] eKLR, in support of his argument.

(iv) 3rd Respondent's Case

[37] The 3rd respondent's submissions are dated 22nd November, 2019 and filed on 29th November, 2019. It submits that this Court has jurisdiction to hear and determine the appeals before it as they raise issues of constitutional controversy that have arisen through the court's hierarchy.

[38] It submits that Section 26 of the EACC Act enhances and promotes values espoused under Article 47 of the Constitution. It is urged that before any adverse administrative action can be undertaken against affected persons, they must be granted an opportunity to respond. It argues that any Orders made *ex-parte* thereof are arbitrary, adverse and amount to violation of fundamental rights and freedoms. It is submitted that with the enactment of anti-laundering regulations and with modern technologies that enable the tracing of movements of money, the 1st appellant's fear that prior Notice might jeopardize investigations is misguided.

[39] The 3rd respondent submits that the Constitution must be read as a whole, with each Article complementing and not destroying the other. Therefore, it is contended that Article 79 must be read together with Article 47 of the Constitution, which leads to the conclusion that the EACC, being an institution established by the Constitution, cannot negate the provisions of Article 47. It relies on the

Ugandan Case of ***Tinyefuza v. AG*** [1997 UGCC3]. The 3rd respondent further submits that prior Notice, is a mandatory requirement under the provisions of Section 26 of the ACECA and Article 47 of the Constitution. It is also submitted that Sections 118A of the CPC and 180 of the Evidence Act must be read in a manner that brings them in conformity with the Constitution as is the requirement under the Sixth Schedule. Accordingly, it is submitted that the two Sections are also subject to the requirement of Article 47 of the Constitution.

[40] In conclusion, it is the 3rd respondent's submission that the requirement to issue prior Notice is particularly important to the legal profession, specifically to advocates-client confidentiality which is the backbone and bedrock of legal practice. Furthermore, it is argued that to issue a search warrant against an advocate-client account without Notice, adversely undermines and invades the privacy of not only the client, the subject of investigations, but all other clients whose affairs are made public. It cites the case of ***King Wollen Mills Limited & Another v. Kaplan & Stratton Advocate***s [1900-1994] E.A 214.

D. ISSUES FOR DETERMINATION

[41] On the basis of the pleadings and submissions by the parties herein, we consider that four issues merit our determination:

(i) *Whether the Court has jurisdiction under Article 163 (4)(a) of the Constitution to entertain the appeal;*

(ii) *Whether investigations by the 1st appellant constitute an administrative action, within the meaning of Article 47 of the Constitution, and Section 2 of the Fair Administrative Action Act;*

(iii) Whether the 1st respondent's fundamental rights and freedoms were violated by the 1st appellant's investigative actions against him; and

(iv) Whether the 1st appellant is inflexibly bound to issue prior notice before commencing its investigations including applying for warrants.

E. ANALYSIS

(i) On Jurisdiction

[42] The 1st respondent has challenged this Court's jurisdiction under Article 163(4)(a) of the Constitution. He contends that the consolidated appeal does not raise any issues involving the interpretation or application of the Constitution, or cogent issues of constitutional controversy. It is argued that all the appellants seek, is the interpretation of statutory provisions. Moreover, he maintains that the appeal is moot as the impugned warrants were issued and effected, hence spent. Conversely, the appellants urge that the appeal raises issues of constitutional interpretation and application, which have arisen through the judicial hierarchy. The 3rd respondent agrees with this contention.

[43] Article 163 (4) (a) stipulates:

"Appeals shall lie from the Court of Appeal to the Supreme Court—

(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)" [emphasis added].

[44] This Court has settled the law on when an appeal lies to this Court under Article 163(4)(a) of the Constitution. In ***Lawrence Nduttu Case*** the Court observed:

> *"[28] The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution.* ***In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation.*** *Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)"* [emphasis ours].

[45] Subsequently, in the ***Munya Case***, the Court in determining whether it had jurisdiction under Article 163(4)(a) of the Constitution stated that:

> *"The import of the Court's statement in the* ***Ngoge Case*** *is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the* ***very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application"*** [emphasis added].

[46] Flowing from the above, it is settled that for a litigant to invoke this Court's appellate jurisdiction under Article 163(4) (a) of the Constitution, it must be demonstrated that the matter in issue revolves around constitutional contestation that has come through the judicial hierarchy, running up to the Court of Appeal and requiring this Court's final input. At the very least, an appellant must

demonstrate that the Court's reasoning and conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.

[47] Upon an extensive examination of the record, it is apparent that the issue before the trial court was whether warrants issued *ex-parte* infringed the 1st respondent's rights enshrined in Articles 27, 40, 47 and 50 of the Constitution. The 1st respondent sought a declaration, among others, that the impugned warrants breached his rights and fundamental freedoms protected under Articles 27, 31, 40, 47 and 50 of the Constitution of Kenya.

[48] The High Court partly found for the 1st respondent. It determined that the 1st appellant's actions or omission were in breach of the 1st respondent's right to fair administrative action and fair hearing under Articles 47 and 50 of the Constitution. On appeal, the appellate court upheld the High Court. The appeal before us raises *inter alia* the issue as to whether investigations by the 1st appellant constitute an administrative action subject to Article 47 of the Constitution as read with Articles 10 and 24 of the Constitution. The superior courts' finding on violations of the 1st respondent's rights under Articles 47 and 50 of the Constitution is challenged.

[49] From the foregoing, we are convinced that the issues before the High Court and Court of Appeal, leading to the impugned Judgments squarely bring the instant appeal within the ambit of Article 163(4)(a) of the Constitution. Besides, the 1st respondent having filed a constitutional petition and succeeded before the two superior courts, cannot now claim that the resultant appeal therefrom is not sustainable under Article 163 (4) (a) of the Constitution. We consequently find that we have the jurisdiction to hear and determine it.

[50] The 2nd respondent also submits albeit tangentially, that this Court lacks jurisdiction on ground of mootness. It is his argument, that the impugned warrants which triggered the appeals were sought, issued and enforced in 2015, and as such,

there is no justiciable issue between the parties. We find this argument far-fetched given the fact that the enforcement of the impugned warrants did not resolve the grievances that have remained live up-to this day. Indeed, it was the issuance of those warrants that prompted the 1st respondent to move to the High Court seeking to have them quashed. The question of when an issue is to be regarded to have become moot was extensively addressed by this Court in ***Institute for Social Accountability & Another v. The National Assembly & Others (***Petition No. 1 of 2018) [2022] KESC 39 (KLR) (Civ) (8 August 2022) (Judgment).

(ii) Whether investigations by the 1st appellant constitute an administrative action within the meaning of Article 47 of the Constitution

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

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

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

> ***"47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***
>
> *(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall–*
>
> *(a) provide for the review of administrative action by a court or, if appropriate, and independent and impartial tribunal; and*
>
> ***(b) promote efficient administration."***

[54] So, what constitutes "an administrative action" within the meaning of Article 47(1) of the Constitution? Articles 47 and 260 of the Constitution do not define an "administrative action". Section 2 of the FAA Act which was enacted to give effect to Article 47, defines 'administrative action' as follows:

> *"Administrative action" includes—*
>
> *(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or*
>
> *(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates".*

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

[56] A close scrutiny of Article 47 of the Constitution gives a glimpse of what an "administrative action" entails. Towards this end, the said Article provides that:

> "...
>
> ***(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall–***
>
> ...
>
> *(b) promote efficient administration."*

[57] By stipulating that the legislation so contemplated has to among other things, *promote efficient administration*, the Constitution leaves no doubt that an "administrative action" is not just any action or omission, or any exercise of power or authority, but one that relates to *the management of affairs* of an institution, organization, or agency. This explains why such action is described as "administrative" as opposed to any other action. The ***Concise Oxford Dictionary (9th Ed)*** defines the word "administrative" as "*concerning or relating to the management of affairs"* ***Black's Law Dictionary, (11th Ed)*** defines "administrative action" to mean "*a decision or an implementation relating to the government's executive function or a business's management*". ***Burton's***

Legal Thesaurus (4th Ed) defines the adjective "administrative" to mean among others, *"directorial, guiding, managerial, regulative, supervisory.*

[58] 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.

(iii) Whether the 1st respondent's fundamental rights and freedoms were violated by the 1st appellant's investigative actions against him

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

[60] Article 20 (1) of the Constitution, provides that ***the Bill of Rights applies to all and bind all State organs and all persons***. It entrenches the enjoyment of rights and fundamental freedoms in the Bill of Rights by every person and to the greatest extent consistent with the nature of the right or fundamental

freedom. The right to fair administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair is one such right under the Bill of Rights.

[61] Having already concluded that the investigative actions of the 1st appellant cannot be categorized as "administrative action" within the context of Article 47 of the Constitution, we find no basis upon which we can hold, that the 1st respondent's rights were violated for failure to observe the requirements of the said Article. Therefore, in the absence of proof of violation of his other fundamental rights and freedoms guaranteed by the Constitution, the impugned warrants ought not to have been quashed on the basis of this claim.

(iv) Whether the 1st appellant is inflexibly bound to issue prior notice before applying for warrants

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

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

"(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, ***the Secretary may, by notice in writing,*** *require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property—*

(a) enumerating the suspected person's property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property…" [emphasis added].

[64] Section 27 of the ACECA provides:

"(1) The Commission may apply ex-parte to the Court for an order requiring an associate of a suspected person ***to provide, within a reasonable time specified in the order, a written statement stating,*** *in relation to any property specified by the Secretary, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property*.

(2) In subsection (1), ***"associate of a suspected person"*** *means a person, whether or not suspected of corruption or economic crime, who the investigator reasonably believes may have had*

dealings with a person suspected of corruption or economic crime.

*(3) The Commission **may by notice in writing** require any person to provide, within a reasonable time specified in the notice, any **information or documents** in the person's possession that relate to a person suspected of corruption or economic crime.*

(4) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(5) No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act (Cap. 80.)."

[65] While Section 28 provides:

"*(1) The Commission may apply, **with notice to affected parties**, to the Court for an order to –*

*(a) require a person, whether or not suspected of corruption or economic crime, to **produce specified records** in his possession that may be required for an investigation;*

...

*(8) The Commission may **by notice in writing** require a person to produce for inspection, within a reasonable time specified in the notice, any property in the person's possession, being*

property of a person reasonably suspected of corruption or economic crime.

(9) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(10) No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act (Cap. 80)" [emphasis added].

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

[67] Under Section 26, the 1st appellant is required to issue a Notice in writing ***where the Secretary is satisfied that it could assist or expedite an investigation.*** The language in this Section is permissive rather than mandatory. It all depends on whether the Secretary is satisfied that the furnishing of information regarding specified property could assist or expedite an investigation. This explains why the person reasonably suspected of corruption is the one required through a Notice in writing to furnish the requisite information relating to the property or properties specified in the Notice. Obviously, if the Secretary is

not satisfied that such Notice will assist or expedite an investigation, then he/she does not have to issue it. The Secretary may very well be of the opinion that such Notice, instead of assisting or expediting an investigation, could actually jeopardize or delay it. It is also clear to us that such Notice, if necessary, would be issued during an ongoing, and not prior to an investigation. Otherwise, how would the Secretary form an opinion that an investigation requires to be assisted or expedited, if it was not ongoing? Before the conclusion that certain information is required, preliminary investigative processes must have been undertaken.

[68] Under Section 27, the 1st appellant has two options, either, it can move directly and obtain an *ex-parte Order* from Court against an associate of a person suspected of corruption, requiring such associate to produce certain documents or information, or it can with Notice in writing require the Associate to produce the specified information. It is noteworthy that where the 1st appellant opts for the Court process, no Notice is required to be issued to the Associate. Only where it chooses to get the information directly from the Associate, is the 1st appellant required to issue the Notice in writing. Again, the language of the statute is permissive rather than mandatory.

[69] Under Section 28, the Commission may with Notice in writing to the affected parties seek a court order requiring the production of *specified records in the possession of any person whether or not suspected of corruption*. It is again to be noted that in this instance, the Notice may be issued to any person, and not just one suspected of corruption. It may be reasonably assumed that in such a situation, the Notice is to be issued before the commencement of an investigation. The Section clearly states that such specified records *may be required for an investigation,* hence our determination that what is envisaged, is a process of investigation that is yet to commence. This explains the fact that the Notice is not confined to persons suspected of corruption but extends to any others that the Commission believes are in possession of such records.

[70] Secondly under this Section, the Commission may issue Notice directly to a person suspected of corruption or economic crimes, requiring him to *produce specified property* as opposed to *specified records*. The property is so required for *inspection*. In this instance, it can be reasonably assumed that such Notice may be issued by the Commission during an on-going investigation. Section 28 is however silent as to whether in this regard, the issuance of Notice by the Commission is also dependent on the opinion of the Secretary.

[71] Section 23(4) of ACECA, on the other hand confers upon the Secretary to the Commission and Investigators under the Act, powers, privileges and immunities of a Police Officer in so far as the same are not inconsistent with the provisions of the Act or any other law. Therefore, there is no doubt that the 1st appellant's Secretary and Investigators are given Police powers, which they may exercise in the course of their duties under the relevant provisions of other applicable laws. Such laws include the Police Act, the CPC, the Evidence Act, among others. It is clear that the 1st appellant is not limited to the provisions of ACECA, in carrying out its investigative mandate. We however hasten to add that, where the provisions of the ACECA are clear and unambiguous, the 1st appellant's first resort must be to this enabling statute.

[72] What conclusions can we derive from the foregoing analysis? First and foremost, it must be acknowledged that the 1st appellant has a wide and critical mandate under the Constitution and the law to combat Corruption and Economic Crime in our society. In executing this mandate, the 1st appellant assumes different postures depending on the nature of the specific function it is carrying out. Thus, on the one hand, the Commission may assume a non-confrontational and largely facilitative role when for example, it is educating the public on the nature and vices of corruption, or conducting research into the nature of corruption, or when undertaking a systems' review of a specific agency with a view to sealing corruption loopholes. On the other hand, the Commission may assume a law enforcement

posture, when conducting investigations into suspected corrupt conduct, effecting arrests of corruption suspects, disrupting corruption networks, and through the Office of the Director of Public Prosecutions, arraigning suspects before courts of law. Lastly, the Commission may assume an intelligence gathering posture, when for example it is tracing the proceeds of crime (asset tracing) with a view to recovering the same.

[73] In all these, the Commission will apply different sets of laws and strategies. Regarding investigations, it all depends on what is at stake, the nature of the evidence required, and the urgency with which the said evidence must be acquired. In the circumstances, it cannot be said that the Commission must always give prior Notice to those it intends to investigate before commencing an investigation. We have elaborately interrogated the provisions of Sections 26, 27 and 28 of ACECA. The said provisions set out very specific circumstances in which the Commission may issue Notice. If the conditions so specified obtain, then the Commission may issue Notice in writing to the affected parties. If the Commission is carrying out a police operation or an intelligence gathering or asset tracing exercise, it cannot be required to issue a prior mandatory Notice to the intended targets. In such a situation, the provisions of Section 23 of ACECA, the Evidence Act, the CPC, and any other enabling legislation come into play. It is however worth emphasizing that, at all times, whatever the nature of the investigations the Commission may be undertaking, it must do so within the confines of the Constitution and the law.

[74] It is now time to apply these conclusions to the issue at hand, that is whether the 1st appellant acted unlawfully by obtaining warrants *ex-parte* from court, which would have enabled it access to an Advocate client bank account operated by the 1st respondent. On the one hand, the 1st appellant maintains that it acted lawfully under the relevant provisions of the Constitution, the Evidence Act and the CPC. It further submits that it was conducting a law enforcement operation, as opposed to an administrative action, to warrant conformity with the requirements of Article

47 of the Constitution and the FAA Act. On his part, the 1st respondent submits that the 1st appellant acted unlawfully by obtaining the warrants without prior Notice, in violation of Article 47 of the Constitution, and the provisions of Article 26, 27 and 28 of the ACECA.

[75] We have already held that the 1st appellant is not required to give written Notice prior to commencing an investigation in all situations. We have also held that where circumstances obtain under Sections 26, 27 and 28 of ACECA, the 1st appellant has to issue written Notice in accordance with the stipulations therein. Having held so, we cannot state with certainty that the 1st appellant ought to have moved to court under Section 26 because we have no information on record showing that the Secretary had formed an opinion that the information sought was to aid or expedite the on-going investigation. Neither can we state that the 1st appellant ought to have moved to court under Section 27 since it was not investigating the 1st respondent as *an Associate of a person suspected of corruption or economic crime*. That leaves us with Section 28 which is confined to notices requiring the production of *records or property as the case may be*. Can it be said that the 1st appellant ought to have moved to Court under Section 28? We think not, because in this instance, the investigations had already commenced (See paragraph 69 above).

[76] In view of the foregoing, we find it difficult to sustain the declaration by the Court of Appeal to the effect that, the 1st appellant is inflexibly bound to issue Notice in the conduct of its investigations. Where the 1st appellant is acting under its Police powers, it is bound by the laws pursuant to which the Police conduct their investigations and connected purposes. Where it conducts investigations in circumstances where the law requires it to issue written Notice, then it has to issue the Notice. At the end of the day, the people expect that the law enforcement agencies established under the Constitution and the law are effective enough to protect them from crime and related dangers. By the same token, the people expect

that such agencies will carry out their mandates in accordance with the Constitution and the law.

[77] The foregoing conclusions and findings, lead us to make the following Orders.

F. ORDERS

[78] Having considered the issues as framed by this Court for determination, the final Orders are as follows:

(i) The Petitions of Appeal dated 30th July 2019, and 31st July 2019, as consolidated, are hereby allowed.

(ii) The Judgment of the Court of Appeal dated 28th June, 2019 is hereby overturned.

G. ON COSTS

Each Party shall bear its own costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **7th Day** of **October, 2022.**

.....

P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE
SUPREME COURT

.....	**.....**
M. K. IBRAHIM	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....	.....
NJOKI NDUNGU	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA