



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 409 OF 2013

JAMES HUMHREY OSWAGOPETITIONER

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSIONRESPONDENT

JUDGMENT

Introduction

1. In the petition dated 12th August 2013, the petitioner challenges the grant to and execution of search warrants by the respondent and the process of obtaining the said warrants from the Magistrate’s Court in Kibera in accordance with the provisions of section 118 of the Criminal Procedure Code. He contends that the procedure in which the warrants were obtained violated his constitutional rights, as did the manner in which the respondent executed the warrants.

The Facts

2. Briefly, the facts giving rise to this petition as presented by the petitioner are as follows. The petitioner, who describes himself in the affidavit in support of the petition as the Chief Executive Officer (CEO) of the Independent Electoral and Boundaries Commission (IEBC), was on several occasions summoned by the respondent to its offices where he gave information in his capacity as CEO of IEBC on issues touching on the tendering and procurement process of the Election Voter Identification Device (EVID) kits used in the 4th March 2013 general elections. The said summons were not issued to him in his personal capacity but as the CEO of IEBC. The respondent was investigating alleged malpractices in the procurement of the EVID kits used in the said election.

3. The respondent then applied and was granted orders to search the petitioner's premises by the Chief Magistrate's Court at Kibera in **Miscellaneous Criminal Application No 222 of 2013**. Pursuant to the grant of these orders, the respondent proceeded to search the petitioner's homes in Loresho and Fedha Estate in Nairobi and his rural home in Kisumu, and took away therefrom various documents and electronic equipment.

The Petitioner's Case

4. The petitioner's case was presented by Mr. Arwa in reliance on the averments contained in the petitioner's affidavit and further affidavit and the written submissions and authorities dated 12th September 2013.

5. In the affidavit in support of the petition sworn on 8th August 2013, the petitioner makes various averments in support of his case, the bulk of which are based on the advice of his Counsel and pertain to matters of law. He avers that the respondent have wrongly alleged that he abused his office as the CEO of IEBC by soliciting bribes from suppliers before the awarding of the contracts to supply the EVID kits; that he was never contacted by the respondent to inform him of the allegations against him, which he terms as wild, malicious, ludicrous and unfounded, and neither was he afforded an opportunity to be heard and respond to the allegations.

6. He alleges that he has a right to information under Article 35 of the Constitution, and is therefore entitled to be informed of the allegations against him; that under Article 50(2)(b),(j) and (k) of the Constitution, he has the right to be informed of the charge against him, and to be informed in advance the evidence the prosecution intends to rely on, to have reasonable access to that evidence and an opportunity to adduce and challenge the evidence.

7. The petitioner contends that he was never afforded an opportunity to be heard and to respond to the allegations levelled against him; that the respondent proceeded to Court and secured a warrant to enter, search and seize his property; that as the allegations relating to bribery in the procurement of the EVID kits were not made against him personally but against the IEBC, he was at a loss as to how and why the investigations were confined to him.

8. He contends that other than the allegations made against him by the respondent, there is no credible and rational basis for the respondent to have moved to Court to obtain a warrant to enter, search and seize his property; that the respondent misdirected and unlawfully applied section 23 of the **Anti-Corruption and Economic Crimes Act (ACECA) 2003** which gives the respondent powers similar to those given under the provisions of the Criminal Procedure Code, the Evidence Act, and the National Police Service Act necessary for the detection prevention and investigation of offences relating to corruption and economic crimes; and that the powers to compel attendance of witness at a police station as provided for under section 52 of the National Police Service Act 2011 also apply to the respondent in light of section 23 of the **ACECA**, which gives the respondent powers of investigation. He avers further that it is only upon failure to co-operate as required under the provisions of section 23 that the police can move in and exercise powers of search and seizure of property.

9. The petitioner asserts that he has constitutionally protected rights to privacy and property under Articles 31 and 40 of the Constitution respectively which cannot be limited except in accordance with the law; and that they cannot be limited on the basis of suspicion and rumours.

10. The petitioner contends that under Article 249 of the Constitution, commissions and independent offices are subject to the Constitution and the law and should promote constitutionalism. He asks the court to quash the warrants of search and seizure obtained against him as they were prematurely applied for as he was not informed of the allegations against him or afforded an opportunity to respond to them; that the search warrants were obtained on false information evidenced by the reckless and fraudulent misrepresentation by the respondent's officer in the affidavit in support of the application before the Magistrate's Court in Miscellaneous Criminal Application No 222 of 2013 where he states that they have been unable to obtain documents relative to its investigation. He alleges that his privacy was violated as he had not denied the respondent any information or refused to co-operate with it. He also asserts that he is entitled to the information that the respondent alleges that it has in its possession regarding the alleged corruption and malpractices in the tendering and procurement of the EVID kits which he asserts does not exist. He is aggrieved that there is no prima facie case established against him to justify the orders of search and seizure obtained against him.

11. The petitioner has also sworn a further affidavit on 30th August 2013 in which he controverts the averments sworn on behalf of the respondent by Ignatius Wekesa. He denies the alleged irregular award of tender for supply of the EVID kits, and asserts that the award was regular and underwent a legal process. He also makes lengthy factual averments with regard to the award of the tender for the EVID kits which are not relevant for the purposes of the issues before me.

12. In his submissions on behalf of the petitioner, Learned Counsel, Mr. Arwa, submitted that there must be a prima facie case raised before the EACC can investigate; that whether such prima facie case exists must be determined objectively and not on caprice. It was Learned Counsel's submission therefore that since the petitioner had shown that all the issues raised by the respondent were against the **IEBC**, no prima facie case had been established against him that would have entitled the respondent to obtain and execute search warrants against him; and that no reasonable suspicion had been raised as against him to warrant investigation.

13. It was further submitted on behalf of the petitioner that in pursuing investigations against him, the respondent was not acting as an independent commission as contemplated under Article 79 of the Constitution read with section 12 of the **Ethics and Anti-Corruption Commission Act**. Rather, the respondent was showing that it was subject to the control of other forces, in this case the Director of Public Prosecutions, which was a violation of the Constitution.

14. The petitioner is also aggrieved by the procedure followed by the respondent in executing the search warrants against him. It was submitted on his behalf that the respondent had conducted multiple raids in his home without prior communication; and that the procedure of obtaining the warrants was also wrong as sections 27, 28 and 29 of the **ACECA Act** required that an application for a warrant must be preceded by a request for information by the EACC before it could apply for a warrant. According to the petitioner, the acts of the respondent in applying for the warrant were unconstitutional as he was ready to give the information that the respondent was seeking.

15. Mr. Arwa submitted further that the application for a warrant under section 29 of the **ACECA**, which the respondent had sought and obtained ex parte, should have been applied for inter partes to enable the petitioner show why it should not issue. Mr. Arwa contended that a structural reading of the **ACECA** led to this conclusion; that if the intention had been for such applications to be made ex parte, the Act should have said so; that further, in accordance

with Articles 48 and 50 with regard to access to justice and a fair hearing, warrants of search should be applied for inter partes.

16. The petitioner was also aggrieved by the order issued by the Kibera Resident's Magistrate's Court, which he termed as irregular. This was because the order indicates that the orders were issued in Milimani, while the return shows they were issued in Kibera. He contended therefore that the orders were issued by a Magistrate not seized of the matter.

17. It was his contention further that even if the orders were regular and properly obtained, the respondent acted ultra vires the orders as they were authorised to collect documents but they collected, in addition, iPads and other electronic gadgets. He submitted that by collecting and confiscating items outside those permitted by the warrant, the respondent violated Article 31 on the right to privacy and Article 40 on the right to property.

18. To the respondent's contention that the present proceedings are premature, the petitioner took the view that Article 23(3)(f) gives redress before the High Court where there has been a violation of rights. He therefore asked for the warrants to be quashed as whatever was done pursuant to the warrants was an illegality and asks the Court to grant the following orders:

1. A declaration that the Respondent acted prematurely and illegally and abused the processes of the court by applying for authority to enter and search the petitioner's office and premises from the Chief Magistrates Court in Kibera (hereinafter referred to as the said authority to search) on the basis of misrepresentations, fabrications and substantiated and baseless rumours.

2. An Order of Certiorari quashing the said authority to search as the same was procured illegally and unconstitutionally and also amounts to an abuse of the process of this court besides violating the petitioner's fundamental rights and freedoms.

3. *An Order of injunction restraining the respondent from taking any/or further action, whether in purported compliance with the said authority to search or howsoever otherwise, in violation of the petitioner's fundamental rights and freedoms as secured and protected under the Constitution based on the said authority to enter and search or in any manner whatsoever.*

4. *A declaration that the respondent violated Article 31 and other provisions of the Constitution by forcibly entering and searching the petitioner's Uyomna Rarieda District home, his Loresho and Fedha Estate homes in Nairobi and also his anniversary office in Nairobi and consequently seizing therefrom his documents and other valuable items including his ipad.*

5. *A declaration that the acts of the Respondent of going to court prematurely and based on unsubstantiated allegations and rumors and as such obtaining the said authority to search the petitioner's homes and office contravened section 52 of the national Police Service Act, the Criminal Procedure Code among other provisions of the law.*

6. *A mandatory Order compelling the Respondent to return to the petitioner all the documents and other valuable items including his ipad which they illegally seized and took from the Petitioner whence they under took their forcibly entry and search of the Petitioner's Uyoma Rarieda District home, his Loresho and Fedha Estate homes in Nairobi and also his Anniversary office in Nairobi.*

7. *An Order for general damages to compensate the petitioner whose fundamental rights and freedoms were infringed upon by the respondent contrary to Article 31 of the Constitution among other provisions of the Constitution and the law.*

8. *A mandatory Order compelling the Respondent to release to the Petitioner all the information they have against him as he is entitled to the same under Article 35(1)(b) which provides that every citizen has the right to access information held by another person and required for the exercise or protection of any right or fundamental freedom.*

9. *The Costs consequent upon this petition be borne by the Respondent.*

10. *Any other or further order(s) or relief(s) that this Honourable Court may deem fit to grant.*

The Respondent's Case

19. The position taken by the respondent as presented to the Court by Learned Counsel, Mr. Waudu, is that this petition is an abuse of the Court process and should be dismissed with costs.

20. The respondent has filed a replying affidavit sworn on 23rd August 2013 by **Ignatius Wekesa**, a Forensic Investigator with the respondent, who describes himself as one of the officers inquiring into allegations of malpractices in the procurement of election support materials by the IEBC.

21. In the said affidavit, Mr. Wekesa depones that sometime in early 2013, the respondent received intelligence reports concerning alleged corruption in IEBC in the procurement of election support materials and that it therefore instituted preliminary investigations into the issue; that investigations included inquiring into allegations that IEBC irregularly awarded the tender for supply of Biometric Voter identification (BVI/EVD) kits which were used during the 2013 elections to a company known as Face Technologies.

22. Mr. Wekesa avers further that the respondent received a letter dated 17th April 2013, from the Director of Public Prosecutions requesting the Commission to institute investigations into the failure of the Electronic Voter identification Devices (EVID) and Results Transmission System (RTS) Technologies during the March 4th 2013 General Elections pursuant to the recommendations of the Supreme Court in Consolidated Petition Nos. 3, 4, and 5 of 2013.

23. He states that the respondent, pursuant to its legal mandate to investigate corruption and economic crimes derived from the provisions of Article 79 of the Constitution of Kenya, the

Anti-Corruption and Economic Crimes Act, 2003 (ACECA), and the Ethics and Anti-Corruption Commission Act, 2011 among other laws, instituted investigations into the award of the contract for the Biometric Voter identification (BVI/EVID) kits and accessories to Face Technologies Limited.

24. Like the petitioner, the respondent, in the replying affidavit sworn by Mr. Wekesa, goes into some detail into the facts pertaining to the award of the contract and various alleged failures with regard to the grant of the said contract, the terms thereof and variations thereto, as well as failures in performance of the said contract, the bulk of which are also not relevant for the purposes of this petition.

25. However, the crux of the averments by the respondent is that it was justified in the actions it took with regard to the petitioner; that as the IEBC's CEO, the petitioner is the IEBC's Accounting Officer and as such is obligated to safeguard the IEBC's assets, including ensuring prudent management of its financial resources.

26. The respondent avers that the petitioner's offices and residential premises were searched and property seized pursuant to lawful orders issued by the Kibera Resident Magistrate's Court on 5th August 2013 in Miscellaneous Criminal Application No 222 of 2013; that the said Court had the jurisdiction to issue the orders under the provisions of Section 118 of the Criminal Procedure Code; that the petitioner cannot contend that his constitutional rights have been contravened by the execution of orders issued by the Kibera Resident Magistrate's Court in proceedings in which the said Court is not a party; and that the respondent cannot be liable for violating the petitioner's constitutional right of privacy by executing lawful Court orders.

27. It is the respondent's further averment that the constitutional jurisdiction of this Court is being needlessly invoked as the law provides a mechanism for challenging such orders as were issued by the Magistrate's Court; that some of the orders sought by the petitioner cannot in any event be granted as they have been overtaken by events as the orders of the Magistrate's Court have already been executed as the search warrants in question were executed on 7th August 2013, several documents and devices were seized, and an inventory of the seized items submitted on 13th August 2013 to the Court which issued the search and seizure orders in compliance with the provisions of section 121(1) of the Criminal Procedure Code.

28. The respondent asserts on the advice of its Counsel that prior demand for entry into the relevant premises is not a condition precedent under section 118 of the Criminal Procedure Code; that an investigations by its very nature is largely a covert operation and giving notice of an intended action to the suspect may lead to failure of the operation; that the right to privacy granted under Article 31 is not absolute and does not fall within the category of the non-derogable rights under Article 25 of the Constitution and can be limited and qualified in the circumstances set out under Article 24(1) to safeguard the public interest in combating corruption and economic crime and ensuring the prudent management of public bodies and resources.

29. It is also the respondent's averment that the right to a fair hearing under Article 50 of the Constitution on the basis of which this Court has been moved is available to the petitioner during trial.

30. According to the respondent, the petitioner's primary challenge is to the orders made by the Court in Kibera and the actions taken thereafter. Mr. Waudu, Learned Counsel for the respondent, argued that the orders were issued by a Court of competent jurisdiction which has power under section 118 of the Criminal Procedure Code. He contended further that the only challenge raised was that the orders were made in Kibera, issued in Milimani, and returns made to Kibera. According to the respondent, however, the Court stamp shows that the application for the orders was filed in Kibera; that section 118 of the Criminal Procedure Code confers jurisdiction on a Magistrate's Court to grant the orders; and that the petitioner cannot challenge the orders in proceedings where the Court which issued the orders is not a party as the Court is also entitled to be heard.

31. The respondent submitted that the petitioner has an issue with the adequacy of the evidence before the Chief Magistrate's Court when the warrants were issued; that this was not a constitutional issue but rather an issue of jurisdiction as it goes to the merits of the case and so orders of certiorari could not issue as this Court was not concerned with matters of evidence.

32. The respondent relied on the decision of the court in **Cargo Distributions Ltd -vs- CID Director Misc App. No 39 of 2006** cited with approval in **David Njane Rui -Vs- R (2009) eKLR** in which it was held that applications under section 118 of the Criminal Procedure Code cannot be argued inter parties and the police need not give all the details in their possession.

33. The respondent also took the view that the petition was an abuse of process as it did not meet the criteria for challenging court orders. It relied in this regard on the decision in **Kenya Bus Services -vs- Attorney General Misc. Civil Suit No 413 of 2008** for the proposition that an unchallenged Court order cannot be the basis of a constitutional reference and that judgments cannot be challenged except for lack of due process. Mr. Waudu submitted that no evidence had been placed before the Court to show that the Magistrate acted without jurisdiction, or that there was lack of due process or that the orders issued were tainted with irrationality. He contended further that no evidence had been adduced to show that the respondent lacked capacity to apply for the orders.

34. With regard to the provisions of section 29 of the **ACECA**, Counsel submitted that the section empowers the respondent to apply for warrants, but does not regulate the process for such applications, which is regulated by section 118 of the Criminal Procedure Code. Counsel argued further that should the petitioner be dissatisfied with the orders issued by the Magistrate's Court, his recourse was provided by section 382 of the Criminal Procedure Code which provides for revision, and did not lie in a petition to this Court. Counsel relied in this regard on the decision in **Kenya Bus Service -vs- Attorney General (supra)** and **Harrikisoon -v- Attorney General of Trinidad & Tabago (1980) A.C 265** and submitted that the Courts frown on the practice of approaching the constitutional court to avoid the process provided by law.

Rejoinder

35. In his reply to the respondent's submissions, Counsel for the petitioner countered that the petitioner was not seeking to challenge the adequacy of evidence before the Chief Magistrate Court but the constitutionality of the entire process from investigation to the issue of warrants; that the authorities relied on by the respondent predated the new Constitution; the standards set in the new Constitution are different; and the authorities were therefore not relevant to the present case. Counsel argued further that it was not irregular for the petitioner to approach this Court even though there was another process provided by law in the form of revision under section 382 of the Criminal Procedure Code which he submitted would not have been useful to the petitioner in this case.

36. To the respondent's argument with regard to the issuance of warrants under section 118 of the Criminal Procedure Code rather than section 29 of the **ACECA**, it was Counsel's

contention that Section 118 needed to be re-examined as the interpretation placed on it by the respondent would render section 118 unconstitutional.

Determination

37. This petition primarily revolves around the circumstances under which the respondent can make an application for search warrants with respect to the suspected commission of an economic crime, and the procedure to be followed in so doing. It is the petitioner's contention that the process is regulated by section 29 of the **Anti- Corruption and Economic Crimes Act (ACECA)**, and not by the provisions of section 118 of the **Criminal Procedure Code**; that the application for warrants before the Magistrate's Court should have been *inter partes*, not *ex parte*, thus allowing the petitioner to be heard before the Court issued the warrants; that the orders obtained by the respondent were irregular; and that even if they were regular, their execution led to a violation of the petitioner's rights under Articles 31 and 40 of the Constitution. It appears also to be a contention by the petitioner, alluded to in submissions by his Counsel, that the provisions of section 118 of the Criminal Procedure Code are unconstitutional.

38. The respondent's contention, on the other hand, is that while the provisions of Section 29 of the **ACECA** provide the powers to apply for warrants, the procedure for so doing is as set out in section 118 of the Criminal Procedure Code; that the petitioner was challenging the adequacy of the evidence before the Court which granted the warrants, a challenge that should have been raised by way of revision and not by filing a constitutional reference; and that therefore the present petition is an abuse of the court process and should be dismissed.

39. It is, I believe, useful to dispense at the outset with some of the collateral arguments presented before the Court before dealing with the main issues that the petition raises.

Rights under Article 50

40. The first of these relates to the alleged violation of the petitioner's right to information and to a hearing. It is undisputed that a person charged with a crime is entitled, under the provisions of Article 50(2)(b) of the Constitution, to information with regard to the charges facing him, and to an opportunity to be heard and to challenge the evidence brought against him. In my view, the provisions of Article 50(2) do not have any application in the present circumstances. The petitioner was not, at the time the application for search warrants was

made before the Magistrate's Court in Kibera, charged with any offence. If he had been, he would indeed have been entitled to all the rights that an accused person is entitled to under the said Article 50(2).

Right to Information

41. The second argument pertains to the petitioner's right to information. Again, this is an undisputed right, to which all citizens are entitled as of right with regard to information held by the state and all state organs, and with respect to information held by any other person if such information is required for the enjoyment or protection of a fundamental right or freedom. Indeed, section 29 of the **Ethics and Anti-Corruption Commission Act** recognises the right to information by providing, at section 29 thereof, headed "**Management of Information**", as follows:

1. *The Commission shall publish and publicise important information within its mandate affecting the nation.*

2. *A request for information by a citizen—*

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

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

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

(3) Subject to Article 35 of the Constitution, the Commission may decline to give information to an applicant on the following grounds—

(a) the request is unreasonable in the circumstances;

(b) the information requested is at a deliberative stage by the Commission;

(c) failure of payment of a prescribed fee; or

(d) failure of the applicant to satisfy confidentiality requirements by the Commission.

(4) The right of access to information under Article 35 of the Constitution is limited to the nature and extent specified under this section.

(5) Every member and employee of the Commission shall sign a confidentiality agreement.

42. As this Court observed in the case of **Nairobi Law Monthly vs Kengen and Another High Court Petition No. 278 of 2011**, what is required is for the person seeking information to make a request for such information. A violation of the right to information cannot be alleged before a request for information has been made.

Application of Section 118 of the Criminal Procedure Act

43. The core of the petitioner's claim, I believe, is whether the respondent can invoke the provisions of section 118 of the Criminal Procedure Code to obtain search warrants against him. The petitioner's argument appears to be two-fold. First, it is his contention that the respondent is limited to making its application for a warrant under the provisions of section 29 of the **ACECA**, and that it cannot make an application for a search warrant under section 118 of the Criminal Procedure Act.

44. The second limb of his argument is that in making such application, the respondent, and presumably any other officer or body exercising similar powers, must give advance notice to the person in the position of the petitioner, who is then entitled to be heard before an order authorising search and seizure can be made.

45. Section 29 of the Anti-Corruption and Economic Crimes Act (**ACECA**), which is headed '**Search of Premises**' is in the following terms:

(1) The Commission may, with a warrant, enter upon and search any premises for any record, property or other thing reasonably suspected to be in or on the premises and that has not been produced by a person pursuant to a requirement under the foregoing provisions of this Part.

(2) The power conferred by this section is in addition to, and does not limit or restrict, a power conferred by section 23(3) or by any other provision of this part.

46. Counsel for the petitioner contends that the application for a search warrant in respect of the petitioner's premises should have been done under the provisions of this section. However, a reading of this section shows that it does not provide a process for obtaining the search warrant contemplated. It only permits the Commission to enter premises 'with a warrant', without providing how such warrant is to be obtained. However, when read with section 23(4) of the Act, it is clear that the warrant required under section 29 is to be obtained as provided under section 118 of the Criminal Procedure Code. Section 23 of ACECA provides as follows:

(1) The Director or a person authorized by the Director may conduct an investigation on behalf of the Commission.

(2) Except as otherwise provided by this Part, the powers conferred on the Commission by this Part may be exercised, for the purposes of an investigation, by the director or an investigator.

3. For the purposes of an investigation, the Director and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Director or investigator has under this Part.

(4) The provisions of the Criminal Procedure Code (Cap. 75), the Evidence Act (Cap. 80), the Police Act (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Director and an investigator as if reference in those provisions to a police officer included reference to the Director or an investigator. (Emphasis added)

47. This Court finds, therefore, that the respondent properly exercised its powers under the provisions of the ACECA in obtaining warrants to search the petitioner's premises by invoking the procedure provided under section 118 of the Criminal Procedure Code.

48. The petitioner has also challenged the orders issued on the basis that they were issued in Kibera but were extracted in Milimani. This is not, in my view, a material objection to the warrant, and the petitioner has not alleged any prejudice that has been occasioned as a result.

49. Similarly, I can find no basis for impugning the warrants on the basis that the execution thereof extended beyond the purview of the warrants. The basis of this contention is that the warrants authorised the seizure of documents, while the respondent also seized electronics such as iPads. While it can be properly argued that ‘documents’ may extend to documents held in electronics such as iPads and computers, that is also, in my view, an issue that properly fell for determination or interpretation by the Court that issued the warrant, and to the High Court by way of revision.

50. The petitioner also contends that the application before the Magistrate’s Court should have been inter partes so that the petitioner could be heard before the warrants were issued. Section 118 of the Criminal Procedure Code under which the warrants were issued is in the following terms:

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

51. The question is what the purpose of obtaining the search warrants under the above section is. In my view, it is two-fold. With regard to the protection of the rights of citizens, it is to ensure that any entry into a citizen’s premises or property is done in accordance with, and with the sanction and authority of, the law. Without such a provision, police officers could easily infringe citizen’s rights by way of arbitrary entries and searches.

52. With regard to the public interest, the administration of justice and the apprehension of offenders, I believe the section is intended to ensure that investigating authorities can gain access to incriminating information or evidence without the suspected offender getting an opportunity to conceal or destroy such evidence. That being the case, it would clearly defeat the purposes and intention behind searching premises as contemplated under section 118 of

the Criminal Procedure Code set out above if an application for a search warrant were to be made inter partes, with notice, and for the person in respect of whose property or premises the warrants of search are directed to be heard before such warrants are issued.

53. In the circumstances, I can find no merit in the present petition, and it is hereby dismissed with costs to the respondent.

Dated Delivered and Signed at Nairobi this 17th day of January 2014.

MUMBI NGUGI

JUDGE

Mr. Jotham Arwa instructed by the firm of Rachier & Amollo & Co. Advocates for the petitioner.

Mr. Waudu instructed by the firm of Edwin W. Waudu & Co. Advocates for the respondent



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