

KENYA ANTI-CORRUPTION COMMISSION



STATEMENT OF THE ADVISORY BOARD OF THE KENYA ANTI-CORRUPTION COMMISSION WITH REFERENCE TO THE POWERS OF THE COMMISSION FOR DETECTION AND INVESTIGATION OF CORRUPTION AND ECONOMIC CRIME IN SECTIONS 26, 27 AND 28 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT 2003

The attention of the Advisory Board has been drawn to remarks attributed to Hon. Paul Muite, M.P., Senior Counsel and Chairman of the Parliamentary Committee on the Administration of Justice and Legal Affairs, appearing on the back page of the Daily Nation of Monday, 12th March 2007.

Hon. Muite is reported as having stated that the Parliamentary Committee will propose amendments to *The Anti-Corruption and Economic Crimes Act 2003* to repeal provisions which he alleges are against the Constitution and to “obligate KACC to carry out investigations and not to ask people to incriminate themselves”. It is clear to the Advisory Board that Hon. Muite was referring to Sections 26, 27 and 28 of *The Anti-Corruption and Economic Crimes Act 2003*.

Powers conferred on the KACC by the law

The Anti-Corruption and Economic Crimes Act, 2003 confers investigatory and crime-detection powers on the KACC that are necessary for success in the fight against corruption in Kenya. Sections 26, 27 and 28 of the Act empower KACC;

- 1) *To require a person who is reasonably suspected of corruption or economic crime to provide a written statement of his/her property, and to explain how he/she acquired such property;*
- 2) *To call upon an associate of a person reasonably suspected of corruption or economic crime to provide a written statement of his/her property; and*
- 3) *To obtain records and information as required for purposes of a criminal investigation.*

The Advisory Board is of the view that to deny the KACC these powers would be a dangerous and retrogressive step in Kenya's efforts to deal with corruption. On the allegation of unconstitutionality relating to Sections 26, 27 and 28, the Advisory Board wishes to pose two pertinent questions, which are:-

- (a) *Which organ of State has the constitutional function of determining questions of constitutionality and unconstitutionality? And*
- (b) *Are sections 26, 27 and 28 of The Anti-Corruption and Economic Crimes Act 2003 really unconstitutional as alleged?*

(a) Which organ determines questions of constitutional interpretation?

Kenya is a Constitutional democracy. This is to say that it is the Constitution of Kenya, rather than any single organ of Government, that is supreme. No organ is superior to the other. All bow to the Constitution.

The Constitution establishes three organs of Government; the Legislature is given primacy in law-making. The Executive is given primacy in policy formulation and implementation (including execution of laws), while the Judiciary has primacy in interpreting the Constitution and all other laws made under and subject to it.

Accordingly, any authoritative interpretation of the Constitution and any other law can only be made by the Judiciary.

(b) Are sections 26, 27 and 28 of *The Anti-Corruption and Economic Crimes Act 2003* really unconstitutional?

The issue of the constitutionality of sections 26, 27 and 28 of *The Anti-Corruption and Economic Crimes Act 2003* was addressed squarely by the High Court of Kenya sitting as a Constitutional Court during the hearing of High Court of Kenya Miscellaneous Application Number 54 of 2006, *Dr Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and the Attorney General*.

After hearing arguments on both sides, the Constitutional Court made a ruling on 1st December 2006, where it firmly and unambiguously said that sections 26, 27 and 28 of *The Anti-Corruption and Economic Crimes Act 2003* are **not unconstitutional**. The decision of the court in this regard is conclusive and binding on all organs of Government.

The Hon. Dr. Christopher Ndarathi Murungaru's Application

The Constitutional application was filed by Hon. Paul Muite M.P. on behalf of his client, the Hon. Dr Christopher Murungaru M.P., in February 2006. In summary, Hon. Muite argued that the powers given to the Commission in

Sections 26, 27 and 28 of *The Anti-Corruption and Economic Crimes Act 2003* were a violation of his client's constitutional rights, namely;

- (1) The presumption of innocence through due process;
- (2) The right to silence; and
- (3) The right not to be compelled to self-incriminate.

Pronouncements of the Constitutional Court

In reaching its finding that Sections 26, 27 and 28 of *The Anti-Corruption and Economic Crimes Act 2003* are not unconstitutional, the Constitutional Court made crucial observations on the importance of Sections 26, 27 and 28 in fighting corruption and economic crime in Kenya. Briefly;

(1) The serious menace of corruption

The Court likened corruption to terrorism and tyranny over the majority of the population. The Court went further to state that it was a social and economic imperative for Kenya to enact and implement, to the letter, anti-corruption and economic crimes legislation.

(2) Comparison with other countries' legislation and international instruments

The Court observed that other democratic countries of the World such as Britain, Northern Ireland, Brunei, the United States of America, Singapore, Hong Kong, South Africa and Botswana have embraced laws with provisions similar to those granted to the KACC by Sections 26, 27 and 28 of *The Anti-Corruption and Economic Crimes Act 2003*, and that such provisions have been found not to be unconstitutional in those other democracies.

The Court cited the United Nations Convention against Corruption (UNCAC), of which Kenya was the first country in the world to sign and ratify, and which requires States Parties to it to enact effective laws for detection, investigation, asset tracing and asset recovery in cases of corruption. The Convention also obliges States Parties to establish independent anti-corruption authorities. The Court also cited other Conventions of democratic regions of the world, and concluded that *“these instruments are the standards upon which the Kenya Anti-Corruption and Economic crimes Act must be measured”*.

(3) **The need for powers of detection of corruption**

The Constitutional Court fully considered the justification for enhanced powers of investigation and detection of corruption having regard to the secretive and complicitous nature of the vice. The Court acknowledged the great difficulty of detecting and investigating modern day corruption and economic crime, noting as follows:

“...Because much of the information lies within the suspect’s knowledge and that of his associates the investigatory power must be all-encompassing to include such associates and accomplices in some cases. ... The compelling of suspects to give a list of their properties is a method widely used all over the world in open and democratic societies”.

(4) **Whether indeed there is a constitutional provision contravened**

Of utmost importance in the Constitutional Court’s ruling is the finding that sections 26, 27 and 28 of the Act do not violate the Constitution of Kenya in any way whatsoever. The Court referred to the Social Contract Theory and to the precise provisions of the Kenya Constitution in observing that the rights of an individual person are not absolute, but must be balanced against the public interest, the social contract, and the general good.

Of particular interest was the observation that British courts, in *SMITH v DIRECTOR OF SERIOUS FRAUD OFFICE (1992)*, found and held that the Director of the UK's Serious Fraud Office “could obtain by compulsion responses to questions which might be self-incriminatory”.

Conclusion

The Judicial Arm of Government, whose mandate it is to interpret the Constitution and the law of Kenya, has ruled that Sections 26, 27 and 28 of *The Anti-Corruption and Economic Crimes Act 2003* do not violate the Constitution. Parliament cannot therefore amend the Act by deleting those sections on the basis of their alleged unconstitutionality.

The Advisory Board appreciates that *The Anti-Corruption and Economic Crimes Act 2003* was enacted by Parliament in keeping with International Treaties and Instruments, and in keeping with modern legislative practices to effectively combat corruption and economic crime. The serious effects of corruption are obvious to everyone in Kenya.

It is with this in mind that the Advisory Board of the Kenya Anti-Corruption Commission appeals to Parliament not to entertain any changes to the law that would weaken the Commission's effectiveness to detect and investigate corruption and economic crime.

The powers conferred on the Kenya Anti-Corruption Commission by those provisions of law are exercisable by the Commission on behalf of the general public, in the public interest, as a necessary instrument to fight corruption and economic crime in Kenya. Accordingly, they should not be tampered with.

SIGNED & DATED AT NAIROBI THIS 16th DAY OF MARCH 2007

Allan N. Ngugi, OGW,

Chairman

Kenya Anti-Corruption Commission Advisory Board