

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: LAIBUTA, ALI-ARONI & MATIVO, JJ.A.)

CIVIL APPEAL NO. 187 OF 2018

BETWEEN

JIMMY MUTUKU KIAMBAA.....1ST APPELLANT
TRACY MBINYA MUSAU.....2ND APPELLANT
JIMBISE LIMITED3RD APPELLANT
MUTHAIGA GREEN ACRES LIMITED.....4TH APPELLANT

AND

**ETHICS AND ANTI-CORRUPTION
COMMISSION.....1ST RESPONDENT**
KENYA REVENUE AUTHORITY.....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT

AND

EQUITY BANK LIMITED.....1ST INTERESTED PARTY
**PUBLIC SERVICE COMMISSION OF
KENYA.....2ND INTERESTED PARTY**

*(Being an appeal from the judgement and decree of the High Court of
Kenya at Nairobi (Hedwig I. Ong’udi, J.) dated 20th March, 2018*

in

ACECA PETITION NO. 7 OF 2017)

JUDGEMENT OF THE COURT

1. The 1st respondent, the **Ethics and Anti-Corruption Commission**, is a public body established under **Section 3** of the **Ethics and Anti-Corruption Commission (EACC) Act, No.**

22 of 2011 its functions inter alia include: developing and promoting standards and best practices in integrity and anti-corruption, receiving complaints on the breach of the code of ethics by public officers, investigating and recommending to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the **EACC Act, the Anti-Corruption and Economic Crimes Act** or any other law enacted pursuant to Chapter Six of the Constitution; recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct.

2. The 2nd respondent, **The Kenya Revenue Authority** (KRA), is also a public body established under **Chapter 469** of the **Laws of Kenya** and charged with the responsibility of collecting revenue on behalf of the Government of Kenya.
3. Whereas the 3rd respondent is the Attorney General, whose office is established under **Article 156** of the **Constitution**, vested with responsibility of being the principal legal advisor to the Government.
4. The 1st respondent, received intelligence dissemination report from the Financial Reporting Centre pursuant to **Section 24(b) of the Proceeds of Crime and Anti- Money Laundering Act, 2009**, to the effect that the 1st appellant's assets exceeded his known legitimate source of income, and embarked on carrying out investigations. At the time, the 1st appellant was an

employee of the Nairobi City County. The 2nd appellant is the 1st appellant's spouse, while the 3rd and 4th appellants are companies owned by the 1st and 2nd appellants.

5. On carrying out its investigations, the 1st respondent reasonably believed that the appellants had '*unexplained assets*' worth Kshs.872,096,147. The 2nd respondent, on its part, assessed the appellants to have had undeclared tax amounting to Kshs.98,000,000.
6. Aggrieved by the outcome of the investigations and the tax assessment the appellants moved the high court by way of a Constitutional Petition in ***Anti-Corruption and Economic Crime, Petition No. 7 of 2017***, citing violation and infringement of their rights and freedoms under ***Articles 25(a), and (c), 27, 28, 29, 31, 32, 40, 41, 47(1) and (2), 48 and 50 of the Constitution***. Further, they claimed violation and infringement of ***Articles 2, 3, 10, 19(1) and (2), 20(1) and (2), 21(1), 22(1), 258, and 259*** of the ***Constitution***.
7. In the said petition, the appellants claimed that the investigations by the 1st respondent were carried out pursuant to ***Section 7 of the Anti-Corruption and Economic Crimes Act (ACECA)***, which section had since been repealed by ***Section 37 of the Ethics and Anti-Corruption Commission Act No. 22 of 2011 (EACC Act)***, and thus illegal, null and void. Secondly, they complained that the figures arrived at had monumental errors, that led to an erroneous conclusion that

the appellants were receiving in their bank accounts huge sums of monies beyond their known sources of income.

8. They also claimed that the action of the 2nd respondent of sharing the 1st appellant's Declaration of Income Assets and Liabilities forms with the 1st respondent was an affront to the 1st appellant's right to privacy, and as such, the respondents' action amounted to violation of the appellants' constitutional rights to: human dignity; right to privacy, right to property and the right to fair administrative action.

9. As a consequence of the alleged wrongdoing on the part of the respondents, the appellants sought from the court:

a. A declaration that the petitioners (the appellants') Constitutional rights to human dignity and freedom and security of the person as guaranteed by Articles 25(a), 28 and 29 of the Constitution had been violated by the 1st and 2nd respondents, their agents, employees, representatives and/or servants.

b. A declaration that the petitioners' Constitutional rights to privacy as guaranteed by Article 31 of the Constitution had been violated by the 1st and 2nd respondents, their agents, employees, representatives and/or servants.

c. A declaration that the petitioners' Constitutional rights to fair administrative action as guaranteed by Article 40(1) and (2) of the Constitution had been violated by the 1st and 2nd respondents, their agents, employees, representatives and/or servants.

- d. A declaration that the petitioners' rights to fair administrative action as guaranteed by Article 47(1) and (2) of the Constitution has been violated by the 1st and 2nd respondent, their agents, employees, representatives and/or servants.**
- e. A declaration that the petitioners be compensated to a total sum of Ten Million Kenya Shillings (Kshs. 10,000,000/-), or to any amount that the court deemed sufficient and/or appropriate, by the 1st and 2nd respondents jointly and severally for violation of the petitioners' Constitutional rights.**
- f. A declaration that section 55 of the Anti-Corruption and Economic Crimes Act, 2003, and the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 is unconstitutional for contravening Article 50(2) (a) and (1) of the Constitution.**
- g. A declaration that section 56 of the Anti-Corruption and Economic Crimes Act, Cap 65 of the laws of Kenya, the Anti-Corruption and Economic Crimes Act, 2003 and the Anti-corruption and Economic Crimes Act No. 3 of 2003 is unconstitutional for contravening Articles 40(1) and (2), 47(1) and (2), and 50(2) (a) of the Constitution.**
- h. A declaration that the proceedings and consequent orders in Nairobi Tax Appeals No. 183 of 2015 were illegal, null and void.**
- i. A declaration that the proceedings and consequent orders in Nairobi High Court Anti-Corruption and Economic Crimes Case No. 1 of 2016 (Formerly Nairobi High Court Civil Case No. 22 of 2016 (OS) were illegal, null and void.**
- j. ...**
- k. The costs of the application be provided for.**

10. In response to the petition, the 1st respondent affirmed that it had indeed received an intelligence report on the 1st appellant and, upon investigation, it established that, during the period of interest, the appellants deposited, held and/or transacted amounts totaling Kshs.1,057,915,456. Further, upon receipt of the information on the appellants, it issued notices to the appellants to explain the suspect assets, however, the answers received were unsatisfactory, necessitating the filing of an application in court seeking preservation orders to allow it investigate the matter further. The High Court issued preservation orders for six months and, after the lapse of the six months, the court declined to extend the orders.
11. The 1st appellant denied violation of any of the appellants' rights and averred that its conduct was mandated by the Constitution and the law. It is its case that the law empowers it to conduct investigation of its own motion, or on receiving a complaint from a third party.
12. On its part, the 2nd respondent informed the court that it had received information from the 1st respondent that the 1st appellant had over a period of time accumulated substantial amounts of cash in his bank accounts and assets, which may not be supported by his income as a public servant; that they under took investigation for the years between 2007-2014, which revealed massive under declaration of taxable income upon which they assessed; and that the appellants', being

aggrieved by the assessment appealed to the tax tribunal. It was its case that **Section 5 of the Kenya Revenue Act** allows it to receive information on tax invasion from third parties and, further, it behooves every Kenyan to pay taxes.

13. The matter proceeded by way of *viva voce* evidence with each party adducing evidence and making final submissions. Whilst dismissing the petition, the trial Court was of the view that the allegations against the appellants were not only generalized, but that no alleged violation of the appellants' constitutional rights was proved. As relates to the violation of the right to fair administrative action, the trial court found that; **Nairobi High Court ACECA No.1 of 2016** had not been heard and that, although the plaintiff was ready to proceed, the appellants herein were not keen to proceed, meaning that the court had not been given an opportunity to make a fair decision. Further, the court found that the respondents were merely carrying out their respective mandates under the law.
14. In relation to **Section 55 and 56 of ACECA**, the learned judge was of the view that the sections permitted a person suspected of having acquired assets by corrupt means to give an explanation and, this did not amount to violation of one's constitutional rights. Further, in terms of getting a fair hearing, when a matter is referred to court, a party gets a second opportunity to explain himself further. The learned judge therefore made a finding that the action of the 1st respondent of seeking for explanation from the appellants on the source of the

‘unexplained assets pursuant to **Section 56 of ACECA** did not violate **Section 50** of the **Constitution** as alleged.

15. With regard to inspection and scrutiny of documents, the, Declaration of Income, Assets and Liabilities form, the court was of the view that once the said form is surrendered to the 2nd respondent, its inspection and scrutiny by its officers cannot be deemed to be an invasion of one’s privacy. Further, the 2nd respondent’s investigation into whether the appellants were tax compliant was within the law. Notably the court stated that there was no mention of any provision of **Section 55 and 56 of ACECA** or **Section 5 of the KRA Act** that had been violated in the investigations carried out by the respondents.
16. Aggrieved by the judgement of **Hedwig I. Ong’udi, J**, the appellants moved to this Court on appeal faulting the learned judge for: (a) finding that the 1st and 2nd respondents did not violate the petitioners rights in the process of investigations; (b) finding that the petitioners right to fair hearing was not violated; (c) finding that Section 55 of the ACECA is not unconstitutional; (d) finding that the constitutionality of section 55 of ACECA was conclusively determined in **Kenya Anti-Corruption Commission vs. Stanley Mombo Amuti [2015] eKLR**; (e) failing to take cognizance that the Court of Appeal never determined the constitutionality or otherwise of section 55 of ACECA; (f) failing to consider that the petitioner also challenged the constitutionality or otherwise of section 56 of ACECA; (g)

failing to observe that the constitutionality or otherwise of section 56 of ACECA has not been determined; (h) holding that the petitioners did not mention any single provision of sections 55 and 56 of the ACECA or section 5 of the Kenya Revenue Authority Act that had been violated by the respondents in their investigations; (i) and in holding that the petitioners were not entitled to compensation for violation of their constitutional rights.

17. In his submissions before us, Prof. Ojienda SC, learned counsel for the appellants informed the court that this Appeal arose from **Nairobi Anti-Corruption and Economic Crimes Case No.7 of 2016** (details of the complains of the appellants are detailed in Paragraph 8 above).
18. Learned counsel for the appellants informed the court further that some of the issues raised had fallen through the cracks as judgement was entered in **Anti-Corruption and Economic Crime Case No. 1 of 2016**, which led to **Civil Appeal No. 464 of 2020**, further, the 2nd respondent had proceeded with additional tax assessment and a judgement delivered in **Tax Appeal No. 183 of 2015** and, therefore, the only issue left for determination is whether **Section 55 of ACECA** is unconstitutional, and whether action taken under that section violated the petitioners' rights.
19. In addition, learned counsel submitted that **Section 55 of ACECA** shifts the onus of proving 'unexplained assets' to the suspect; and that, the fact that such assets were not acquired

corruptly, results in the presumption that such a person is guilty, and thereby requiring him/her to prove his innocence. Counsel further asserted, that the 1st respondent used powers donated by **Section 55(b) of ACECA** to require the 1st and 2nd appellant to explain the alleged disproportion between their known income and their assets, making the appellants submit self-incriminating explanations contrary to the fundamental right against self-incrimination enshrined in **Article 50(2) (1) of the Constitution**. That a person put under the proceedings in **Section 55 of ACECA** has no choice but to cooperate and attempt to explain the alleged disproportion to avoid adverse orders of equal amount as the value of the alleged unexplained asset.

Learned counsel contended that, flowing from the first letter of explanation by the 1st appellant, several things happened, including an application dated 8th May, 2015 in **Nairobi High Court Miscellaneous Civil Application No.804 of 2014**, where the 1st respondent sought for preservative and **High Court Miscellaneous Civil Application No 285 of 2015**, where the 2nd respondent sought and obtained orders preserving funds in the 1st respondents accounts; and an application dated 29th January, 2016 in **Nairobi High Court Anti-Corruption and Economic Crime No 1 of 2016**. learned counsel urged that the multiplicity of applications by the respondents was based on self-incriminating evidence contained in the letters explaining the unexplained assets,

which violated the appellants' rights as guaranteed by **Article 50(2) (1) of the Constitution**.

20. Further, learned counsel submitted that **Section 2 of ACECA** defines unexplained assets as assets of a person (a) acquired at or around the time the person in question was suspected of corruption for economic crime and or (b) whose value is disproportionate to his known source of income, but around the time and for which there is no such explanation. Counsel argued further that, for the purposes of the Act, **Section 2** states that a person is deemed to be in the position of any record, property, information or other thing if the possession is under his control. Counsel contended that, in arriving at its determination, the High Court proceeded on this basis and misdirected question of unexplained assets, and equally failed to ascertain the value of the assets in question and the alleged disproportionality. In other words, the High Court failed to properly address itself to what was before it and applied wrong non-existence principles on the interpretation of **Section 2**, and that forms the crux of this appeal.
21. Learned counsel contended further, that the learned trial Judge focused on bank deposits, and yet such deposits are not the assets; that the Court, in analyzing what constitutes assets, should have confined itself to what is available in the bank, and not deposits that are made in the bank and paid out; and that the court ought to have considered cash in the bank and physical assets, such as land and motor vehicles. Further, that

the assets are easily ascertainable from the bank statements because the deposits that are made in bank accounts are used to obtain the assets and, therefore, one ought not to consider deposits as assets and at the same time consider what was purchased from the said deposits because, in the end, one ends up with a situation where the true value of an asset is misconstrued as was the position in this case.

22. Further, learned counsel submitted, that the disproportion contemplated by **Section 2 and 55(2) of ACECA** is the difference between the total assets in value and the 'unexplained asset' in value. He stated that, the appellants had a total of Kshs.120 million in their bank account, further, that there were properties purchased before the period of interest, and yet the learned Judge did not take that into account and, secondly, the learned judge ignored the earnings of the appellants which were presented in the balance sheet and in the accounts submitted to court, however, the Judge accepted the figures given by the 1st respondent.
23. Further, learned counsel urged that the appellant provided financial books of accounts and, on the basis of those financial books of accounts, the true value of what the appellants worth ought to have been ascertained. Further, according to learned counsel, the learned Judge had only expressed dissatisfaction on the acquisition of L.R. 7785/818 (Original No. 7785/10/557). However, she made an error in her final orders by directing that the 1st appellant pays 35 million or that the

said property L.R 7785/605 (Original Number 7785/10/430) I.R. 56556 be forfeited to the State.

24. Learned counsel further asserted that, the 1st appellant had a legitimate earning of Kshs.236,981.10 during the entire period of interest, on her part the 2nd appellant's sources of income were all found to be legitimate. She earned a total of Kshs.63,158,100 from a beauty parlour, interior design and rent, and this was not challenged. Learned counsel submitted that, on the basis of the income from the appellants, the court had no basis to compel the 1st appellant to pay Kshs.35 million and, in lieu thereof, forfeit L.R 7785/605 (Original Number 7785/10/430) I.R. 56556 against a decision of the court made by **Mboghli, JA.** in **Nairobi Civil Application No. 805 of 2014**, where the Judge, in a ruling dated 25th June 2015, found that there was no evidence presented to the court that the appellants properties were disproportionate to their earnings, and had been acquired through corrupt means.

Further, counsel urged that the trial court failed to declare the difference or disproportion between the value of known assets and the '*unexplained assets.*'

25. Opposing the appeal, learned counsel for the 1st respondent submitted that the 1st respondent is a specialized Commission with Constitutional, statutory and international underpinning to combat corruption and unethical conduct pursuant to **Articles 79 & 252 of the Constitution**; the **United Nation Convention Against Corruption (UNCAC)**; **Sections 11(1) and**

11(d) of the Ethics and Anti-Corruption Act, 2011 (EACC Act); and in the preamble of **ACECA**. Further, **Section 11(1) (j)** of the **EACC Act** empowers it to institute and conduct proceedings in court for purposes of confiscation of proceeds of corruption and **Section 13 (2) (c)** of **EACC Act** gives it power to conduct investigations on its own or based on a complaint by a third party. In support of this assertion, counsel relied on the case of **Okiya Omtata Okoiti & 2 Others vs. Attorney General & 4 Others [2018]** as consolidated with **ACECA No. 8 of 2017 (Formerly Petition 78 of 2017)**.

26. In its written submissions, the 1st respondent extensively submitted against the allegations that it had violated several rights of the appellants as enshrined in the constitution. The appellants as seen elsewhere did not pursue the grounds of violation and compensation, and we shall therefore not belabor on the response to the same.
27. Miss Ngethe appearing for the 1st respondent agreed with the appellants' counsel that several issues raised in the appeal had been settled including the first issue on the mandate of the commission, as provided under the Ethics and Anti-Corruption Commission Act and Anti-Corruption and Economic Crimes Act. She referred the court to the Supreme Court decision in **Ethics & Anti - Corruption Commission vs. Prof. Tom Ojienda & Others Petition 30 of 2019** as consolidated with **Petition 31 of 2019**, a judgment delivered on 7th August 2022.

28. Learned counsel submitted that the appellants voluntarily filed an appeal against the decision of the 2nd respondent in ***Nairobi Tax Appeal Tribunal No. 183 of 2015***, seeking to have the decision quashed. It was therefore illogical for the appellants to seek to quash the said proceedings.
29. The 3rd respondent who also appeared for the 2nd Interested Party, equally opposed the appeal and filed one set of submissions, where extensive submissions were made against the allegation of violation of rights and compensation sought.
30. Flowing from the concession by the parties that some issues raised save for the question of constitutionality of ***Sections 55 and 56 of ACECA*** and likely violations on the right of the appellants arising from action undertaken thereof, are now moot, delve into the same.
31. On ***Section 56 of ACECA***, counsel submitted that the limitation of the right to property is well provided for under ***Articles 24 and 40(6)*** of the ***Constitution***. The protection thereto is not absolute, and does not extend to property unlawfully acquired. Further counsel argued that the court owes a public duty of preserving suspect property and section 56 is aimed at preserve property that is suspected of having been obtained illegally and not to take the same away from the suspected person. In pursuing this argument counsel relied on the holding of this Court in ***Mombo Amuti vs. Kenya Anti-Corruption Commission*** (*supra*) where this court held ***‘that the protection***

of the right to property has socio-political, moral, ethical, economic and legal underpinning’, and that the law protects only legally acquired property and not protect property obtained through larceny, money laundering, proceeds of crime or any illegal enterprise.

32. Further, it was submitted that preservation of property is not deprivation of property under **Article 40 of the Constitution**. Further, **Section 56** of the **ACECA** allows the process of identification, tracing, freezing and seizure of property acquired through corrupt conduct. The process purposely seeks to support forfeiture proceedings and not to punish the accused.
33. Further, counsel informed the court that several notices issued upon the appellants before the institution of the recovery proceedings pursuant to the provisions of **Sections 26, 55 and 56 of the ACECA**, were an indication of a fair administrative action, which the appellants expressly admitted to have responded to, explaining the alleged disproportion of their assets, as against known income, therefore, they cannot turn around and claim violation of their right.
34. It was equally submitted that recovery proceedings are civil in nature and, therefore, placing the burden of proof in respect of some specific facts on a suspect is not prohibited by law. For this proposition, counsel relied on **Section 112 of the Evidence Act**, that provides that in civil proceedings where a fact is especially within the knowledge of a party to the proceedings,

the burden of proving or disproving the fact relies on the said person.

35. On the question of constitutionality of **Sections 55 and 56 of ACECA**, it was argued that, legally enacted statutes enjoy the presumption of constitutionality, and that the burden of proving otherwise rest with the party alleging unconstitutionality. Further, **Article 259 of the Constitution** calls for the interpretation of the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. Learned counsel in propagating the need for courts to presume constitutionality of statute and not rush to declare them unconstitutional.
36. relied on the Supreme Court of India in the decision in **Hamdard Dawakhana & Anor vs. The Union of India (UoI) & Others. AIR1960 SC 554, 1960 CriLJ 671, (1960) IIMLJ 1 SC, 1960 2 SCR 671.**
37. Further, it was argued that **Sections 55 and 56 of ACECA** provides a suspected person with reasonable opportunity to explain his/her disproportionate assets by giving evidence on oath, tabling documentary evidence and challenging any evidence against him. The provisions therefore cannot be said to be oppressive as there are inbuilt protective mechanisms under **Section 56(4) of the said Act** where one can to apply to lift the orders **within 15 days.**

38. This is a first appeal and we are mindful that we have to re-consider the evidence afresh, analyse and evaluate the same in order to arrive at an independent determination in line with the holding in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123** where this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

39. In the case of **Charles Mwirigi Miriti vs. Thananga Tea growing SACCO & Another [2014] eKLR** this Court repeated the words of **Selle & Another** (*supra*) and went further to state:

"...in particular the court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account- of a particular circumstance or probabilities materially to estimate the evidence or if the impression based on the demeanor of witnesses is inconsistent with the evidence in the case generally."

40. We have considered the grounds of appeal, submissions by counsel for the parties and the authorities cited, and are of the considered opinion that the issues before us are; -

- i. Whether the appellants' Constitutional rights to human dignity, freedom and security under Articles 27 & 28, right to privacy under Article 31; right to own property under Article 40(1), right to fair Administrative Action and to fair hearing under Article 47 and Article 50 of the Constitution 2010 respectively were violated by the 1st and the 2nd respondents while carrying out their respective mandates.*
- ii. If (i) above is in the affirmative, whether the appellants ought to be compensated for the alleged violations, and what would be the appropriate quantum of damages?*
- iii. Did the appellants acquire and/or occupy 'unexplained assets'? If the answer is in the affirmative, did they give sufficient and reasonable explanation on the 'unexplained assets'?*
- iv. Whether sections 55 and 56 of ACECA are unconstitutional.*
- v. Who meets the costs of the appeal?*

41. It is common ground that, during the period of interest, the 1st appellant was a public officer and had, over the years, worked for various municipalities, and county councils, lastly, he worked for the Nairobi City County. The 2nd Appellant is the wife to the 1st appellant, and the 3rd appellant is a company owned by the 1st and 2nd appellants.

42. The evidence on record show that the 1st respondent received an intelligence dissemination report dated 4th November 2014, from the Financial Reporting Center (pursuant to **Section 24(b)**)

of the Proceeds of Crime and Anti Money Laundering Act, 2009) with information that the 1st appellant, between January and March 2014, had banked various sums amounting to Kshs.200,000,000 in his account claiming to be proceeds of rent, which ought to have reflected on monthly basis. The letter also informed the 1st respondent that the suspect was a chief finance officer at Nairobi City County, and appeared to be siphoning funds from his employer. They requested for further investigations to be carried out. The 1st respondent embarked on investigating the appellants. In the process, it communicated the concerns with the 2nd respondent, who in turn shared the 1st appellant's Wealth Declaration Forms.

43. Following the investigations, the 1st respondent reasonably suspected that the appellants had acquired assets in excess of their known income with proceeds of corrupt deals, and sought an explanation from the appellants on the source of both cash & landed properties in their possession during the period of interest. They also approached the court for preservation orders of the assets and subsequently filed suit for recovery of the *'unexplained assets.'*
44. On its part, the 2nd respondent, on receiving information from the 1st respondent, also embarked on its own investigation and came to the conclusion that taxes in excess of Kshs.98 million were unpaid by the appellants, and it sought payment thereof.

45. In **Petition No. 7 of 2017**, the appellants' complaints were, *inter alia*, that the 1st respondent's purported investigation was based on **Section 7 of ACECA**, which had been repealed by **Section 37 of EACC Act No. 22 of 2011** and therefore null and void.
46. Secondly, the 1st respondent issued notices forcing the appellants to give self-incriminating statements and by so doing, was in violation of various rights under the Constitution: right to human dignity and freedom; right to privacy; right to own property; right to fair administrative action and right to a fair hearing, as a result of the alleged violations, the appellants sought to be compensated.
47. **Article 79 of the Constitution** directs Parliament to establish an Independent Anti-Corruption Commission for purposes of ensuring compliance with the provisions of Chapter Six and to enact relevant statutes.

Equally the **United Nations Convention** against corruption requires the creation of the bodies/commissions by member states as contemplated by **Article 79 (supra)**.

Section 11(1) (d) and (j) of the EACC Act, 2011 empowers the 1st respondent to investigate corruption and economic crimes, and to facilitate criminal prosecution and recovery of assets.

Section 11 (1) confers the 1st respondent the mandate to:

... ..

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation

of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution;

... ..

- (j) *institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.*

48. On the part of the 2nd respondent, **Section 5A of the Kenya Revenue Authority Act** permits the 2nd respondent to receive information on tax evasion from third parties; and **Article 252 (1) (a) of the Constitution** gives credence to the statutes mentioned above and the acts of the respondents as it provides that ***each commission, and each holder of an independent office may conduct investigations on its own initiative or on a complaint made by members of the public.***

Article 259, on the other hand, require that that the Constitution be interpreted, *inter alia*, in a manner that ***promotes its purpose, values and principles and contributes to good governance.***

Section 13 of the EACC Act provides that:

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

(2) Without prejudice to the generality of subsection (1), the Commission shall have power to-

(a)...;

(b) Undertake preventive measures against unethical and corrupt practices;

(c) Conduct investigations on its own initiative or on complaint made by any person.

On its part **Section 26** of **EACC Act** provides

Statement of suspect's property

(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.

(2) 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.

(3) The powers of the Commission under this section may be exercised only by the Secretary.

49. Flowing from our analysis above, notices were issued by the 1st respondent pursuant to **Section 26 of ACECA**, to the 1st appellant on 30th March 2015 and in July 2015 to both the 2nd and 3rd appellants. The 1st appellant responded to the notice vide a letter dated 30th March 2015, while the 2nd appellant vide an undated letter, and the 3rd vide a letter dated 15th August to our mind, the appellants were accorded an opportunity to explain the *'unexplained assets'* as required by law. Accordingly, we do not see any violation of their rights in keeping with **Articles 47 on Fair Administrative Action and 50(l)** on the right not to give self-incriminating information.
50. The 1st appellant was a public officer during the period of interest, within the meaning of **Article 260 of the Constitution**. He declared his income and that of his family as by Law required at the scheduled periods. The appellants contended that, by sharing the 1st appellant's Declaration of Income, Assets and Liability Forms with the 1st respondent, the 2nd respondent denied them their right to privacy. The respondents acknowledged that the 2nd respondent shared the said forms with the 1st respondent, however, they contended that this is permissible under the law. Reference was made to **Section 11(3) of the EACC Act** which permits inter agency collaboration and cooperation. The section provides that:

The Commission may cooperate and collaborate with other State organs and agencies and any foreign

government or international or regional organisation in the prevention and investigation for corruption.

51. **Article 31** of the **Constitution** safe guards the right to privacy, including the right not to have one's information or that of his family unnecessarily required or revealed. However, this right is not absolute as it does not fall within the rights safeguarded by **Article 25** of the **Constitution**. We do agree with the respondents' proposition that this right may be limited in the circumstances set out in **Article 24(1)** of the **Constitution** for public good. Further, **Section 30(1)** of the **Public Officer Ethics Act** provides that:

The contents of a declaration or clarification under this Act shall be accessible to any person upon application to the responsible Commission in the prescribed manner if the applicant shows to the satisfaction of the responsible Commission that he or she has a legitimate interest and good cause in furtherance of the objectives of this Act, in such declaration or clarification.

52. In our view, sharing of the Declaration of income, Assets and Liability Forms among the respondents was lawful and justifiable. Indeed, any action taken lawfully pursuant to sections 30(1) of the Public Officers Ethics Act, sections 11(1) and 11(3) of the EACC Act cannot be said to be in violation of Article 31 of the Constitution. As held in ***Financial Mail (Pty) Ltd vs. Sage Holdings 61993 2 SA 451 (A) 462F:***

“breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another; or by way of unlawful disclosure of private facts about a person. The unlawfulness of a (factual)

infringement of privacy is adjudged in the light of contemporary boni mores and the general sense of justice of the community as perceived by the court.”
(emphasis added)

53. In view of the foregoing, we find no fault with the finding of the learned judge on this point and, accordingly, decline to find any violation of the appellants’ right to privacy.
54. The appellants further assert that they were arbitrarily denied the use and enjoyment of their property. From the record, as put to us, the 1st respondent sent notices to the appellants asking them to explain the source of what the 1st respondent deemed as ‘*unexplained assets.*’ On their part, the appellants explained their source of income, which the 1st respondent did not find sufficient. As a result, the 1st respondent sought orders from the court for preservation of the said assets and eventually applied for forfeiture and recovery of the ‘unexplained asset’.
55. **Article 40 of the Constitution** guarantees the right to own property, it provides that every person has a right either individually or in association with others to acquire and own property. However, this right is subject to the limitation in **Articles 24 and 40(6)**, which provides that:

the right under this Article do not extent to any property that has been found to have been unlawfully acquired.

56. From the facts on record, we find that the 1st respondent did not act arbitrarily. It issued notices that were indeed responded

to. The 1st respondent was not satisfied by the explanation given, and moved the court initially for preservation orders and later filed a suit for forfeiture and recovery of the ‘*unexplained assets.*’ We find that the 1st respondent’s action was within the confines of the law. How then would the 1st respondent have undertaken its investigations and ensured that the said assets were intact before it could seek forfeiture as it did. We view the action undertaken by the 1st respondent as having been necessary in the circumstances. We fail to find that there was any violation of the appellants’ right to property, taking to mind the decision of this Court in **Stanley Mombo Amuti vs. Kenya Anti-Corruption Commission (2019) eKLR** where it was held:

“The protection of the right to property has a socio-political, moral, ethical, economic and legal underpinning. The right protects the sweat of the brow-it does not protect property acquired through larceny, money laundering, or proceeds of crime or any illegal enterprise. When an individual is alleged to have assets disproportionate to his known lawful source of income, is asking such a person to explain and account for the unexplained disproportionate assets a violation of the constitutional protection of the right to property? The answer is in the negative. There is no violation of the right to property if an individual is requested to explain the source of his assets that is disproportionate to his legitimate source of income. Comparatively, while considering a similar contestation, the UK court in National Crime Agency - v- Mrs. A [2018] EWHC 2534, rejected submission that requirement to clarify unexplained wealth violates property rights. The court expressed that if there is any interference with property rights, such interference is proportionate and strikes a "fair

balance"; that where there are grounds to believe a property has been obtained through unlawful conduct, the requirement to explain is justifiable.

57. The other issue for our consideration is whether the appellants' constitutional right to fair hearing was infringed by the alleged multiplicity of applications by the 1st & 2nd respondents and the notices requiring explanation from the appellants in response to which they made self-incriminating statements contrary to **Section 50(2)(1)**. In our considered view, the notices as we held earlier in this judgement were lawful. The appellants were asked to explain the source of suspect assets, and they responded in accordance with **Section 26 of ACECA**.

58. Dissatisfied with the explanation given by the appellants, the 1st respondent moved the court for preservation orders under **Section 56 of ACECA** which provides:

(1) On an ex parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.

(2) An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.

(3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission. No. 3 of 2003 Anti-Corruption and Economic Crimes [Rev. 2016] [Issue 3] A17 – 26.

(4) A person served with an order under this section may, within fifteen days after being served, apply to the court to discharge or vary the order and the court may, after hearing the parties, discharge or vary the order or dismiss the application.

(5) The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.

(6) A person who is served with an order under this section and who contravenes it is guilty of an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.”

59. We do not find any wrongdoing on the part of the 1st respondent since an application was made *ex parte* in accordance with **Section 56(1)** seeking for preservation of the ‘*unexplained assets*’. In any event, the appellants had the liberty to apply to vary or discharge the order within 15 days of service. As appears from their pleadings, the appellants challenged the orders, which were not extended.

60. This Court has on several occasions upheld the importance of stating constitutional claims with precision. In **Anarita Karimi Njeru vs. Republic (No.1) (1979) 54 KLR**, this Court stated:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case that he should set out with a reasonable degree of precision that of which he complains, the

provisions said to be infringed, and the manner in which they are alleged to be infringed.”

The above statement was restated in **Mumo Matemu vs. Trusted Society of Human Rights Alliance (2013) eKLR.**

61. Based on the foregoing analysis, we are of the view that the alleged violation claimed by the appellants were generalized. Save for reference to the Articles of the Constitution said to have been allegedly violated, the appellants failed to demonstrate the manner in which the said rights were infringed.
62. We now address the question whether the learned Judge was biased, harsh or erred by failing to consider non-compliance on the part of the 1st respondent with **Sections 28 and 29 of ACECA**, the appellants did not seriously canvass this ground otherwise than alluding to an application made to arrest the judgement, which the learned Judge refused to consider. The said application was not placed before us as part of the record. We also note that the issue was never raised before the trial court it appears to be an afterthought. We decline therefore the appellants’ attempt to introduce this new issue before this court.
63. Having formed the opinion above, there would be no reason to compensate the appellants. They are not entitled to compensation for the alleged violation of rights; to human dignity, privacy, freedom to own property, fair administrative action or fair hearing. Accordingly, we find nothing to fault the

learned Judge for in declining to grant the appellants claim in this regard.

64. This Court has also been asked to declare **Sections 55 & 56** of **ACECA** unconstitutional on the ground that it requires the person suspected of owning ‘unexplained assets’ to make self-incriminating statements; presuming such a suspect to be guilty; requiring him to prove his innocence; and for requiring forfeiture of such ‘*unexplained assets*’.

65. **Section 55** provides:

Forfeiture of unexplained assets

(1) In this section, “corrupt conduct” means—

(a) conduct that constitutes corruption or economic crime; or

b) conduct that took place before this Act came into operation and which—

(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

(2) The Commission may commence proceedings under this section against a person if—

(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and

(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of

income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

(3) Proceedings under this section shall be commenced in the High Court by way of originating summons.

(4) In proceedings under this section—

(a) the Commission shall adduce evidence that the person has unexplained assets; and

(b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

(7) For the purposes of proceedings under this section, the assets of the person whose assets are in

question shall be deemed to include any assets of another person that the court finds—

(a) are held in trust for the person whose assets are in question or otherwise on his behalf; or

(b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration.

(8) The record of proceedings under this section shall be admissible in evidence in any other proceedings, including any prosecution for corruption or economic crime.

(9) This section shall apply retroactively.

56. Order preserving suspect property, etc.

(1) On an ex parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.

(2) An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.

(3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission (4) A person served with an order under this section may, within fifteen days after being served, apply to the court to discharge or vary the order and the court may, after hearing the parties, discharge or vary the order or dismiss the application.

(5) The court may discharge or vary an order under subsection

(4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.

(6) A person who is served with an order under this section and who contravenes it is guilty of an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.

(7) In this section, “corrupt conduct” means—

(a) conduct that constitutes corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which—

(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

We have extensively discussed **Section 56** earlier in this judgment and will not rehash the same.

66. In our view, courts ought not to readily declare sections of statute law enacted pursuant to provisions of the Constitution to be unconstitutional. Courts ought to seriously interrogate the background, circumstances and the reasoning that gave rise to the constitutional enactment in the first place and, secondly, appreciate why the legislation was enacted. In **Hamdard Dawakhana & Another** (*supra*), the Supreme Court of India held:

“(1) In examining the constitutionality of a

statute it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they are enacted. Presumption is therefore in favour of constitutionality.

(2) That in order to sustain the presumption of Constitutionality the court may take into account matters of common knowledge, the history of the times and may assume every state of facts which can be conceived as existing, at the time of legislation.”

67. The appellants' contention that the provisions of **Sections 55 & 56 of ACECA** are unconstitutional merely because the 1st respondent, on investigating a body, required an explanation on assets which *prima facie* appeared disproportionate to the 1st appellant's known income is untenable. We deem the issuance of a notice to explain what on the face of it appeared to be 'unexplained asset', to be a reasonable and progressive way of obtaining information, so as to inform the decision to be arrived at by the 1st respondent. In this instance, the information sought was from public officer, who in any event is expected by the Constitution to be transparent and accountable.

68. In a suit brought under **Section 55 of ACECA**, as the law require, the legal burden of proving the facts always remained with the person asserted the existence of the said facts. The 1st

respondent had to prove on a balance of probabilities that the assets were disproportionate to the appellants' known income. However, the evidential burden shifted to the appellants; who had knowledge of the facts in question and were best placed to prove the same. Indeed, this is the position as contemplated in **Section 112 of the Evidence Act**. The legal burden of proving a fact always remains with the person asserting the existence of a fact.

69. In **Stanley Mombo Amuti case** (*supra*), which is on all fours with the matter at hand, this Court stated:

“78. The concept of “unexplained assets” and its forfeiture under Sections 26 and 55 (2) of ACECA is neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. Sections 26 and 55 of ACECA are non-conviction based civil forfeiture provisions. The Sections are activated as an action in rem against the property itself. The Sections require the Anti-Corruption Commission to prove on balance of probability that an individual has assets disproportionate to his/her legitimately known sources of income. Section 55 (2) of the Act make provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it. Section 55 (2) of ACECA is in sync with Section 112 of the Evidence Act, Cap 80 of the Laws of Kenya. Section 112 of the Evidence Act, (Cap 80 of the Laws of Kenya) provides:

“In civil proceedings when any fact is especially within the knowledge of any party to those

proceedings the burden of proving or disproving that fact is upon him.”

79. Under section 55 (2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the assets or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets, which is tainted property. If legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired.”

70. The Court went on to say:

“74. ...we are satisfied that the provisions of Sections 26 and 55 (2) of the ACECA do not violate the right to property as enshrined in Article 40 of the Constitution. In any event, constitutional protection of property does not extend to property that has unlawfully been acquired. If it were to be held that the requirement to explain violates the right to property under Article 40 of the Constitution, enforcement of a Notice issued under Section 26 of ACECA and the requirement to explain the source of disproportionate assets would be rendered nugatory. We decline to so hold.”

71. We are in agreement with the position taken by this Court in the afore-cited authorities, and find no reason to depart therefrom. Likewise, we do not consider **Sections 55 and 56 of ACECA** to be unconstitutional.
72. Having considered the record as put to us, the impugned judgment, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails in its entirety and is hereby dismissed with costs to the respondents.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of February, 2024.

DR. K. I. LAIBUTA

.....
JUDGE OF APPEAL

ALI-ARONI

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.