

**AFRICAN CENTRE FOR INTERNATIONAL YOUTH EXCHANGE (ACIYE) & 2 OTHERS V
ETHICS AND ANTI CORRUPTION COMMISSION & ANOTHER[2012]eKLR**



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 334 of 2012

AFRICAN CENTRE FOR INTERNATIONAL YOUTH EXCHANGE (ACIYE)1ST PETITIONER
JOHN ABOK GARANG 2ND PETITIONER
CALEB OKECH 3RD PETITIONER
AND
THE ETHICS AND ANTI CORRUPTION COMMISSION.....1ST RESPONDENT
JANE MUTHAURA 2ND RESPONDENT

JUDGMENT

Introduction

1. The issue for determination in this petition is whether Ms Jane Muthaura, in performing the functions and duties of the secretary of the Ethics and Anti-Corruption Commission (EACCA) is entitled to continue performing those duties without taking and subscribing to the oath or affirmation of office required under **Article 74**.
2. The second issue is whether employees of the EACCA whose contracts have expired may continue to work for the Commission upon secondment by the Public Service Commission.

Background

3. The basic facts of this matter relate to the premiere body charged with fighting the cancer of corruption. The first corporate body established to fight corruption in Kenya was the Kenya Anti-Corruption Authority (KACA) under the provisions of the **Prevention of Corruption Act (Chapter 65 of the Laws of Kenya)**. This body was disbanded when the High Court ruled that the body was unconstitutional in the case of **Gachiengo v Republic (2000) 1 EA 52 (CAK)**.
4. Thereafter, the Kenya Anti-Corruption Authority was established under **Section 6** of the **Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003)** as a corporate body to fight corruption. The Act also established the Anti-Corruption Advisory Board, an unincorporated body of persons nominated by different stakeholders. Its role was to recommend persons to be appointed Director and Assistant Director and on matters concerning the exercise of its powers and performance of its functions.
5. Following the promulgation of the Constitution, **Article 79** empowered Parliament to, “enact legislation to establish an independent ethics and anti-corruption commission, which shall have the statues and powers of a commission under Chapter Fifteen for purposes of ensuring compliance with and enforcement of the provisions of this Chapter.”
6. On 5th September 2011, the **Ethics and Anti-Corruption Commission Act (Act No. 2011)** (“the Act”) was enacted pursuant to the Constitution and it established the Ethics and Anti-Corruption Commission under **section 3** of the Act.
7. **Part V** of the Act made provisions for transition from the old commission to the new. **Section 34(1)** of the Act while transitioning staff of the defunct KACC to the EACCA specifically excluded the previous management of KACC, that is, the Director and his Assistants from moving to the new Commission. Under **section 6** of the Act it was envisaged that the three commissioners would be appointed within a period of three months. Under the provisions of **section 16** of the Act, the Commission is required to recruit its secretary through a competitive and

transparent process.

8. Although the offices of Director and Assistant Directors were abolished, the Advisory Board created under Part III B of the **Anti-Corruption and Economic Crimes Act** was retained for a period of 90 days or until the full commission was constituted, whichever came first. The Advisory Board was retained for a limited time and its function remained purely advisory.

9. In the meantime, the Commission was not fully constituted because the appointment of one of the appointed Commissioners was challenged in court in the case of **Trusted Society of Human Rights Alliance v The Attorney General and Others Nairobi Petition No 229 of 2011**. The case is now headed to the Court of Appeal.

10. On 8th September 2011, Ms Jane Muthaura, the 2nd respondent, who was serving as the Principal Officer Finance and Accounts was informed that the Advisory Board had designated her to oversee the Commission's operations and affairs during the transition period. The mandate of the Advisory Board came to an end on 6th December 2011 and it resolved to hand over the operations of the Commission to Ms Muthaura. She was left to coordinate and oversee the activities of the Commission with the assistance of the other officers of the Commission.

11. In order for her to effectively carry out and manage the responsibilities of the Commission, the Permanent Secretary, the Treasury appointed her the Accounting Officer under **section 17** of the **Government Financial Management Act, 2004** for the financial year 2011/2012. Ms Muthaura also received the letter dated 2nd December 2011 from the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service stating that, "Pending appointment of the substantive Secretary of the Ethics and Anti-Corruption Commission, you are appointed in that position with immediate effect."

12. Upon receipt of the letter from the Head of the Public Service, Ms Muthaura, sought legal opinion of her status from the Attorney General. The Attorney General in a letter dated 23rd January 2012 advised that the acting secretary may assume, subject to the law, all functions of the office until a substantive holder is appointed to officer.

13. During this interregnum, on 30th April 2012, the contracts of 63 members of staff expired and contracts of other employees continue to expire. It was in fact projected contracts for 123 members of staff would expire before the Commission is fully constituted. In order to ensure that the operation of the Commission were not jeopardised, the 1st respondent invoked the provision of **Article 234** of the Constitution, **section 18(2)(b)** of the Act and **section 12** of the **Service Commission Act** and requested the Public Service Commission through the Ministry of Justice, National Cohesion and Constitutional Affairs to consider re-appointing and seconding officers whose contracts had expired to the 1st respondent.

14. The Public Service Commission duly acceded to the request and by its letter dated 2nd May 2012, informed the Ministry of Justice, National Cohesion and Constitutional Affairs that it had appointed the officers for one year or until a further decision by EACCA is reached whichever is earlier.

Petitioners' case

15. The petitioner in its petition dated 31st July 2012 has challenged the position of the acting secretary and seeks the following declarations;

(a) *Whether the actions of the Acting Secretary to continue acting in office without taking the Oath and affirmation of office including continuing to make commitments and expend finances and bind the Commission are an illegality and contrary to **Article 74** of the Constitution.*

(b) *Whether the continued stay in office by the Commissioners without taking the oath and affirmation of office including continuing to make commitments and expend finances and bind the commission are an illegality and contrary to Article 74 of the Constitution.*

(c) *Whether the acting secretary as well as commissioners should be surcharged and barred from holding public office for expending public/tax payers' money in breach of the Constitution.*

(d) *Whether the actions of the acting secretary to the commission as well as the commissioners is an abuse of the office contrary to the Public Ethics Officers Act and should be charged in a court of Law as such and be privately prosecuted.*

(e) *Whether under the Ethics and Anti Corruption Commission Act, 2012, in particular section 34(2) and (3) (a) and (b) the staff and officers of the Commission are required to apply afresh and be vetted to establish their fitness or suitability to serve in the Commission and if so whether the officers whose contracts expired in April 2012 and who now serve purportedly under letters of appointment from the 2nd respondent under directions from the Public Commission are in office illegally.*

(f) *Whether the acting secretary and the 63 officers of the Commission and who continue to serve illegally in office should be surcharged for monies earned outside the expiry of their contract and whether the court has powers under Article 23 (e) to order the said officers to pay compensation to the tax payer and be found to have*

breached chapter six of the Constitution and be barred from holding public office.

Issues for determination

16. The pleadings and submissions made by the parties disclose two main issues for determination as follows;
- (a) Whether the 2nd respondent is in breach of the **Article 74** of the Constitution by performing the functions of a State Officer without taking or subscribing to the oath of office.
 - (b) Whether the 63 officers seconded to the Commission by the Public Service Commission are illegally in office.
 - (c) If the answer to both or either of the issues is in the affirmative, then what relief should be granted?

Whether there is a breach of Article 74

17. **Article 74** of the Constitution provides as follows;

Before assuming a State office, acting in a State office, or performing any functions of a State office, a person shall take and subscribe the oath or affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament.[Emphasis mine]

18. **Article 260** sets out the specific offices which are termed as State offices. Although the Secretary to the EACC is not in the list of officers, **Article 260** also includes “an office established and designated as a state office by national legislation” as part of the definition of a State officer.

19. **Section 16** of the EACCA provides, in part, as follows;

(2) The secretary shall be a State officer and shall serve on such terms and condition as the commission may determine.

(3) Before assuming office, the secretary shall take and subscribe to the oath of office set out in the First Schedule.

20. It is not disputed that Ms Muthaura has neither been appointed secretary under the EACCA nor subscribed to the oath of office as required either **Article 74** or the provisions of the Act.

21. Mr Oluoch, counsel for the petitioner, contended that Ms Muthaura was acting in the position of secretary to the Commission and had not subscribed to the oath as required by **Article 74** and in the circumstances she continued to act illegally and her acts were contrary to the Constitution illegal null and void.

22. The position taken by the respondents, represented by Mr. Olola, is that in fact Ms Muthaura was not the acting secretary and she had not assumed the position of secretary in accordance with the Act and she was therefore not required to subscribe to the oath as required by the Constitution and the Act.

23. Mr Olola contended that although Ms Muthaura was designated as the “acting secretary” by the Head of the Public Service, this matter is to be looked at in substance and not form. He submitted that the Head of the Public Service could not appoint Ms Muthaura as acting secretary and that the procedure for appointment of the Commission secretary is clearly set out in the EACCA and it requires appointment by the Commission and it is not in dispute that at the time of filing suit, the Commission was yet to be constituted and therefore it was not possible to recruit or appoint a substantive or acting secretary.

24. I think that the question then for purposes of this decision is whether Ms Muthaura is “**performing functions of a state officer**” within the meaning of **Article 74**. Whether a person is performing the functions of a State officer is a question of fact which must be determined in light of the circumstances. According to **section 16(7)** of the EACCA, the Secretary of the Commission has the following duties;

- (a) Chief executive officer of the Commission.
- (b) The accounting officer of the Commission
- (c) Responsibility for carrying out the decisions of the Commission, day to day administration and management of the affairs of the Commission, supervision of other employees of the Commission and the performance of such other duties as may be assigned by the Commission.

25. Ms Muthaura depones that her role has been and continues to be that of trustee pending assumption of office of the Chairman and members of the Commission rather than as State officer appointed under **section 16** of EACCA. In this regard, the Commission has to date refrained from undertaking certain functions which would require the exercise of power by two fully constituted Commissioners such as hiring of new staff and or renewal of staff contracts.

26. The petitioner on the other hand contends that Ms Muthaura continues to carry out ordinary duties of the commission which include communicating to the Director of Public Prosecution recommendations made under **section 35** of the **Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003)** as read with **Section 11(d)** of the **EACCA**, internal advertising of vacant posts and lastly acting as the accounting officer of the Commission.

27. I take the position that although Ms Muthaura is not the secretary nor is she capable of being appointed as the secretary of the Commission in accordance with the Act, she is carrying out acts which ordinarily fall within the duties carried out by the Secretary as provided by **section 16**. Whether she describes herself as a trustee or not, the fact is that she is “*performing actions of a State office*” within the meaning of **Article 74**.

28. I do not think it is necessary that the person designated as performing the functions of a State office, perform all the functions that come with that office. It is enough that the person performs some of the functions of the office. Ms Muthaura has been designated as the accounting officer by the Permanent Secretary to the Treasury in accordance with the **section 17** of the **Government Financial Management Act, 2004**. Although the Attorney General opined that the provisions of the said Act are excluded by the provisions of EACCA, in this case they would continue to apply until the Commissioners are appointed and Secretary is appointed. The duties outlined in the appointment constitute the kind of duties that would be performed by the Secretary to the Commission who is the accounting officer of the corporation.

29. The Constitution also contemplates and recognizes holders of state officers in an acting capacity. **Article 259(3)(b)** which states, inter alia;

Every provision in this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things-

(b) A reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time.

30. **Article 74** of the Constitution is part of the **Chapter Six** of the Constitution dealing with “**Leadership and Integrity.**” The taking of or subscribing to the oath of office is a prelude to assuming State office. It is an expression of one’s fidelity to the Constitution and a sign that one is ready and willing to abide by the Constitution. Once an officer assumes office, the Constitution exacts upon the officer higher standards of probity and responsibility in conducting himself or herself. **Article 74** expands the responsibilities of a person who though not a State officer, assumes the responsibility of a state officer by performing any functions of a State officer.

31. It is on this basis that I find and hold that Ms Jane Muthaura continues to perform the functions of the Secretary to the Commission, which is a State office and is entitled to act as such until the Commission appoints a substantive holder. Furthermore in terms of **Article 259(3)(b)**, Ms Muthaura is holding an acting position of a State Officer. I further find that Ms Muthaura is in breach of **Article 74** of the Constitution by failing to subscribe to the Oath of office and is required to do so in order to continue performing the functions.

Position of employees of the Commission

32. The petitioners’ case is that the staff and officers of the Commission are required to apply afresh and be vetted to establish their fitness or suitability to serve in the commission as required by **section 34(2)(3)(a)** and **(b)** and **(4)** of the EACCA.

33. The respondents’ position is that **Article 252(1)(c)** read together with **section 18** of the EACCA exclusively vest the powers of appointment of staff of the commission upon the fully constituted Commission and in order to deal with the challenges inherent in transition process, the Commission was entitled to call upon the Public Service Commission to second staff in accordance with **section 18(2)(b)** of EACCA, which provides that the secretariat shall comprise of, “**(b) such offices as may be seconded by the Public Service Commission to the Commission upon its request.**”

34. The petitioner’s arguments lack merit. The vetting or otherwise of officers must await the establishment of the Commission and until this is done, serving offices continue to serve. I am also satisfied that the Public Service Commission was entitled to second officers and under its statute, the Commission was entitled to accept seconded officers from the Public service. I also note that these officers were in any case, employees of the Commission but whose contracts could not be renewed due to the fact that the Commission lacked capacity to renew the contracts. As the Public Service Commission made clear, the officers would serve subject to the Commission’s decision once it was constituted.

35. The issue of employees of the Commission also arose in the case of **Ruth Muganda v Kenya Anti-Corruption Commission and Director of Public Prosecutions Nairobi HC Misc. Crim. Appl. No. 288 of 2012** and in holding that the members of the secretariat of the Commission were properly in office Lady Justice Achode observed that, “[45].... **Thus this Court is alive to the fact that the envisaged transitional period prescribed in the statute could not foresee all transitional challenges, bearing in mind possibilities of litigation as in the case here affecting the appointment of the chairman and therefore assumption of office by members of the Commission.. [46] A purposive approach to this issue requires the Court, in the spirit of the Constitution, to promote the continuing and intended objects and functions of the Commission throughout the transitional process as opposed to extinguishing its existence.**”

Relief and consequences

36. I have found that the 2nd respondent has continued to perform the functions of a state office without subscribing to the oath. The petition seeks that the 2nd respondent be surcharged. The question then is what relief I should grant to remedy the breach.

37. In the case of **Jayne Mati v Attorney General Nairobi Petition No. 108 of 201 (unreported)**, I stated, “[46] **the issuing of declaration or any other relief under Article 258 of the Constitution is a matter of discretion for the court dependent on the circumstances of the case. While the right is granted to every person to institute proceedings claiming the Constitution has been contravened or is threatened, it is not in every case that the court will grant relief. What constitutes a threat to the constitution will of course be dependent on the facts of each particular case.**”

38. This case highlights the challenges faced in the transition process, where uncertainties may be created by litigation and by the mere fact that processes required to effect the transition are controlled by human beings and not machines. The Court is required to consider all the facts and more importantly to address itself to the objects and intent of the Constitution. **Article 259(1)** requires that the Constitution be interpreted in a manner that promotes, its purposes values and principles, advances, the rule of law, human rights and fundamental rights and freedoms in the bill of rights and permits development of the law and contributes to good governance.

39. The Ethics and Anti-Corruption Commission is the foundation upon which **Chapter Six** of the Constitution is built. It is the body required to superintend and enforce the provisions **Chapter Six** and the **Leadership and Integrity Act, 2012** which is the legislation giving effect to **Chapter Six**. Therefore, any approach to this issue should be to secure the institution rather than diminish its capacity. In the words of **Article 259**, the approach must be one that meets the Constitutional purposes and objectives and fosters good governance.

40. The functions performed by Ms Muthaura were necessary to ensure the survival of a constitutionally mandated body and were done in good faith without any intent to undermine or threaten the Constitution. The relief and remedy I grant takes into account these considerations.

Disposition

41. I summarise my finding as follows;

(a) I find and hold that Ms Jane Muthaura, has performed and continues to perform the functions of a state officer namely the Secretary of the Ethics and Anti-Corruption Commission within the meaning of **Article 74**. In accordance with **Article 259(3)(b)**, she is entitled to continue acting as such until the Commission appoints a substantive holder of the said office.

(b) As a result, she is required to subscribe to the oath of office in accordance with **Article 74** of the Constitution.

(c) I find and hold that secondment of employees by the Public Service Commission to the Ethics and Anti-Corruption Commission was in accordance with the **Ethics and Anti-Corruption Act** and is not inconsistent with the Constitution.

42. In view of the findings I make the following orders;

(i) I hereby order that Ms Jane Muthaura, subscribe to the oath of office in accordance with **Article 74** of the Constitution within the next **fourteen (14) days** from the date hereof as a condition for her to continue performing the functions.

(ii) I decline to grant declarations (a)(b)(c) and (d) of the petition.

(iii) Each party shall bear their own costs.

DATED and DELIVERED at NAIROBI this 3rd day of December 2012

D.S. MAJANJA

JUDGE

Mr A. T. Oluoch instructed by A. T. Oluoch and Company Advocates for the petitioners.

Mr J. Olola, Advocate, instructed by the Ethics and Anti-corruption Commission.



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