**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Misc Civ Appli 54 of 2006**

**DR. CHRISTOPHER NDARATHI MURUNGARU …….…….…… PLAINTIFF**

**AND**

**KENYA ANTI-CORRUPTION COMMISSION…1ST DEFENDANT/RESPONDENT**

**HON. ATTORNEY- GENERAL……2ND DEFENDANT/RESPONDENT**

**J U D G E M E N T**

Introduction

**The Application**

This judgement relates to an application brought by way of an Originating Summons dated and filed in Court on 1st February, 2006. The Application is supported by the Applicant's Supporting Affidavit sworn on 1st February, 2006 and has extensive annextures Newspaper cuttings containing reports on the Applicant in relation to the question of corruption. The Applicant also filed a Further Affidavit with annextures thereto sworn on 1st September 2006. In further support of his case, the Applicant's Counsel filed skeletal submissions together with lists of decided cases from around the Commonwealth and other countries.

The first Respondent that is to say, the Kenya Anti-Corruption Commission, ***"the Commission***" filed on 8-10-2006 a Replying Affidavit sworn on 7th February, 2006 by its Director, Retired Justice Aaron Gitonga Ringera, together also with written submissions (skeletal arguments) dated and filed on 14th February, 2006. The First Respondent also filed Revised Submissions in the course of the hearing of the Applicant's Originating Summons. There were also filed on behalf of the First Defendant lists of authorities some similar to those of filed by the Applicant's Counsel.

The 2nd Defendant the Honourable Attorney also filed a Replying Affidavit on 14th February, 2006 sworn by one James Mungai Warui, a Senior State Counsel attached to the State Laws Office and having the conduct of this matter. We will in the course of this judgment make reference to the said Affidavits. So at the commencement of the hearing of the Plaintiff's application all necessary documentation was on record, and at all material time, the Plaintiff was represented by Mr. P.K. Muite,

Senior Counsel appearing together with Kioko Kilukumi, while the first and second Defendants were represented by Prof. Githu Muigai and Mr. ***Warui Mungai*** respectively.

THE FACTS

The facts relating to this Application are not in dispute. The trigger thereto was the letter of Notice by the First Defendant's Director dated 9th January, 2006 addressed to the Plaintiff and which because of its centrality to this whole matter, we beg to set out in full – it carries in its letter head the crest oremblem of the first Defendant, with the words, "***Spear of Integrity,"*** and the First Defendant's Reference – KACC/INN6/36/84) and is addressed as follows-

**Hon. Dr. Christopher Murungaru,**

**Member of Parliament,**

**Continental House,**

Nairobi.

NOTICE TO FURNISH A STATEMENT OF PROPERTY PURSUANT TO SECTION 26 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003.

**WHEREAS** you Hon. DR. **CHRISTOPHER MURUNGARU**

are reasonably suspected of Corruption and Economic Crime, ***NOW THEREFORE*** **TAKE NOTICE** that you are required to furnish to the Director, Kenya Anti-Corruption Commission, within 7 days of this notice, a written statement enumerating all your property.

The Statement should include, but is not limited to, the following details:

(1) list of all property owned, including money, and date of such acquisition;

(2) detailed particulars of the property, location, and with regards to money details of account (s) held;

(3) detailed particulars specifying how the property was acquired, state further whether it was a purchase, a gift or inheritance and at what consideration, if any, was given for the property including source and mode of financing applied;

(4) list of any other property where you have a direct or indirect interest through a spouse, relative, friend, trust or business associate and provide details of the nature of interest held;

(5) particulars of any corporations, partnerships, businesses, or bodies in which you have a direct or indirect interest and the nature of such interest;

(6) particulars of capital or money market investments (e.g. bonds, stocks, T. Bills, shares, fixed deposits etc.);

(7) Details of your current employment and income,

***TAKE FURTHER NOTICE*** that failure to comply with this ***NOTICE*** is an offence punishable by a fine of upto Kenya Shillings three hundred thousand (Kshs.300,000/=) imprisonment for a term of not exceeding three (3) years or both.

**Signed**

**JUSTICE RTD. AARON G. RINGERA**

**DIRECTOR/THE CHIEF EXECUTIVE**

It is clear from the subsequent correspondence between the Plaintiff's Counsel Paul Kibugi Muite, Senior Counsel aforesaid, that the First Defendant's Director's letter above, triggered the discharge of other bullets, namely, a letter dated 16th January, 2006, from the Plaintiff's Counsel in reply to the Director's Notice aforesaid, and a further volley from the Director dated 23rd January, 2006. Again because of the centrality of the issues later emanating from these exchanges, we set out the said replies to, and from the Director.

Firstly, Mr. P.K. Muite, Senior Counsel's letter. It is as follows-

**P.K. MUITE, S.C.**

**ADVOCATE**

c**/o Waruhiu,**

**K'owade & Nganga**

**Advocates.**

**Electricity House, 6th floor,**

**NAIROBI.**

**16th January, 2006.**

**Justice (Rtd.) Aaron G. Ringera,**

**The Director**

**Kenya anti-Corruption**

**Integrity Centre**

**P. O. Box 61130 – 00200**

**NAIROBI.**

**Dear Judge**

STATUTORY NOTICE

The Hon. Dr. Christopher Murungaru has consulted me on your letter to him of 9th January, 2006.

As I mentioned to you on telephone, I shall be out of the country this week and request, for that reason, that further action on this matter be stayed to accord me time to raise with you a number of legal issues which arise from your letter. In this connection and to assist me to raise those issues, I shall be grateful if you will let me know the basis for reasonably suspecting Hon. Dr. Murungaru of "**corruption and economic crime**."

I shall also be grateful to know whether besides the Hon. Dr. Murungaru, there are any other Kenyans to whom you have sent similar letters. It is common knowledge that there are many Kenyans who have been publicly spoken of during the former Presidents' Kenyatta and Moi regimes as having acquired well known and identifiable properties, in either unexplained or known circumstances and to the best of my knowledge they have not been obligated to do what you require of my client. NOT to be discriminated against is provided for in Section 82 of the Constitution of the Republic of Kenya.

To the extent also that Section 26 of the Anti-Corruption and Economic Crimes Act seeks implicitly to negate the Constitutional presumption of innocence and seeks to impose an obligation on a citizen to investigate himself/herself and to provide you with evidence of self-investigation and indeed for citizens to potentially incriminate themselves, the section is in my opinion unconstitutional. But be that as it may, my Client would be happy to furnish you with evidence of how he acquired any property or properties which you yourself identify as belonging to him.

I shall raise those and other issues with you upon my return to the country and trust that in the meantime, you will hold this matter in abeyance.

**Yours sincerely,**

**Signed**

**P.K. Muite**

d.d. The Hon. Dr. Murungaru."

And the First Defendant's Director, replied on 23rd January, 2006 as follows-

**"Ref. KACC/INV. 6/36 (144)**

**Hon. Paul K. Muite, S.C.**

**Advocate,**

**P. O. Box 47122-00100**

**NAIROBI**

NOTICE UNDER S. 26 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT 2003 ISSUED

TO THE HON. DR. CHRISTOPHER NDARATHI MURUNGARU

We acknowledge receipt of your letter of 16th January, 2006.

We would respond to your concerns as follows:-

(a) ***the basis for reasonably suspecting Hon. Dr. Murungaru of corruption and economic crimes is information in the hands of the Commission relating to his property.***

***(b) similar notices have been issued to several other persons;***

***(c) there is no prohibition by law on the Kenya Anti-Corruption Commission on who may be the subject matter of such notice and the timing of such notices is at the discretion of the Commission;***

***(c) the Constitutional presumption of innocence comes into play only once a person has been charged in a Court of Law;***

***(d) the Act places a positive obligation on your Client to furnish the information set out in the notice and failure or refusal to do so, completes an offence the liability for which is stated in section 26 (2) of the Act.***

Please be informed that the subject of a notice does not have to appear in person or by Counsel before the Commission. Indeed the Commission does not entertain such appearances and requires only a written answer to the notice As you are now back, we trust you will advice your client accordingly and we expect his compliance **WITHIN TEN (10) DAYS** from the date of your receipt of this letter.

Signed

**A.G. RINGERA**"

Threatened with a real possibility of being arraigned in Court for disobedience of the notice to account for his assets and property, the Plaintiff moved the Court for urgent intervention by filing 1st February, 2006, Misc. Civil Application No. 54 of 2006, (OS), being the application the subject of this judgement seeking interpretation of the Constitution and awaiting such interpretation, the intervention of the Court by issuance of an appropriate conservatory order to enforce or secure the enforcement of his fundamental rights pending an exhaustive deliberation of the issue.

On 2nd February, 2006, our brother Hon. Mr. Justice Nyamu declined to issue any interim or conservatory orders, leaving to the Defendants the liberty to arraign the Plaintiff before a subordinate court for the offence of non-compliance with the impugned provisions of Section 26 of the Anti-Corruption and Economic Crimes Act ***(the Act).***

Indeed on 17th February, 2006, the Plaintiff was arraigned before the Chief Magistrate's Court in Anti-Corruption Case No. 11 of 2006 charged with one count of non-compliance with the provisions of Section 26 of the aforesaid Act. He pleaded not guilty and was released on a cash bail of Kshs.200,000/=.

Following the release on bail, and pending the hearing and determination of the constitutional questions he had raised before this Court, the Plaintiff moved the Court of Appeal which on 24th March,

2006 delivered itself and issued a stay order in these terms:-

***"We think we should stay and we hereby do, the implementation and enforcement of the NOTICE dated 9th January, 2006 issued by the Director of the Commission to the Applicant and since Criminal Case No. ACC 11 of 2006 in the Magistrate's Court was instituted pursuant to the NOTICE, the hearing of that case is also hereby stayed pending the hearing and determination of the appeal brought to this Court or the hearing and determination of the Applicant's Originating Summons in the High Court whichever is the earlier. In other words, this order of stay does not prevent the High Court from hearing and determining the Constitutionality of the sections of the Act challenged by the Applicant. We also wish to make it abundantly clear that this order of stay does not in any way prevent the Commission from independently investigating the Applicant and if necessary, recommending his being charged with an offence of corruption or economic crime based on the evidence which the Commission may obtain by its own investigations. The costs of the motion before us shall be in the appeal already filed. Those shall be our orders."***

In compliance with the order of the Court of Appeal, the subordinate court stayed any further proceedings in Criminal Anti-Corruption Case No. 11 of 2006 between ***REPUBLIC –VS- HON. DR. C.N. MURUNGARU.***

In the course of their submission to this Court, as well as in their written submissions, the Plaintiff's Counsel, Hon. P.K. Muite Senior Counsel as well as Kioko Kilukumi were at pains to emphasise that the Plaintiff does not and cannot seek to prevent investigations and/or prosecution for he or any one else cannot succeed in doing so. The Plaintiff's case is that in carrying out any investigations or prosecutions, his fundamental rights to be presumed innocent, right to silence and the privilege not to incriminate himself, be respected and not be violated by the Defendants. The Plaintiff's Counsel also note that the Defendants have not charged the Plaintiff for any offence of corruption or economic crimes arising from the Defendants' own independent investigations of the Plaintiff.

On that background therefore the Plaintiff has come to this Court, and by the Originating Summons dated and filed on 1st February, 2006, and seeks the following reliefs:-

***(1) A declaration that the inherent, inalienable, universal, fundamental, legal and constitutional right to be presumed innocent applies at all times, that is to say, before or prior to investigations, prior to being arraigned in Court.***

***(2) A declaration that it is not constitutionally permissible for the provisions of Sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act to reverse the burden of proof in criminal cases which burden is squarely placed on the shoulders of the investigators and the prosecution by virtue of Section 77 (2) of the Constitution.***

***(3) A declaration that the First Defendant's statutory requirement that the Plaintiff furnishes a list of all the Plaintiff's property and mode of acquisition amount to an intrusion into the Plaintiff's privacy which is not reasonably justifiable in a democratic society.***

***(4) A declaration that the first Defendant's statutory requirement that the Plaintiff furnishes a list of all the Plaintiff's property and mode of acquisition is inhumane, demeaning and degrading treatment in contravention of Section 74 (1) of the Constitution of Kenya;***

***(5) A declaration that the provisions of Sections 26 (1); 27, and 28 of the Anti-Corruption and Economic Crimes Act are inconsistent with the provisions of Section 70(c), 77 (2) (a) and 77 (7) of***

***the Constitution and therefore void,***

***(6) A declaration that the inherent, inalienable, fundamental, legal and Constitutional right against self incrimination protected by the Constitution applies at all times prior to investigation, during investigations, prior to arraignment in court and during trial.***

***(7) A declaration that pre-trial adverse publicity orchestrated by the First Defendant with or without its connivance, both in the electronic and print media is likely to contravene the Plaintiff's right to a fair hearing guaranteed under Section 77 (1) of the Constitution of Kenya,***

***(8) A declaration that the Defendants are applying the provisions of the Anti-Corruption and Economic Crimes Act selectively and in a discriminatory manner against the Plaintiff in contravention of the provisions of Section 82 (1) and (2) of the Constitution of Kenya;***

**(9) A declaration that it is not constitutionally permissible and in accordance with the rule of law, public interest, public policy and public decency for the First Defendant to embark on criminal investigations arbitrarily, in a high handed fashion and in a well calculated witch hunt so as to achieve political mileage and for extraneous purposes not intended at all to uphold and enforce the criminal law and such conduct by the First Defendant denies the applicant the protection of law as guaranteed by Section 70 (a) of the Constitution;**

**(10) an order directing the First Defendant to forthwith stop contravening and/or violating the aforementioned rights of the Plaintiff in the discharge of its statutory mandate and permanently stay and/or quash the operation of the statutory notices dated 9th January, 2006 issued by the First Defendant;**

**(11) further, or other relief, direction, writ or order that the Court may consider appropriate for the purpose of enforcing or securing the enforcement of the provisions of the Constitution that the Plaintiff has identified as having been, are being, or are likely to be contravened by the Defendants.**

**(12) That provision be made for the costs of the suit.**

**THE CONSTITUTIONAL QUESTIONS**

In seeking this Court's intervention the Plaintiff has inverted the said declarations and turned them into nine (9) constitutional questions which, as Counsel for the Plaintiff stated in at page 4 paragraph 30 of the Plaintiff's written submissions, are interlinked and prays that this Court to breathe some life to words written in our Constitution over forty (40) years ago. These are the questions-

***(i) Does the inherent, inalienable, universal, fundamental, legal and Constitutional right to be presumed innocent apply at all time, that is, prior to investigations, during investigations, prior to being arraigned in court or is it a right that arises only when a person has been charged with a Criminal offence.***

***(ii) Is it constitutionally permissible for the provisions of Sections 26, 27, 28 and 58 of the Anti-Corruption and Economic Crimes Act to reverse the burden of proof in criminal cases which burden is squarely placed on the shoulders of the investigators and the prosecution by virtue of Section 77 (2) (a) of the Constitution"***

(***iii) Does the First Defendant's statutory requirement that the Plaintiff furnishes a list of all the Plaintiff's property and mode of acquisition amount to an intrusion into his privacy which is not reasonably justifiable in a democratic society"***

***(iv) Is the first Defendant's statutory statement that the Plaintiff furnishes a list of all the Plaintiff's property and mode of acquisition inhumane, demeaning and degrading treatment in contravention of Section 74 (1) of the Constitution of Kenya"***

***(v) Are the provisions of Sections 26 (1); 27, 28 and 58 of the Anti-Corruption Act inconsistent with the provisions of Section 70 (a), 70 (c),77 (2) (a); 76 (c), 77 (7) and 82 of the Constitution"***

***(vi) Does the inherent, inalienable, fundamental or legal and constitutional right against self-incrimination protected by the Constitution apply at all times prior to investigations, prior to arraignment in Court or is it a right that only arises at the trial of a criminal offence"***

***(vii) Is the pre-trial adverse publicity orchestrated by the First Defendant and/or carried out with its connivance, both in the electronic and print media likely to contravene the right to a fair trial and a fair hearing guaranteed under Section 77 (1) and 77 (9) of the Constitution"***

***(viii) Are the Defendants applying the provisions of the Anti-Corruption and Economic Crimes Act selectively and in a discriminatory manner against the Plaintiff in contravention of the provisions of Section 82 (1) and (2) of the Constitution of Kenya"***

***(ix) Is it constitutionally permissible and in accordance with the Rule of Law, public interest, public policy and public decency for the First Defendant to embark on criminal investigations arbitrarily in a high-handed fashion and in a well calculated witch hunt so as to achieve political mileage and for extraneous purposes not intended at all to uphold and enforce the criminal law or does such conduct by the First Defendant deny the suspect the protection of law guaranteed by Section 70 (a) of the Constitution"***

We accept the opinion expressed by learned Counsel for the Plaintiff in paragraph 3.2 of their written submissions that answers to all these questions are critical in view of the opinion of the first Defendant's Director, who is also a retired Judge of Appeal in his letter of 23rd January, 2006, paragraph (d)-

**"(d)** ***The Constitutional presumption of innocence comes into play only once a person has been charged in a court of law".***

THE DEFENDANTS' REPLIES

The Defendant as noted already, filed two Affidavits. Firstly, there was the Replying Affidavit of Aaron Gitonga Ringera, the First Defendant's Director/Chief Executive Officer sworn on 7th February, 2006. There is also the Replying Affidavit of James Mungai Warui, sworn on 14th February, 2006 on behalf of the Second Defendant, the Hon. the Attorney-General. The position of both Defendants on these questions is crystal clear, that the presumption of innocence, the right to silence and the privilege against self incrimination can only arise at the trial stage, when a suspect has been charged in a court of law, and that those rights have no place until and unless a suspect has been taken to a court of law. These positions are expressed as follows in the Replying Affidavits of respectively, Aaron Gitonga Ringera (paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18 inclusive that:-

**(a)** ***the Constitutional right of the Applicant to be presumed innocent until he is proved guilty or has pleaded guilty is only applicable in circumstances of a person already charged with a criminal offence and the same does not prohibit an investigator from reasonably suspecting an individual of having committed an offence during investigations*** (paragraph 10),

**(b)** ***reasonably suspecting the Plaintiff of having committed an offence in the course of ……. investigations is not tantamount to presuming the suspect guilty of the offence in question*** **(***paragraph 11***);**

**(c)** ***the Constitutional guarantee of the presumption of innocence prior to proof of quilt does not extend to the evidentiary burden which the Constitution permits may shift to an accused person*** *(paragraph 12***)**

***(d)*** **the requirement of the Plaintiff to give a detailed report of his property does not amount to intrusion into his privacy as the Plaintiff has, on his own admission, filed similar annual declarations with the Clerk of the National Assembly; (***Paragraph 13),

***(e)*** **section 26 of the Act only applies to the investigation stage which is not part of the proceedings, envisaged by Section 77 of the Constitution of the Republic of Kenya** *(paragraph 14),*

***(f)*** **the statutory notice issued to the Plaintiff pursuant to Section 26 of the Act does not constitute inhuman degrading or other treatment within the meaning of Section 74 of the Constitution of the Republic of Kenya** *(paragraph 15)*

***(g)*** **to the extent that Sections 26 (1), 27, and 28 of the Act apply to every Kenyan regardless of race, tribe, place of origin or residence or other local connection, political opinions, colour or creed, the same do not *infringe the provisions of Section 82 of the Constitution of the Republic of Kenya*** *(paragraph 16**)***

***(h)*** **section 70 of the Constitution of the Republic of Kenya makes every right of the individual subject to the public interest and the rights of other people (***page 17),*

***(i)*** **to the extent that Section 26, 27, 28 and 58 of the Act are intended to foster the objective of the Act, namely, to provide for the prevention, investigation and punishment of corruption, economic crimes and related offences and for matters incidental thereto and connected therewith, the same are in accordance with public interest and the rights of the larger corpus of Kenyans,** *(paragraph 17);*

***(j)*** ***the request to the Plaintiff to provide certain information does not amount to the Plaintiff investigating himself as alleged but rather it constitutes the Plaintiff's performance of a statutory obligation placed upon the Plaintiff by law (paragraph 18),***

And Mr. James Mungai Warui's Replying Affidavit is in like vein –

***(a)*** ***that Sections 26, 27, 28 (and 58) of the Anti-Corruption and Economic Crimes Act does not offend the provisions of Section 82 of the Constitution or any other Section thereof as the said Sections apply to every Kenyan, regardless of race, tribe, and place of origin or residence, (paragraph 14),***

**(b) that the statutory notice requiring the Applicant to furnish a list of all his property and mode of acquisition does not amount to inhumane, demeaning and degrading treatment within the meaning of Section 74 (1) of the Constitution** *(paragraph 13),*

***(c)* that the Plaintiffs' application is based on a misapprehension of the respective rights of the Republic and the citizen in criminal cases,** *(paragraph 9)*

***(d) that the Application by KACC of the provisions of Sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act, 2003 against the Applicant has given rise to the operation of two fundamental principles which every democratic society is called upon to apply from time to time namely:-***

*(i) that the citizen undertakes to live by the laws which protect him and must accept the penalties that may flow from the application of those laws; and*

*(ii) that when actions of public officers undermine public confidence, the public is entitled, through criminal trials to know what those officers have done in their name;* ***(paragraph 10),***

***(e) that with coming into force of the Anti-Corruption and Economic Crimes Act, 2006 the first Defendant was entrusted with the primary mandate to carry out investigations into matters involving corruption, economic crimes, and related offences and make reports with recommendations to the Attorney-General*** *(paragraph 4),*

***(f) that the fight against corruption is one of the major policies of the Government and the Kenya Anti-Corruption Commission was set up pursuant to that policy. I believe that filing and prosecution of the Application is designed to undermine that policy*** *(paragraph 3)*

***(g) that there is nothing illegal, improper or oppressive in efforts to require the Plaintiff to comply with the notice as, the same is based on the KACC reasonably suspecting the Plaintiff of corruption and economic crimes; (paragraph 7).***

The import of the above cited averments by the Defendants' Director and Senior State Counsel respectively is that the principles of the presumption of innocence, the right to silence and the privilege against self-incrimination can only arise at the trial stage, when a suspect has been charged in a court of law, that the Defendants are carrying out a statutory duty, that the Defendants have not breached or threatened to breach any of the Plaintiff's fundamental rights.

THE PLAINTIFF'S SUBMISSIONS

The Plaintiff's case, according to Hon. P.K. Muite, Senior Counsel for the Plaintiff is essentially premised upon the three pillars of fundamental rights set out in Section 77 of the Constitution of Kenya, namely,

***(1) the presumption of innocence through due process;***

***(2) the right to silence,***

***(3) the right not to be compelled to self-incriminate.***

Senior Counsel submitted that if any of those principles are violated there can be no fair trial and the

Constitutional right to a fair trial guaranteed under Section 77 (1) of the Constitution to a fair trial is violated.

Senior Counsel submitted that this Reference is about how the court should proceed to interpret the Constitution vis-à-vis the provisions of Sections 26, 27, and 28 of the Anti-Corruption and Economic Crimes Act, which Counsel said encroach the provisions of the Constitution. The Reference Senior Counsel reiterated is to seek the objective the founding fathers had in employing the language of the Constitution as set out in Chapter V of the Constitution, the Bill of Rights, the values, and spirit of the Constitution, and what value do we as Kenyans give to the words or language of the Constitution, that it is the judges who give life to the spirit of the Constitution, and strike a balance in those values between the desires of the nation as a whole, and the rights of the individual.

Senior Counsel submitted that being reasonably suspected of a corruption or economic crimes is a serious matter. Counsel gave the example of a suspected murderer – that for a fair trial, the Police who carry out their investigations, are required to caution the suspect that whatever you say may be used in evidence against you.

In anti-corruption and economic crimes investigations, there is no similar caution, the Director of the first Defendant ***"demands***" evidence so as to charge the suspect for the statement of assets is to be so detailed as to include assets held in trust by friend and relatives, information of a most intrusive nature is sought, and in default prosecution may ensue with a likely conviction, and subjection to a fine and imprisonment or both.

Counsel submitted that the information sought is not for statistical purposes, but more likely for institution of a prosecution against the suspect particularly as the nature of the corruption and economic crime is not specified. The First Defendant cannot attack a suspect without a basis for such suspicion. For instance Counsel said, the First Defendant should say that a suspect owns a prominent building in Nairobi, like International Life House, a farm in Australia, or flats in London. This is the kind of investigation the first Defendant should first confront the suspect with and to confront a citizen without such information is unconstitutional.

Senior Counsel submitted that the First Defendant being a creature of statute it has powers to do that which the statute empowers it to do, and the Director of the First Defendant would be acting ***ultra Vires*** the provisions of the Act if he purported to act merely on the basis of "***reasonably suspected"*** or merely "***on intelligence information***" Without such a basis the First Defendant cannot issue a Demand Notice for information on a person suspected of corruption and economic crimes for if the First Defendant had such information against the Plaintiff, it could merely charge him with corruption.

Senior Counsel referred to Gazette Notice No. 8587dated 19th October, 2006 in which there are references to various projects with an estimated cost of Euros 40 billion, and in respect of which there was no budgetary allocation. Counsel submitted that even if there was no budgetary allocation, there was no such offence under the Anti-Corruption and Economic Crimes Act, unlike Section 128 of the Penal Code ***(Cap 63, Laws of Kenya)*** which creates the offence of neglect of duty which offence relates to public officers, for instance failure to confront a criminal when committing an offence. Besides, Counsel contended the First Plaintiff while he was a Minister, was not an accounting officer.

For the First Defendant to seek information from the Plaintiff on corruption or economic crimes, the Director of the First Defendant must confront the Plaintiff with evidence of corruption, and which the Counsel noted, the said Director had failed to do. Whereas therefore the First Defendant's Director may carry on with its investigations against the Plaintiff, and which investigations the Plaintiff cannot prevent

or stop the Director from carrying out, the Plaintiff contends that he is entitled to his Constitutional guarantees of innocence until charged, to silence, and to non-self incrimination.

In support of these contentions the Plaintiff's Counsel cited both Kenyan, regional and foreign decisions in support of the proposition that the Constitution is the supreme law of the country, and should not unlike an ordinary statute, be interpreted in its literal or pedantic manner. Senior Counsel submitted that the Constitution of a country like that of Kenya, should be interpreted '***purposefully***, and robustly, and broadly in order to realize the spirit and values thereof in accordance with the aspiration of the founding fathers of the nation when the provisions of the Bill of Rights (Cap. V of the Constitution) were entrenched into the Constitution.

The local cases cited were:-

**(1**) ***REPUBLIC -Vs- EL MANN [1969] E.A.* 420 at page 360.**

This case gave birth to what was referred to in the submissions as the ***EL MANN Doctrine,*** and Mr. P.K. Muite_Senior Counsel dared by virtue of later decisions, to sugest that, ***EL MANN*** decision was made ***per incurian*** or wrongly decided.

In the El Mann case the Court expressed itself thus:-

***"We do not deny that in certain contexts a literal interpretation may be called for, but in one cardinal respect we are satisfied that a Constitution, is to be construed in the same way as any legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words."***

The other cases referred to were ***CRISPUS KARANJA –VS- ATTORNEY-GENERAL*** (*unreported***)** H.C. Criminal Application No. 39 of 2000, in which a three (3) judge bench of this Court agreed with the sentiments expressed in the ***EL Mann Case*** (*supra)*. At pages 25-28 of their judgment the Judges expressed themselves as follows:-

***"We do not accept the proposition that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme. Were an Act of Parliament is in any way inconsequent with the Constitution, that Act of Parliament, to the extent of that inconsistency becomes void. It gives way to the Constitution. It is our considred view, that Constitutional provisions ought to be interpreted broadly or liberally, and not in a pedantic way i.e. restrictive way. Constitutional provisions must be read to give values and aspirations of the people. The court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document."***

In the case of **MWANGI & 7 OTHERS –VS- ATTORNEY-GENERAL [2002]** 2 K.L.R. 709 at pages 715-716, the court restated its purposive approach to the interpretation of the Constitution when it said-

***"……the provisions of the Constitution, shall be construed, as per the spirit, purpose and vision of the makers thereof. Where there is any doubt respecting the extent and scope of any power conferred by the Constitution, the object for which such power was bestowed are to be***

***considered in the interpretation of the Constitution. To achieve this the Constitution must be read as a whole……. this …….has given birth to the doctrine of purposive interpretation. While interpreting a provision of the Constitution, we have to remember that it is a Constitution, a mechanism under which laws are made and not a mere Act which declares what the law is to be. Recognizing the status of the Constitution, there is room for excluding the general rules of interpretation to see that the purport, spirit and vision of the Constitution are kept intact and in harmony."***

In the case of **NJOYA & OTHERS -VS- ATTORNEY-GENERAL & OTHERS [2004]** I.EA. 194 Ringera J (as he then was) at page 206 e.g. said-

***"I shall accordingly approach Constitutional Interpretation in this case on the premise that the Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land. It is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposefully or teleologically to give effect to those values and principles; and that whenever the consistency of any provision(s) of an Act of Parliament with the Constitution are called into question, the court must seek to find whether those provisions meet the values and principles embodied in the Constitution."***

***To affirm that is not to deny that words in a constitutional text have certain ordinary and natural meaning in the English or other language employed in the Constitution and that it is the duty of the Court to give effect to such meaning.*** *It is to hold that the court should not be obsessed with the ordinary and natural meaning of words if to do so would lead to absurdity or plainly dilute or vitiate Constitutional values and principles.* ***And what are those values and principles" I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none inferior or supreme; the Constitution is supreme and they all bow to it. I would also include the thread that runs through the Constitution, the separation of powers is another value of the Constitution. And so is the enjoyment of fundamental rights and freedoms . Those to my mind, are the values and principles of the Constitution to which a court must constantly fix its eyes when interpreting the Constitution."***

In the same ***Njoya Case*** Ringera J. (as he then was) also cited with approval the sentiments expressed by Hon. Samatta C.J. (of Tanzania) in the case of ***NYANABO –VS- ATTORNEY GENERAL [2001] I E.A.*** 194 at page 493-

***"We propose to allude to general provisions governing Constitutional Interpretation. These principles may in the interest of brevity, be stated as follows, First the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own kind as reflected in the preamble and fundamental objectives and directive principles of state policy.*** *Courts must therefore endeavour to avoid crippling it* ***by construing it technically or in a narrow spirit. It must be construed in (line) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As it was stated by Hon. Mr. Justice E.O. Ayoola, a former Chief Justice of Gambia……" a timerous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document"***

***Secondly, the provisions touching fundamental rights, have to be interpreted in a broader and liberal manner, thereby jealously protecting and developing dimensions of those rights and***

***ensuring that our people enjoy those rights. Our young democracy not only functions, but grows and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly constrained."***

On this theme, P.K. Muite, Senior Counsel, learned Counsel for the Plaintiff also referred us to a series of cases in which the purposive approach in interpreting the Constitution has been applied by the Constitutional Court in relation to-

**(1)** ***the Challenge to the entry of a Nolle Prosequi in the case of*** *CRISPUS NJOGU –VS-ATTORNEY-GENERAL* ***(unreported) H.C. Criminal Application No. 39 of 2000), the Court said -***

***"It is our considered view that the present practice in our criminal justice system that a*** *Nolle Prosequi* ***cannot be challenged in a court flies on the face of the doctrine of separation of powers. To say that the Attorney-General's exercise of his powers, as a member of the Executive, cannot be questioned in court when entering a Nolle Prosequi, is to say that the Executive arm of Government is accountable to itself. We find such a proposition to be untenable under the Kenya Constitution…. (page 40.)***

***…….It becomes the duty of the court to consider the Constitutional principles that are necessarily implied by the entry of a Nolle Prosequi. If the Court finds that*** *Constitutional Principles and values* ***will be offended by the entry of a Nolle prosequi, then the court is entitled to reject it. In the light of this Mr. Okumu's restrictive and pedantic way of interpreting the constitution is for rejection*** *(page 28).*

***(2) The right of accused persons to be supplied with copies of statements made by prosecution witnesses and all other exhibits including documentary exhibits. In the case of GEORGE*** NGODHE JUMA & 2 OTHERS -VS- ATTORNEY GENERAL *(unreported****) H.C. Misc. Criminal No. 345 of 2001, the Court said:-***

***"Therefore in our considered judgment the provision of the Constitution of Kenya under consideration can have*** *life and practical meaning* ***only if accused persons are provided with copies of statements made to the Police by persons who will or may be called to testify as witnesses for the prosecution as well as copies of the exhibits which are to be offered in evidence for the prosecution…… obviously the Constitutional rights to be represented by a lawyer of one's choice would be meaningless if it did not mean informed representation;***

***(4) the right to anticipatory bail or bail pending arrest. In*** *SAMUEL MUCIRI W' NJUGUNA –VS- REPUBLIC* ***(****unreported****) H.C. Criminal Case No. 710 of 2002), using the broad, liberal and purposeful approach in interpretation of Section of the Constitution, the Court at pages 24-25, 29, said-***

***" We are further of the humble opinion that the right to anticipatory bail has to be called out where there are circumstances of serious breaches of a citizens rights by an organ of state which is supposed to protect the same***."

Counsel for the Plaintiff also relied on the United States case of ***WEEMS –VS- U.S***. [1910] 217 US 349, reproduced from an address by Hon Mr. Justice P.N. Bhagwati, Chief Justice of India in ***Developing Human Rights Jurisprudence Vol. 7, Seventh Judicial Colloquim on the Domestic Application of International Human Rights Norms*** (Legal and Constitutional Affairs Division, Commonwealth Secretariat, where the Supreme Court of the United States said-

***"Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not therefore, be necessarily confined to the form that evil has therefore taken. These works changes, brings into existence new conditions and purposes. Therefore a principle to be vital, must be capable of wider application than the mischief which it gave birth. This is peculiarly of Constitutions. They are to use the words of Chief Justice Marshal, "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and the provision of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared might be lost and this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction."***

Learned Counsel for the Plaintiff also referred to decisions on the construction of similar provisions of the Constitution in several other countries, including South Africa.l **(PARK-ROSS & OTHERS –VS- DIRECTOR OF OFFICE OF SERIOUS ECONOMIC OFFENCES, [1995] LRC 178, 189 (e.g** Namibia and Canada where Counsel submitted, the courts took a liberal, broad, generous, and purposeful approach to the interpretation of the Constitution.

The question before us is whether the Anti-Corruption and Economic Crimes Act 2003 (No. 3 of 2003) and (hereinafter referred to as "***the Act"*** or those sections of the Act dealing with inquiries or investigations (S. 26 (1)). ***(Statements of a suspected property***).

***(S. 27***) requirement to provide (***S.28***) production of records, presumption of corruption if act show and (***S.58***) are in conflict with the Constitution of Kenya.

We have already set out the facts that triggered this Application and hence this judgement. The above provisions of the Act are compelling and inquisitorial in nature. They are by their terms designed to obtain information from persons reasonably suspected of corruption or other economic crimes, without their consent or involuntary written particulars of their assets or properties together with the mode, means and times of acquisition, and the production of records and in relation to such assets and property. In default a person so suspected commits and is guilty of an offence of non-compliance with that requirement to furnish such particulars. The Applicant Dr. Christopher Ndarathi Murungaru an Honourable Member of the 9th Kenyan Parliament contends that these provisions of the Act violate his fundamental rights as guaranteed in the Constitution. The Respondents contend otherwise.

THE APPLICANT'S CASE STATED

We have largely set out the Applicant's case in the foregoing passages of this judgement. The Applicant has however stated his case in the form of nine (9) questions which we have already set out at the beginning of our judgement. All the questions revolve around the Notice dated 9th and 23rd January, 2006 from the Director of the First Defendant addressed to the Plaintiff, and which the Applicant claims is unconstitutional on the grounds that the notice –

***(a) violates the Plaintiff's right to be presumed innocent;***

***(b) reverses the burden of proof required in criminal cases;***

***(c) intrudes into the privacy of the Applicant in a manner unjustified in a***

***democratic society;***

***(d) violates the Plaintiff's right not to self incriminate, and***

***(e) that the requirement to provide information to the First Defendant is inhuman, demeaning and degrading treatment.***

The Plaintiff complains that the provisions of Sections 26 91) & (2) 27, 28 and 58 of the Act are unconstitutional, that the First Defendant has discriminated against the Plaintiff, that he has been subjected to adverse pre-trial publicity and that such publicity has contravened the Plaintiff's right to a fair trial, and that the investigations against the Plaintiff have been arbitrary and high-handed and therefore against public policy, public interest and the rule of law.

THE DEFENDANT'S CASE

The Defendants contend the Plaintiff's contention that Sections 26 (1), 27, 28 and 58 of the Act conflict with the Constitution. Counsel for the Defendants submit that if the provisions ***prima facie*** appear to conflict with any particular right, then such right may be limited in terms of Section 70 (a) & (c) of the Constitution, "***that the provisions of this Chapter shall have effect for the purpose of affording protection*** *subject to such limitations of that* ***protection as are contained in those provisions (Sections 70-83), being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."***

The Defendants also contend that an investigation is not a trial in terms of Section 77 (2) (a) and 77 (7) of the Constitution.

**THE TEST FOR CONSTITUTIONAL ISSUE**

In their submissions, the First Defendant's Counsel Prof Githu Muigai contended and we agree with his contention, that not every complaint amounts to a Constitutional issue under Section 84 (1) of the Constitution. Section 84 (1) provides:-

***"84(1) Subject to subsection (b), if a person alleges that any of the provisions of sections 70 t0 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained if another person alleges a contravention in relation the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."***

Section 70 (a) and (c) which provide for protection to life, liberty, security of the person and the protection of the law, (70 (a)) and protection for the privacy of his home and other property and from deprivation of property without compensation), (S. 70 (c) together with, Section 74 ***(protection against inhuman or degrading treatment)*** Section 76 protection against arbitrary search or entry), Section 77 (2) (a) (***a right to be presumed innocent***), Section 77 (7) (the right not to self-incriminate whilst in a trial) are part of Chapter V – ***PROTECTION OF FUNDAMENTAL FREEDOMS OF INDIVIDUAL*** of the Constitution of Kenya, and read this:-

***"70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin, or residence or***

***other local connexion, political opinions, colour, creed or sex, but subject to the respect for the rights and freedoms of others and for the public interest to each and all of the following, namely***:-

***(a)*** *life, liberty, security of the person and the protection of the law,*

**(b)** ……

***(c)*** *protection of the privacy of his home and other property and from deprivation of property without compensation,*

***(d)*** *the provisions of this Chapter (SS.80-83) shall have effect for the purpose of affording protection to those rights and* ***freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not-prejudice the rights and freedoms of others or the public interest."***

Section 74 deals with protection from inhuman treatment and reads:-

***"74. (1) No person shall be subject to torture, inhuman or degrading punishment or other treatment;***

***(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963."***

Section 76 as already noted above deals with protection against arbitrary search or entry of any person's premises except with the consent of that person. Again there are exceptions if said search is authorized by law or if such search or entry is required in the interest of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilization of any property in such manner as to promote the public benefit (Section 76 (2) (a), the promotion of the rights or freedoms of other persons; (Section 176 (2) (b), or purposes of collection of tax, rates dues or to carry out works if the property belongs to the Government (S. 76 (2) (c) or enforcement or execution of a judgement S. 76(1) (d) or under the "***search or entry is shown not to be ….. reasonably required in a democratic society."***

Section 77 (1) and more so 77 (2) upon which the Plaintiff greatly relied, as we have already mentioned above, read as follows:-

***77 (1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court and established by law.***

***(2) Every person who is charged with a criminal offence-***

***(a) shall be presumed innocent until he is proved or has pleaded guilty;***

***(b)***

***(c)***

And Section 77 (7) reads-

**"(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial;**

Section 84 (2) of the Constitution grants the Court original jurisdiction a jurisdiction ***sui generis*** to Chapter V of the Constitution, to hear and determine an application brought by a person in pursuance of subsection (1) – alleging a contravention of that person's fundamental rights and freedoms or the fundamental rights and freedoms of another person who is detained. In exercise of this jurisdiction, the Court may issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Section 70 to 83 inclusive of the Constitution (and in this matter Sections 70 (a) & (c), 74, 76, and 77 (1) (2) (a) and 77 (7) thereof).

The Anti-Corruption and Economic Crimes Act provides in Sections 27-28 and 58 thereof as follows-

***"26(1) the Commission may by notice on writing require a person reasonably suspected of corruption, or economic crime to furnish within a reasonable time specified in the notice, a written statement-***

***(a) enumerating the suspected person's property and the times 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 that 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 Director;***

And Section 27 requires other persons to provide information in these terms***:-***

***"27 (1) The Commission may by notice in writing require an associate of a suspected person to provide, within a reasonable time specified in the notice, a written statement of the associate's property at the time specified in the notice.***

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

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

***(4) A person who neglects or fails to comply with a requirement under this section is guilty***

***of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.***

***(4) No requirement under this section requires anything to be disclosed, that is protected by privilege of Advocates including anything protected by section 134 or 137 of the Economic Act.***

Section 28 relating to production of records says-

28 (1) The Commission may by notice in writing –

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

***(b) require that person or any other to provide explanations or information within his knowledge with respect to such records whether the records were produced by the person or not.***

***(2) A requirement under subsection (1) (b) may include a requirement to attend personally to provide explanations and information.***

***(3) A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.***

***(4) The six month(s) limitation in subsection (3) does not prevent the commission from making further requirements for further periods of time as so long as the period of time in respect of which each requirement is made does not exceed six months.***

***(5) Without affecting the operation of section 30, the Commission may make copies of or take extracts from any record produced pursuant to a requirement under this section.***

***(6) A requirement under this section to produce a record stored in electronic form is a requirement-***

***(a) to reduce the record to hard copy and produce it; and***

***(b) if specifically required, to produce a copy of the record in electronic form.***

***(7) In this section "records" includes books, returns, book accounts or other accounts, reports, legal or business documents and correspondence other than correspondence of a strictly personal nature.***

***(8) The Commission may by notice in writing require a person to produce for inspection, within a reasonable time specified in the notice, any property in the person's possession, being property of a person reasonably suspected of corruption or economic crime.***

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

***(10) No requirement under this section requires anything to be disclosed that is protected by the privilege of Advocates including protected by Section 134 or 137 of the Evidence Act.***

And Section 58 which is contained within ***PART VII –EVIDENCE***- (of the Act), relates to presumption of corruption if an act of corruption is shown and says-

***"58. If a person is accused of an offence under Part V an element of which is that an act was done corruptly and the accused person is proved to have done that act the person shall be presumed to have done that act corruptly unless the contrary is proved."***

Having set out the relevant provisions of the Anti-Corruption and Economic Crimes Act ('***the Act as already referred to above)***, we now consider, as the Petitioner contends, whether Section 26, 27, 28 and 58 of the Act are in conflict with the Constitution and if so, whether those provisions are saved or rescued as the Defendants contend by Section 70 itself of the Constitution.

THE PROPER APPROACH TO CONSTITUTIONAL INTERPRETATION.

Before doing so however, it is necessary, we think, to deal with the approach to which the Court should adopt in consideration of the respective contentions, and with the question of where the onus lies in respect of each contention.

It is really not a show of legal or great learning to say that the Constitution of Kenya, or of any other country is a basic law, upon which all the fundamental organs of an organized modern (or one aspiring to be so organized and modern), is the supreme law of such state or country. In Kenya, this fundamental principle of supremacy of the Constitution is to be found in Section 3 of the Constitution which says-

"**3**. ***This is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to Section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency be void."***

This provision was not made in the ***Constitution of Kenya*** set out in Schedule 2 of ***the Kenya Independence order in Council 1963*** Statutory Instrument 1963 No. 1968 published in the Kenya Gazette as Legal Notice No. 718 of 10th December, 1963 and which came into force **immediately** before **12th December, 1963 (***midnight of the Kenya Independence day)***.** This provision was crafted later in the amendments carried in the "***majimbo"*** Regional Independence Constitution from the declaration of the Republic on 12th December, 1964 to consolidation of the Constitutional Provisions Act No. 5 of 1969.

Since therefore the consolidation Constitution of the Republican Constitution, and the declaration of the supremacy of the Constitution, both academic writers and researchers on Constitutional law have expressed their preferences on what the correct way to approach the interpretation of the provisions of this basic or supreme law.

Some, like Hon. P.K. Muite, Senior Counsel, learned Counsel for the Plaintiff have submitted widely on the values and principles and spirit of the Constitution, what Tebutt J. in ***PARK-ROSS –VS-DIRECTOR OF OSEO [1995] ILRL 178*** at 188 said "*with an extravagance of expression*" ***yet others sometimes guarded and at other times not so well guarded in their choice of expression, have fallen into the temptation and trap of resorting to language which helps little in the interpretation process of the Constitution. Tags and labels such as "****liberal", broad****", "****generous****", and***

***"****purposive****" were generously employed by learned Counsel for the Plaintiff. Said Counsel also drew deeply from both the local and bounteous*** of comparative foreign case law from countries with similar provisions in their Constitutions enshrining fundamental rights and freedoms.

Counsel for both the Plaintiff and the Defendants did not spare us, but provided long lists of cases and materials on the question of the Interpretation of the Constitution liberally, broadly, generously and purposively, from as far afield as the ***U.S. WEEMS –VS- U.S. (supra), Namibia, (FREIMAR SA. –Vs. PROSECUTOR GENERAL OF NAMIBIA & ANOTHER [1994] @ LRC, 251***, at page 257, C & L where the High Court of Namibia interpreting the words "***all persons charged with an offence shall be presumed innocent until proven guilty according to law" extended the ordinary and natural meaning of those words to include not only to those accused persons, but also to other persons whose rights are affected by a forfeiture order made after conviction, South Africa (Z STATE –VS- ZUMA & ANOTHER[1995] ILRC, (45) and India, Developing Human Rights Jurisprudence Vol. 7. (Liberty and Security of the person in India with particular access to Courts by Hon. Mr. Justice Bwagwati*** *(supra).*

Unlike the South African Constitution which in Section 35 (1) provides that in interpreting the provisions of Chapter 3 (which provides for fundamental rights and freedoms), the court "***may have regard to comparable foreign case law"*** our Constitution has no similar provision. Our approach to application of foreign case law must be done with circumspection, firstly because we do not have an express provision to borrow with largesse from foreign case law, but secondly more importantly, because of the different social structures and milieu existing in other countries as compared to us in Kenya, and indeed the different historical backgrounds against which the various constitutions came into being. Our Constitution must in our view be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind not only the particular provisions of the Constitution but also the provisions of the law which is sought to be impugned.

In this regard both Hon. P.K. Muite Senior Counsel and Kioko Kilukumi, told us in their submissions that the choice was that of this court to elect whether or not to uphold constitutional values and principles which underwrite the right to be presumed innocent; the right to silence and the privilege against self incrimination or for this court to engage in "***austerity of tabulated legalism***" which will choke the Constitution; rob off its potency and efficacy; dilute, vitiate, cripple and dismantle the fundamental rights and freedoms; deny suspects real and practical protection offered by the Constitution thereby undermining the integrity of our criminal justice system and ultimately frustrate the aspirations and expectations of the Kenyan people.

Counsel also submitted that the privilege against self-incrimination and the right of silence are the two rights which are internationally recognized as being at the heart of a fair trial, that without the availability of the right to silence and privilege against self-incrimination at the investigation stage, the ensuing trial cannot be fair, as guaranteed under Section 77 (1) and 77 (2) (a) of the Constitution, that rights declared will be the lost in reality.

For these contentions said learned Counsel relied upon academic opinions expressed by such authors as ***Stephen Odgers*** "***Police Interrogation and the Right to Silence***" published in the Australian Law Journal Vol. 59, ***(February 1985***), where at page 85, after noting that the state, in any contest with an individual citizen possesses considerable resources, enormous power, a huge organization and trained officers means that the imbalance should be overcome not only at the trial but also at the point of criminal investigations for otherwise trial safeguards would be meaningless if the state ensured conviction before trial by compelling a full confession from the accused; that an individual may justifiably refuse to respond to unfounded rumours or "***fishing expeditions."***

Counsel also relied upon an article by ***D.J. Galligan*** published in ***Current Legal Problems*** 1998 (a publication of the Faculty of Laws, University College London,) entitled "***The Right to Silence"*** at page 87 –

***……under the present conditions, the right to silence is indispensable to the right to a fair trial, the question remains whether there is a basis for the right to silence in values independent of the trial…. and opines that the right to silence is linked to the general principle that the state must prove its case against the suspect not only at the trial but also in pre-trial matters. The burden of proof lies on the state and the burden is not achieved by requiring the suspect to provide incriminating evidence….. hence the right to silence is closely associated with the application of the right against self-incrimination.***

In his Doctoral thesis – Professor Muigai expressed a similar view – "***as a matter of legal logic the right against self-incrimination can only make sense if all persons who can potentially be prosecuted enjoy the same right. For those already prosecuted, the benefit of the right may be lost."***

Counsel for the Plaintiff also found succor in the Article "***HUMAN RIGHTS, SERIOUS CRIME AND CRIMINAL PROCEDURE*** by Andrew Ashworth, Q.C. Vinerian Professor of English Law, All Souls College, Oxford (published under the auspices of the (***HAMLYN TRUST***) where at page 18, the author observes:-

***"The privilege against self-incrimination is declared in Article 14 (3) (g) of the International Covenant on Civil and Political Rights, the right "not to be compelled to testify against himself or to confess guilt" and it is one of two closely linked rights – the other is the right to silence which the Scrasbourg Court has implied in Article t, on the basis that the two rights are internationally recognized as lying at the heart of the notion of a fair trial. The privilege against self-incrimination runs deeper than the right of silence, that right restricts the extent to which adverse inferences may be drawn from a failure to answer questions or to comment on statements, whereas the privilege restricts the extent to which a citizen can be placed under a duty to answer questions or to supply information."***

In Ex-parte ***Y.P. Sennik REPUBLIC –VS- THE SURBODINATE COURT OF THE 1ST CLASS MAGISTRATE*** AT ***CITY HALL, NAIROBI & ATTORNEY GENERAL***, Exparte Youginder Pall Sennik & C.G. ***RETREAT LTD*** H.C. Misc.Application No. 652 of 2005) Nyamu J. considered the International Covenant on Civil and Political Rights, in the context of what constitutes a fair hearing in terms of Section 77 of the Constitution of Kenya and these are-

***(1) the right to equality before the law;***

**(2) the right to presumption of innocence;**

**(3) the right to be tried by a competent, independent and impartial tribunal established by law;**

**(5) the right to a fair hearing;**

**(6) the right to equality of arms and adversarial proceedings.**

Senior Counsel, Hon. P.K. Muite also treated us to a cross-section of decisions by the United States

Supreme Court, the ***CANADIAN APPROACH, the ENGLISH*** and ***SOUTH AFRICAN*** approaches. We will give a few more examples:-

In ***BROWN –VS- STOTT [2002] 2 LRC 612 at 620 d*** & (e), the House of Lords, Britain's highest court commenting on the European Bill of Rights held that-

***"The European Court of Human Rights has recognized a right to silence and a right against self-incrimination at trial, both derived from Article 6 (1) of the Convention. There is no difference in principle between a requirement to admit the driving of a car made out of court before trial, and a similar requirement to testify at trial. To be effective, the right to silence and the right not to incriminate oneself at trial imply recognition of similar rights at the stage when the potential accused is a suspect being questioned in the course of a criminal investigation. To assess whether a person has incriminated himself or herself, the essential consideration is the use to which the evidence obtained under compulsion will be put. The concept is not confined to admissions of wrong or to remarks which are directly incriminating…..***

***….The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings." (ibid pages 627,i - 628(a), 629, f, g, 634; & 638 h).***

The House of Lords (at pages 648 i and 649 a) continued-

***"It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the serious fraud office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover, the fact that the statements were made by the Applicant prior to his being charged does not prevent their later use in Criminal proceedings from constituting an infringement of the right…..***

***It was appreciated from an early stage the accused persons right to silence at trial would be worthless if his right of silence and his right against self-incrimination were not available to him from the outset of the criminal investigation. So rules were developed by the judges to ensure that those rights were respected by the court and the police."***

The last example we cite is that of the South African cases of ***STATE –VS- ZUMA & OTHERS*** [1995] ILRC 145 page 162 h, and ***OSMAN & ANOTHER –VS- ATTORNEY GENERAL*** [1999] 2 LRC 612; 225 (b), where the South African Supreme Court Appellate Division found recourse in the 1925 case of ***REPUBLIC –Vs- CAMINE*** [1925] A.D. 570 where Innes C.J. at page 575 said-

***"It is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced, to do that either before trial, or during the trial. The principle comes to us through the English law; and its roots go back far in history."***

Those are in our view perhaps a sufficient survey of the case law in support of the propositions, that the rights of a suspect and an accused person to silence, and against self-incrimination or testifying against self in comparative jurisdictions, U.S.A. India, South Africa, Canada and the United Kingdom of Great Britain and Northern Ireland. We now turn to the analysis of the Kenya law and situation. We will do so from four approaches-

***(1) the history of the rule to silence and against self-incrimination,***

***(2) the Corruption jurisprudence including international instruments,***

***(3) the Kenya law and situation,***

***(4) The issue for determination of the Court.***

**THE RIGHT TO SILENCE AND NON-SELF INCRIMINATION**

**(a) The Rule**

In the foregoing reference to the case of **R –Vs- CAMINE** (***supra***), Innes C.J. observed that the principle that no one can be compelled to give evidence incriminating himself has its roots far in history.

According to ***PHIPSON ON EVIDENCE*** 8th Edition by Roland Burrows, K.C. Chapter XV, Facts Excluded by Privilege under the Section **CRIMINATING QUESTIONS** at page 188 says-

***"No witness whether party or stranger is, except in specified cases, compellable to answer any question or to produce any document the tendency of which was to expose the witness….. to any criminal charge, penalty or forfeiture, that is in the esoteric*** *Latin Nemo tenetur prodere seipsum,."*

**(b) The basis of principle**

The principle is based upon the policy of encouraging persons to come forward with evidence to the courts of justice, by protecting them, as far as possible, from injury, or needless annoyance, in consequence of so doing. A sensible compromise has been adopted in the modern state by compelling disclosure, but indemnifying the witness in various respects from its results. For instance under the Evidence Act (Cap 80 Laws of Kenya), Section ***128 provides-***

***"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue or in any civil or criminal proceedings, upon the ground that the answer will incriminate, or may tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind****, but no such answer which a witness is compelled to* ***give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceedings except a prosecution for giving false evidence by such answer."***

(c) The history

It was not always so for at common law. The accused, enjoyed in general no immunity from answering upon oath as to the charges against him. On the contrary, such answers formed an essential feature of all the older modes of trial, from the Saxon ordeal and Norman Combat to the more popular compurgation or wager of law, which, although obsolete in the 16th century was not finally abolished until 1833. It was the same in the ***State Trials*** held before Parliament or the Council., and also other inquiries where the accused was not only put on oath but rigorously interrogated. However in Jury trials the accused was not put on oath, not because of any tenderness but because a denial on oath which in the earlier forms of trial (very much like our traditional ancestors used to do under a **Mugumo** or other local large shade tree), was conclusive in the defendant's favour and was regarded as too easy and decisive a method of self – exoneration to be permitted. In most traditional societies, if a suspect **swore that if I committed the offence for which I am accused let me be struck down by lightining or**

**thunder bolt or be bitten by the most poisonous serpent** – and this was sufficient to discharge the suspect. The accused had to be tried by the jury's oath not his own. For instance in 1590 in the case ***R. –Vs. Udal, I HOW St. Tr. 1289;),*** in an exceptional concession in a jury trial, an oath was tendered to the defendant-

"**We offer you that favour which never any indicted felony had before – swear** *that you did not and it shall suffice."*

How and why the modern and opposite doctrine came is to be found in the conflict and struggle for supremacy between the Civil Courts to restrict the usurpation of the spiritual or ecclesiastical courts except in matrimonial and testamentary causes, culminating in the enactment of the Ecclesiassical Jurisdiction Act, 1661 which ousted the jurisdiction of the Ecclesiassical courts from administering any oath whereby an accused would be obliged to accuse himself of any crime, or be exposed to any penalty. It was in resisting such an oath in 1590 that the maxim ***nemo tenetur prodere seipsum*** was in terms first put forward (Cullier –Vs-Cullier, Croz Eliz 201).

Phipson observes that the protection was aimed not against self-incrimination **per se** but against its oppressive exaction by the Church for the presumption was not then, as now, in favour of, but against the innocence of the accused. Later on, in the reaction against the tyranny of the **Star Chamber** and the High Commission Courts (abolished in 1641), the claim is no longer confined to ecclesiastical tribunals, stages of procedure, or, as some held, capital charges, but becomes general that no one should be found to criminate himself in any court or any stage of any trial. That also is the ***fons et origo*** of Section 77(1) (a) of our Constitution and similar Constitutions of the Commonwealth tradition.

**THE SITUATION TODAY**

Today, the citizenry, and the states into which the citizenry are organized are faced with a tyranny, and terror of another kind, namely, the tyranny and terror of organized commercial or sometimes referred to as "***white "collar***" crime because organized crime knows no borders, and is not confined to any one country or groups of countries or continent. It is exacerbated by the new and fast changing communication information technology so that the information available here today is obliterated and transferred to another facility, in another country in another continent by the push and click of a button. To fight such crime needs immense resources, and collaborative effort of various internal and external agencies. That is the background to the ***United Nations*** **Convention against corruption,** done in Arabic, Chinese, English, French, Russian and Spanish texts, equally authentic was formulated a few years ago and of which Kenya is a signatory, and is domesticated under our municipal law by the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003).

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION.

This Convention had its antecedents in the following prior multilateral instruments to combat corruption across the world-

***(1) The Inter American Convention against Corruption, adopted by the Organisation of American States on 29th March, 1996,***

***(2) the Convention to fight Corruption involving officials of the European Communities or Officials of the Member States of the European Union, adopted by the Council of the European Union on 26th May, 1997,***

***(3) the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation of Economic Cooperation and Development on 21st November, 1997,***

***(4) the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27th January, 1999,***

***(5) the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4th November, 1999, and***

***(6) the African Union Convention on Preventing and Combating Corruption adopted by the Heads of State and Government of the African Union on July, 2003, and***

**(7) *the United Nations Convention against Transnational Organized Crime which entered into force on 29th September, 2003.***

These instruments are the standards upon which the Kenya Anti-Corruption and Economic Crimes Act must be measured. This is so because, the greatest threat to the socio-economic and political substratum in the 21st Century are the quadruple evils of corruption, terrorism, drug trafficking and their attendant consequence, money laundering. Consequently all trading nations of the world at various stages of civilization and democratization have initiated and/or have passed similar legislation.

**COMPARATIVE LEGISLATION AND THE SOCIAL CONTRACT AND EXPECTATIONS OF SOCIETY**

In the back-drop of the above cited cases, and multi-lateral instruments, we refer to some countries which have at various times enacted legislation to combat corruption and economic crimes, terrorism, drug trafficking and money laundering, issues which are closely connected and give rise to and are a consequence of the other. These countries with respective legislation are-

(***1) Singapore- Prevention of Corruption Act,*** *Cap.* ***242 – Laws of Singapore,***

***(2) Northern Ireland – Proceeds of Crime Act, Northern Ireland Order 1996,***

***(3) Botswana – Corruption and Economic Crimes***

***Act, 2002*** *(No. 01 of 2002),*

***(4) Brunei – Prevention of Corruption Act, (1982)*** *(Cap. 131, Laws of Brunei**)***

***(5) South Africa – Serious Economic Offences Act, 1991,***

***(6) United Kingdom – Criminal Justice Act, 1987,***

***(7) United States – The Patriot Act.***

**A. THE SOCIAL CONTRACT**

Jean Rousseau in his book, ***"the Social Contract***" Penguin (Classic, ….. at pages 61-62 says-

***If then, we eliminate from the social pact everything that is not essential to it, we find it comes down to this – Each one of us puts into community, his person and all his powers under the supreme direction of the general rule, and as a body, we incorporate every member as an indivible part of the whole."***

***Immediately, in place of the individual person of each contracting party, this act of association creates an artificial and collective body composed of as many members as there are voters in the assembly, and by this same act that body acquires its unity, its common ego, its life and its will. The public person thus formed by the will of all other persons was once called the*** *"city"* ***and area composed of citizens), and is now known as the*** *republic* ***or the body politic. In its passive name is called the*** *state,* ***when it plays an active role it is the*** *sovereign****; and when it is compared to others of its own kind, it is a*** *power.* ***Those who are associated in it take collectively the name of a people, and call themselves individually citizens, in so far as they put themselves under the laws of the state……"***

**(b) Protection of Expectations under the Social Contract**

Friedrick A. Hayek in his seminal work, ***Law Legislation and Liberty*** Vol. I, ***Rules & Orders***, 1973 Edition at page 102 says-

***…The development of new rules of law will evidently involve a continuous interaction between the rules of law and expectations. While new rules will be laid down to protect existing expectations, every new rule will also tend to create new expectations. As some of the prevailing expectations will always conflict with each other, the judge will constantly have to decide which is to be treated as legitimate and in doing so will provide the basis for new expectations. This will in some measure always be an experimental process since the judge*** *(and the same applies to the law maker)* ***will never be able to foresee all the consequences of the rule he lays down, and will often fail in his endeavour to reduce the sources of conflicts of expectations. Any new rule intended to settle one conflict may well prove to give rise to new conflicts at another point, because the establishment of a new rule always acts on an order of actions that the new law alone does not wholly determine. Yet it is only by their effect, on that order of actions, effects which will be discovered only by trial and error, adequacy of the rules can be judged."***

(C) EXPERIENCE OF ENGLAND

In England, in attempting to reconcile the conflicting expectations of the law abiding citizenry in accordance with their social contract, that their elected government would protect them from the acts of a tiny and infinitesimal minority but whose acts tear directly into the rights and expectations of the vast majority and hence the need to balance the rights of that majority and the principle of the presumption of innocence of an individual. Section 16A of the Terrorism ***(Temporary Provisions***) Act 1989 provides-

***16A (i) A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism to which this section applies."***

In the case of ***R-Vs. DPP Ex Kebeline [1999] 4 ALL E.R. 801*** in reiterating the needs to uphold the social contract, and the overriding power of the State, England's Highest Court, the House of Lords (***Lord Hope***) while construing Section 16(3) of the Prevention of Terrorism (Temporary Provisions) Act 1989, which confer a statutory defence on accused – that the accused did not know the articles were

in the premises, or had no control over it, and which will deprive the prosecution of the presumption, went to observe at page 850-

"…….***Then there is the nature of threat which terrorism poses to a free and democratic society. It seeks to achieve its ends by violence and intimidation. It is often indiscriminate in its effects, and sophisticated methods are used to avoid detection both before and after the event. Society has a strong interest in preventing acts of terrorism before they are perpetrated – to spare the lives of innocent people and to avoid the massive damage and dislocation to ordinary life which may follow from explosions which destroy or damage property."***

Corruption is equally a cancer which robs the society in general but more particularly the poor when resources of a country whether public or privately controlled are siphoned into local or foreign accounts for the benefit of a few individuals or groups thereof, when for instance goods supposed to be procured are not in fact procured, but the price or part of it is paid, when goods to be procured do not meet the contractual specification, but the price of the original specifications is paid, when a bridge is certified to be completed, but is in fact incomplete, but the price is paid out when class rooms and dormitories are constructed with shoddy materials, and CDF funds are paid out at inflated rates, it is a cause of great pain and sorrow and lamentation in a country such as Kenya where the vast majority lives on less than Kshs.80/= or a dollar, a day. It is a form of terrorism and tyranny to the poor, the majority of our population.

It is therefore a social and economic imperative for a country like Kenya to enact and implement to the letter an anti-corruption and economic crimes legislation. Corruption as already described in the foregoing passages of this judgement is a complex fraud and the large sums of money embezzled be it through procurement of goods and services or transfer pricing are readily laundered through the purchase of real estate property and stocks, both locally and overseas through chains of trusts and cross-trusts and foundations. Borrowing from various multi-lateral instruments on corruption and economic crimes, the Kenyan Anti-Corruption and Economic Crimes Act had to adopt new and novel modes of investigation and detection of complex webs of local and international corruption. Because much of the information lies within the suspect's knowledge and that of his associates the investigatory power must be all encompassing to include such associates and accomplices in some cases. For instance in the South African case of ***State-Vs-Schabir Shaikh*** reported in the ***Star*** Newspaper of November 7, 2006, the South African Supreme Court of Appeal rejected the appeal by ***Schabir Shaikh*** an associate of the ANC (South Africa's Ruling Party) Deputy Chief, and former Vice President Hon. Zuma, was charged and found guilty of fraud and corruption, meaning that although the individual suspect may escape the noose, his associates in fraud and corruption may not be so lucky. The compelling of suspects to give a list of their properties is a method widely used all over the world in open and democratic societies.

In ***MEME –VS- REPBULIC [2004] I KLR. 640***, the Constitutional Court considered similar anti-corruption forms of legislation from-

(1) ***Botswana*** – Corruption and Economic Crimes Act, 1996, (No. 13 of 1994) Section 39,

(2) ***Singapore*** – Prevention of Corruption Act 1960 (Cap. 241),

(3) ***Malawi*** - Corrupt Practices Act 1999 (Act No. 18 of 1995),

(4) ***Zambia*** – Anti-Corruption Commission Act 1996 ***(No. 42 of 1996***),

(5) ***Nigeria*** – Corrupt Practices and Related Offences Act, 2000,

(6) ***Lesotho*** – Prevention of Corruption and Economic Offences Act 1999,

(8) ***Ethiopia*** – Federal Ethics, and Anti-Corruption Commission Establishment Proclamation No. 235 of 2001,

(9) United Nations Convention Against Corruption 2003,

(10) African Union Convention on Preventing and Combating Corruption 2003.

We will draw examples from Northern Ireland, Singapore, Botswana, Northern Ireland, the United Kingdom, and finally consider the Kenyan Anti-Corruption and Economic Crimes Legislation, the constitutionality thereof, before drawing our conclusions.

THE UNITED KINGDOM

We have already considered the effect of legislation on the prevention and the curtailment of the right to silence and non-self incrimination under terrorism legislation. We now consider comparative anti-corruption and economic crimes legislation. It is called the ***CRIMINAL JUSTICE ACT***, 1987, which establishes the ***Serious Fraud Office,*** similar to the Kenya Anti-Corruption Commission. The relevant provisions are as follows-

**(1)** ***A Serious Fraud Office shall be constituted for England and Wales and Northern Ireland.***

***(2) The Attorney-General shall appoint a person to be the Director of the Serious Fraud Office*** *(referred to in this part of this act as the Director)****, and he shall discharge his functions under the superintendence of the Attorney- General.***

***(3) The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud*****.**

**(4)** ***The Director may (a) institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud; and (b) take over the conduct of any such proceedings at any stage.***

***2.*** Director's investigation powers (***1) The powers of the Director under this section shall be exercisable, but only for the purposes of an investigation under section 1 above, or, on a request made by the Attorney-General of the Isle of Man, Jersey or Guernsey, under legislation corresponding to that section and having effect in the Island whose Attorney-General makes the request, in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.***

***(2) The Director may by notice in writing require the person whose affairs are to be investigated*** *(the person under investigation)* ***or any other person who he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith.***

(3) ***The Director may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which***

***appear to him to relate: and (a) if any such documents are produced, the Director may (i)*** take copies or extracts from them; **(ii)** require the person producing them to provide an explanation of any of them; **(b)** if any such documents are not produced, the Director may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

(8) ***A statement by a person in response to a requirement imposed by virtue of this section may only be used in evidence against him (a)*** on a prosecution for an offence under subsection (14) below**; or (b)** on a prosecution for some other offence where in giving evidence he makes a statement inconsistent with it.

These provisions were challenged in ***Smith –vs- DIRECTOR OF SERIOUS FRAUD OFFICE [1992] 3 ALL ER. 456.*** In that case, the Applicant, a Chairman and Managing Director of a financial company reported to the Bank of England that the company was in financial difficulty. The Bank suspecting that the company's difficulties were as a result of fraud, called the Police to investigate, and as a result of which the Applicant was arrested and charged. He also attracted the attention of the Director of Serious Fraud Office who after determining that the activities of the Applicant were suitable for investigation, summoned the Applicant for interview in terms of section 1 (3) of the Criminal Justice Act 1987.

Before the interview, the Applicant applied for Judicial Review seeking to quash section 2 of the Criminal Justice Act, on the ground that the 1987 Act did not authorise the Director to serve a Section 2 notice on the Applicant after he had been charged. The Applicant further sought orders that the Director be required to caution the Applicant that he was not obliged to answer any questions concerning the matters with which he had been charged, before requiring him to comply with the requirements of section 2 notice.

In its Judgement, the Court held that the Director of Serious Fraud Office was authorized under section 2 of the1987 Act to question a person under investigation and the powers did not come to an end when the person was charged. The Court found that the clear words of the 1987 Act showed that Parliament had intended to establish an inquisitorial regime in relation to serious or complex fraud in which the Director could obtain by compulsion responses to questions which might be self-incriminatory.

As Lord Mustill succinctly puts it, at page 470-

……**my Lords, I feel no doubt that the Counsel were right to take this course. Either the Director was empowered not only to pose questions but to compel an answer, or she was not. If she was, then the administration of a caution which presupposed that an answer could not be compelled would be a self contradictory formality which Parliament cannot possibly have intended."**

And at pages 474 -475 after observing that upholding the power of the Director of Serious Fraud Office to summon and question the Applicant, the Court was not re-establishing in relation to a limited classes of offences an inquisitorial method of ascertaining the truth in criminal law cases which the English law had long since repudiated in favour of the adversarial process- but that it was indisputable and undisputed that this is just what Parliament set out to do, and has effectively done. In truth the adverse comments are criticisms, not of the Director's contention that powers created by the Act apply in the situation now under review, but of the policy are scope of the Act itself. These we may not entertain. In the words of Windeyer J. in ***REES -VS- KRATZMAN [1965] 114 C.L.R. 63*** at 80.

"***If the Legislature thinks that in this field the public interest overcomes some of the***

***common law's traditional considerations for the individual then effect must be given to the statute which embodies the policy."***

The English Courts have thus upheld the provisions of their laws which are similar to ours, as superceding the old common law right against self-incrimination. Lord Mustill references raise the futility of requiring a caution when faced with a compellable law such as ours. This may be equated to the Judges rules which have been in use in all common law jurisdictions.

BRUNEI DARUSSALAM

The **Prevention of Corruption Act**, Chapter 131,

Laws of Brunei (the Brunei Act), enacted to prevent corruption and bribery, establishes the **Brunei Anti Corruption Bureau,** headed by a Director. It has provisions almost similar to the Singapore Act in terms of investigative powers vested upon the Anti-Corruption Bureau.

The relevant provisions material for our present purposes are:

**Special powers of investigation**

**23. (1)** The Public Prosecutor or the Director, if satisfied that there are reasonable grounds for suspecting that an offence under this Act has been committed by any person, may, for the purpose of an investigation into such offence, authorise in writing any Officer of the Bureau specified in such authorization, to exercise the following powers on the production by him of the authorization.

(a) ***(not applicable***)

**(b)** ***to require from any person the production of any accounts, books, documents, safe-deposit box or other article of or relating to any person named or otherwise identified in such authorization which may be required for the purpose of such investigation and the disclosure of all or any information relating thereto, and to take copies of such accounts and books or of any relevant entry therein.***

***(2) – 3 (not issue here).***

**(4)** Any person who, having been lawfully required under this section to disclose any information or to produce any accounts, books, documents, safe deposit box or other article to the Director, Deputy Director or an Officer of the Bureau authorized under subsection (1), shall, notwithstanding the provisions of any other law and any oath of secrecy to the contrary, comply with such requirement, and any such person who fails or neglects, without reasonable excuse, so to do, and any person who obstructs the Director, Deputy Director or an Officer of the Bureau authorized under subsection (1), shall be guilty of an offence: Penalty, a fine of 20,000 and imprisonment for one year.

Section 23A which provides for special powers of investigation says-

***23A. (1) In the course of any investigation into or proceedings relating to an offence alleged or suspected to have been committed by any person under this Act or under sections 161 to 165 or 213 to 215 of the Penal Code*** *(Chapter 22)* ***or a conspiracy to commit, or an attempt to commit, or an abetment of any such offence, the Public Prosecutor may, notwithstanding anything in any other written law to the contrary, by written notice-***

***(a) require any such person to furnish a statutory declaration or, as the Public Prosecutor sees fit, a statement in writing enumerating all movable or immovable property belonging to or possessed by such person and by the spouse, parents, or sons and daughters of such person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise;***

***(b) require any such person to furnish a statutory declaration or, as the Public Prosecutor sees fit, a statement in writing of any money or other property sent out of Brunnei Darussalam by him, his spouse, sons and daughters during such period as may be specified in the notice;***

***(c) require such person to furnish a statutory declaration or, as the Public Prosecutor sees fit, a statement in writing enumerating all movable or immovable property belonging to or possessed by such person where the Public Prosecutor has reasonable grounds to believe that such information can assist the investigations;***

***(d) - (e) specific to banks, and Chief Executives of parastatals and heads of other government departments.***

***(2) Every person to whom a notice is sent by the Public Prosecutor under subsection (1) of this section shall, notwithstanding the provisions of any other law and any oath of secrecy to the contrary, comply with the terms of that notice within such time as may be specified therein and any person who willfully neglects, or fails so to comply shall be guilty of an offence: Penalty, a fine of $5,000 and imprisonment for one year.***

These investigative provisions of the Brunei Act are in material respects similar to the Kenyan provisions under section 26, 27 and 28 of the Act. We have not come across any judicial decision in a matter in which the above provisions have been challenged.

However, the High Court of Brunei Darussalam had occasion to consider a challenge to statutory investigative powers (under the Brunei Investment Agency Act, Chapter 137, Laws of Brunei) based on the right against self-incrimination in **Civil suit No. 31 of 2000 State of Brunei Darussalam & Brunei Investment Agency –Vs- HRH Prince Jefri Bolkiah and 71 others.** The 1st Defendant was the Crown Prince of Brunei Darussalam, and was suspected to have fraudulently caused sums in excess of $14.8 Billion belonging to the State to be paid from the account of the Brunei Investment Agency into bank accounts in his names or under his control. The Brunei Investment Agency and the Brunei Anti-Corruption Bureau commenced investigations against him.

The Defendants were served with notices requiring them to furnish information relevant to the investigations, and had also sought to freeze Defendants assets subject of the investigations. Upon failure to comply, the Court, on an ***ex parte*** application by the Plaintiff, ordered the Defendants to make disclosure. The Defendants took out summons seeking to vary the ***ex parte*** orders, and sought orders, inter alia, that they were entitled to refuse to comply with the notices on the grounds that compliance would incriminate them, and that the Public Prosecutor give an undertaking in writing that, if they complied, any information disclosed would not found any criminal charges against them.

In rejecting the plea of protection against self-incrimination, the Court (Roberts, C.J.) accepted that the privilege against self-incrimination is deeply ingrained in the common law and is a cardinal principle of common law systems of justice, see ***Sorby The Commonwealth*** (1983) 152 CLR. The Court further considered the decided case law in Australia and England, and preferred the English position based on the House of Lords decision in *AT & T Istel Ltd, v Tully* [1993] AC 45 H.I., where the

House of Lords stated that the privilege against self-incrimination substituted, and could be removed by legislation.

We respectfully accept the submission by Counsel for the First Defendant that likewise, in our circumstances, any right against self-incrimination can be removed by statutory provisions. The right cannot be used as a excuse for neglect or failure to comply with sections 26, 27 and 28 of our Act.

BOTSWANA

The ***Botswana Corruption and Economic Crime Act, No. 01 of 2002*** (*the Botswana Act*), inter alia, establishes a Directorate on Corruption and Economic Crime, and confers on the Directorate powers to investigate suspected cases of corruption and economic crime.

The relevant provisions material for our present purpose are:

**Power of Director to obtain information**

**8. (1**) If, in the course of any investigation into any offence under Part IV, the Director is satisfied that it would assist or expedite such investigation, he may, by notice in writing, require-

(a) ***any suspected person to furnish a statement in writing-***

**(i)** enumerating all movable or immovable property belonging to or possessed by him in Botswana or elsewhere or held in trust for him in Botswana or elsewhere, and specifying the date on which every such property was acquired and the consideration paid therefor, and explaining whether it was acquired by way of purchase, gift, bequest, inheritance or otherwise;

(ii) specifying any moneys of other property acquired in Botswana or elsewhere or sent out of Botswana by him on his behalf during such period as may be specified in such notice;

***(b) any other person with whom the Director believes that the suspected person had any financial transactions or other business dealing, relating to an offence under Part IV, to furnish a statement in writing enumerating all movable or immovable property acquired in Botswana and elsewhere or belonging to or possessed by such other person at the material time*****;**

***(c) any person to furnish, notwithstanding the provisions of any other enactment to the contrary, all information in his possession relating to the affairs of any suspected person and to produce or furnish any document or a certified true copy of any document relating to such suspected person, which is in the possession or under the control of the person required to furnish the information.***

(2)***Every person on whom a notice is served by the Director under subsection (1) shall, notwithstanding any oath of secrecy, comply with the requirements of the notice within such time as may be specified therein, and any person who without reasonable excuse fails to so comply shall be guilty of an offence and shall be liable to the penalty prescribed under section 18(2).***

The penalty under section 18 (2) is imprisonment for a term not exceeding five years, or a fine not exceeding Pula 10,000, or to both.

**SINGAPORE**

**Section 21(1) and (2) of the Corruption Action of Singapore** are the equivalents of the Kenya Anti-Corruption and Economic Crimes Act Section 26,27 and 28. They are cited herewith for purposes of clarity.

**Public Prosecutor's Powers to obtain information 21.**

(1) ***In the course of any investigation or proceedings into or relating to an offence by any person in the service of the Government or of any department thereof or of any public conspiracy to commit, or an attempt to commit, or an abetment of any such offence, the Public Prosecutor may, notwithstanding anything in any other written law to the contrary, by written notice.***

**(a) require that person to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or possessed by that person and by the spouse, sons and daughters of that person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise;**

**(b) require that person to furnish a sworn statement in writing of any money or other property sent out of Singapore by him, his spouse, sons and daughters during such period as may be specified in the notice;**

**(c) require any other person to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or possessed by that person where the Public Prosecutor has reasonable grounds to believe that the information can assist the investigation;**

***(d) require the Comptroller of Income tax to furnish, as specified in the notice, all information available to the Comptroller relating to the affairs of that person of or the spouse or a son or daughter of that person, and to produce or furnish, as specified in the notice, any document or a certified copy of any document relating to that person, spouse, son or daughter which is in the possession or under the control of the Comptroller;***

**(e) require the person in charge of any department, office or establishment of the Government, or the President, Chairman, manager or Chief Executive Officer or any public body to produce or furnish, as specified in the notice, any document or a certified copy of any document which is in his possession or under his control;**

(f) **require the manager of any bank to give copies** of the accounts of that person or of the spouse or a son or daughter of that person at the bank.

(2) ***Every person to whom a notice is sent by the Public Prosecutor under subsection (1) shall, notwithstanding the provisions of any written law or any oath of secrecy to the contrary, comply with the terms of that notice within such time as may be specified therein and any person who willfully neglects or fails so to comply shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding one year or to both.***

**Section 21(b**) goes even further that the Kenya law and requires a person to furnish a sworn statement of any money or other property sent out of Singapore by him, his spouse, sons or daughters

during a specified period.

A point worth mentioning is that the person from whom such information is required from is expected to give a sworn statement to that effect.

The Singapore law goes further and requires a Bank Manager to give copies of the accounts of a person at the bank without a Court Order. Further the Comptroller of Income Tax may also be called upon to furnish all information relating to the tax affairs of a person.

It is clear that Singapore has more compelling and inquisitorial laws than ever envisaged here in Kenya and it is not far fetched to equate this situation to the orderly and developed country Singapore has become over the last 40 years.

NORTHERN IRELAND

Northern Ireland has a legislative instrument with provisions similar to our sections 26, 27 and 28. This is **Proceeds of Crimes (Northern Ireland) Order 1996 (the 1996 Order).** The object of the 1996 Order was to provide means of tracing and confiscating money and property derived from criminal conduct. The Order gives to the Court powers designed to assist in the process of tracing the proceeds of crime.

Article 49 empowers a County Court Judge when satisfied of the matters set out in paragraph (1), to appoint a financial investigator to exercise for the purposes of the investigation the powers conferred by schedule 2. Paragraph 2 and 3 of Schedule 2 confer upon the financial investigator a number of specified powers, the material one being that contained in paragraph 2 (1):-

***A Financial Investigator may by notice in writing require any person who he has reason to believe has information which appears to the investigator to relate to any matter relevant to the investigation to attend before the investigator at a specified place either forthwith or at a specified time and answer questions or otherwise furnish information which appears to the investigator to relate to the investigation."***

Paragraph 5 makes it an offence to fail to comply with a financial investigator's requirement. Indeed section 2(1), (2), (3) and section 5(1) of the Irish legislation are similar or equivalents to sections 26(1) and (2) of the Kenya legislation.

Paragraph 6 of the Northern Ireland statute contains restrictions on the use which may be made of answers given or information furnished by the person interviewed and paragraph 7 contains restrictions on disclosure of the information so gained. Those provisions of the Northern Ireland statute were put to test in the case of **CLINTON –VS- BRADLEY [2000] NICA 8.**

**The Facts**

This case went to the Court of Appeal of Northern Ireland by way of a case stated from a decision of a Resident Magistrate whereby the appellant had been convicted of an offence contrary to section 5(1) of Schedule 2 of the Proceeds of Crime (***Northern Ireland***) Order 1996, of failing without reasonable excuse to comply with a requirement imposed upon him to answer questions put to him by a financial investigator. The issue upon which the Appeal turned was whether the appellant had reasonable excuse to refuse to answer if he believed that to do so might tend to incriminate him in respect of another offence with which he was subsequently charged.

In rejecting the Defence's arguments, the Magistrate had ruled that;

"***after examination of the relevant statutes and case law I came to the conclusion, with regret that the Defendant's natural desire not to incriminate himself in the parallel case could not, in the context of this particular statute (the 1996 Order) constitute a reasonable excuse. My reason for this was that to allow such a defence here would have the effect of totally negativing the clear purpose of the legislation, which was to compel answers to questions of an investigative nature to be put to an interviewee in precisely this type of case and not to allow him to use the defence of any right not to incriminate himself."***

The grounds on which Counsel for the appellant contended that he had reasonable excuse for refusing to answer the investigator's questions were:-

***(a) The legislature could not have intended to make such an in-road into the privilege against self-incrimination without a clear expression of intention, and it was not sufficiently clear that it did so intend;***

***(b) The ambiguity permits the Court to have regard to Article 6 (1) of the European Convention on Human Rights, of which the requirement was in breach.***

***(c) In other areas of Irish law the existence of a risk of self-incrimination has been held to constitute a reasonable excuse for refusing to give information.***

**Court of Appeal held that:-**

(i) The question whether the provision of schedule 2, in conferring a power to ask questions or obtain documents or information, excludes the privilege against self-incrimination is one of construction. The Court did not consider the paragraph 5 (1) as ambiguous. The working of the provision is itself perfectly clear, that the failure to comply with the investigator's requirement to answer question or furnish information is an offence. Parliament can and from time to time does enact provisions which interfere with the right to silence.

**(ii)** The Court cited with approval the orbiter of ***Hutton J. in R –Vs- Donnely (1986) NI 54,*** that;

***However I make it clear that in my opinion the defence of reasonable excuse based upon the principle that a man is not bound to incriminate himself will only be valid where there is a genuine risk that the information would tend to incriminate the person and make him liable to prosecution. A person should not be able to raise the defence of reasonable excuse successfully where the possibility of his being prosecuted by reason of the information he might give is fanciful and artificial.***

**(iii)** It was argued on the appellant's behalf, in reliance upon **Saunders –vs- UK (1996) 23 EHBR 313,** that to require a person to incriminate himself would mean that his trial was unfair, in breach of Article 6(1) of the Convention. That cannot however, be judged at the time when the investigators require the person concerned to answer questions or furnish information, or even at the time when the Magistrate's Court decides on the Commission of an offence under paragraph 5(1). It can only be determined at the time of the trial of the offence in respect of which it is claimed that the person may be incriminated by the answers or information. ***(R vs Director of Public Prosecutions, ex-parte Kebeline (1999) 4 ALLER 801 at page 834 per Lord Steyn.*** As the European Court of Human Rights remarked at paragraph 69 of its judgement in ***Sauders vs UK***, the question must be examined by the Court in the

light of circumstances of the case. These cannot possibly be known at the time when the investigators require answers or information.

(**IV)** The functions performed by the inspectors were essentially investigative in nature and did not adjudicate either in form or in substance. Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities prosecuting, regulatory, disciplinary or even legislative. A requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities.

**Comparing Irish & Kenyan situation**

The Northern Ireland experience is particularly relevant to the Kenyan situation. As indicated hereinabove subsections 2(1), (2), (3) and section 5(1) of the Irish legislation are the equivalent to ours. The finding in the ***Bardley case*** *(supra**)*** is even more relevant and should lay to rest any further challenges to the Kenyan legislation. These findings are that***:-***

**(i)** ***Like the Irish legislation, the contents of the Kenyan legislation are clear, explicit and unambiguous. Parliament knowingly enacted the provisions to interfere with the right to silence***.

(**ii)** ***There is no obvious risk of self incrimination when a person answers questions or furnished information of his property under section 26, 27 and 28 of the Kenyan Act. This information, is demanded on the basis of reasonable suspicion. Any further investigations on the furnished information may lead to:-***

**(a) Arraignment in Court over charges of corruption or economic crime.**

**(b) Preservation and forfeiture of assets suspected of being acquired by corruption.**

**(c) No action as the Commission may find that the property was lawfully acquired.**

(iii) Challenging the operations of section 26, 27 and 28 of the Kenyan legislation is tantamount to jumping the gun. Its validity can only be determined at the time of the trial of the offence in respect of which it is claimed that the person may be incriminated by the answers or information. The questions can only be examined in Court in the light of all the circumstances and cannot possibly be answered at the time when the investigators require the information.

**HOW THEN SHOULD THE COURT APPROACH THE INTERPRETATION OF THIS LAW"**

The Court of Appeal in ***CHRISTOPHER NDARATHI MURUNGARU -VS- KENYA ANTI-CORRUPTION COMMISSION & HON. THE ATTORNEY-GENERAL*** (Civil Appeal No. 43 of 2003 (***unreported***) commented on the law and the Judges Rules as follows:-

***"The Director of the Commission was of the view that the provisions relating to fair trials only apply in courts and not in the process of investigation. Yet Parliament itself by the Criminal Law*** *(Amendment**)*** ***Act 2003*** *(Act No. 5 of 2003**)*** ***took away from the police whose duty like the Commission is to investigate suspected crimes, the power to record confessions from persons suspected of crimes. Even the passing of that Act, the*** *Judges Rules* ***applied to officers who were investigating crimes against suspected person(s). If these provisions applied to the process of***

***investigations, why should the fair trial provisions of Section 77 of the Constitution apply in the Court"***

To this question Professor Muigai, learned Counsel for the First Respondent made answer with which we agree and said that the provisions of the Criminal Law (***Amendment***) Act, 2003 (***No. 5 of 2003***) which took away the power of the Police to take confessions from suspects, and the ***Judges Rules*** ***(***against self incrimination) do not alter the constitutional right to silence and non-self incrimination apply only at or during the trial, because-

**(a)** ***A Police Officer is required to caution a suspect who the*** *Police officer has decided to charge* .

(**b)** ***Prior to this, the officer may interview any suspect and is under no obligation to caution them.***

***(c) Judges rules being rules of practice declared to be so by competent Courts are only applicable until overturned by a higher Court or*** *by statute.*

**(d)** ***In the Kenyan case, the Anti-Corruption and Economic Crimes Act gives the Commission the power to investigate*** *but* ***not to prosecute.***

***(e) The Commission does not therefore charge or arraign people in Court but makes recommendations to the Hon. Attorney-General on whether to prosecute or not.***

***(f) The final decision as to whether to prosecute lies with the Hon. Attorney General.***

***(g) The Commission may out of the information obtained from the application of section 26, 27 and 28, make recommendations to the Hon. Attorney-General for prosecution (or not); file for preservation and/or forfeiture of property on obtaining (prima facie) evidence sufficient for these causes of action; or simply close the investigations.***

***(h) Thus purporting to say that answering notices under sections 26, 27 and 28 may lead to self-incrimination is fanciful and far-fetched as the intended use of this information may not be clear at that stage.***

***(i) Any aggrieved party who is charged using the information obtained vide the notices may challenge the production of that evidence once charged in Court with any offence which may arise out of the investigations.***

***(j) The Anti-Corruption & Economic Crimes Act, 2003 is superior to the Judges Rules which are merely rules of practice. Any contradiction between the two should be ruled in favour of the Act.***

In accordance with Court of Appeal's own decision in ***SYEDANA M. BURHANNUDIN SAHEB –VS- MOHAMEDALLY HASSANALLY*** (Civil Appeal at Nairobi No. 28 of 1980) (***unreported***), adopting the decision of Lord Esher M.R. in ***R –VS- THE COUNTY COURT JUDGE OF ESSEX AND CLARK [1887] Vol. XVIII,*** page 704, judgement of Miller J.A. – The Court said –

***"The new Act has introduced a new jurisdiction , a new procedure, new forms or new remedies, the procedure forms, or remedies there prescribed, and the new order must be***

***followed until altered by subsequent legislation."***

**OF THE REASONABLENESS OF THE DIRECTOR'S SUSPICION**

The Kenya Anti-Corruption and Economic Crimes Act is a penal statute. Like all other penal statutes it must be construed strictly. A restatement of Section 26 of the Act is therefore necessary. It reads as follows:

***Section 26(1) the Commission may by notice in writing require a person reasonably suspected of corruption or economic crime to furnish, within a time specified in the notice, a written statement:-***

***(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.***

The most enigmatic phrase in section 26; and which phrase has raised much controversy, are the two words **reasonably suspected** of corruption or economic crime.

**IN THE COURT OF APPEAL, CIVIL APPLICATION NO. NAI 43 OF 2006 (24/2006) DR CHRISTOPHER N. MURUNGARU –VS- KACC & HON. ATTORNEY-GENERAL** the Court stated that:-

"**We pause here to point out that in order to issue a notice under this section (section 26), the Commission (KACC) and its Director must be in possession of some material from which it is** *REASONABLY SUSPECTED* **that the person to whom the notice is being issued has been involved in corruption or economic crime. In the absence of reasonable suspicion of involvement in corruption or economic crime, the Commission and its Director would have no power to issue a notice under section 26 of the Act."**

What therefore is the meaning of the term **Reasonable suspicion"** Whereas the meaning of the word ***reasonable*** is fairly obvious and non contentious; the meaning of the word ***suspicion*** or "***suspicious***" needs to be determined. None other than judicial precedent would be our destination in this quest.

In the case of ***Hussein -vs- Chong Fook Kam [1969] ALL E.R 1626*** at 1630, the Court was seized of a terrorism matter and the question was whether the articles in the accused's possession raised reasonable suspicion that they were connected to terrorism. The Court took up Lord Devlin's observation that:-

"***Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; I suspect but I cannot prove. Suspicion arises at or near the starting point of investigation of which obtaining of prima facie proof is the end."***

The Court also drew a distinction between reasonable suspicion at the time of the arrest and prima facie proof at the trial as follows:-

"***Prima facie*** *(proof****) consists of admissible evidence. Suspicion can take into account***

***matters that could not be put in evidence at all suspicion can take into account also matters which, though admissible could not form part of a prima facie case."***

It is clear that reasonable suspicion is merely reasonable conjecture or surmation. There need not be proof but a mere seed which on investigations may lead to prima facie proof.

This provision is not unique to the Kenyan Statute. A few examples will suffice.

Singapore

In Singapore, ***the Prevention of Corruption Act***, 1960 provides the circumstance under which the Director of the Corrupt Practices Investigation Bureau can exercise his powers of arrest. Section 15(1) provides that:-

"**The Director or any special investigator may without a warrant arrest any person who has been concerned in any offence under this Act or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned."**

It is paramount to note that the circumstances cited above are listed in order of weight of evidence applicable to each circumstance. These are:-

(i) a reasonable complaint

*(ii)* credible information

*(iii)* reasonable suspicion

Reasonable suspicion is listed last thus reinforcing the position that it is a conjecture or mere surmation i.e without proof at that point of time.

It should also be noted that the Singapore statute gives their anti-graft agency the powers to arrest a person on reasonable suspicion that he was involved in the commission of an offence under the Act.

Unlike the draconian Singapore provisions, the power donated by section 26(1) 27, & 28 to the Director of the First Defendant is specific – the person suspected of corruption and economic crimes is required by the notice to enumerate his property and the times when it was acquired, and the mode of the suspected corrupt acquisition or economic crime, and whether the property was acquired by purchase, by gift, inheritance or in some other manner, and what consideration if any was given for the property.

The Director's notice of 9th January, 2006 and reiterated in the letter of 23rd January, 2006 refers to any direct or indirect interest the Plaintiff has or may have in any property held by the Plaintiff's associates, and relatives.

Section 26 (1) of the Act is an independent provision from either section 27, which gives the First Defendant (the Commission) power to issue a notice to an associate of a suspected person to provide within a reasonable time specified, a written statement of the associate's property at the time specified in the notice; or Section 28 which, again donates the Commission power by notice in writing to require any person whether or not suspected of corruption or economic crime to produce specified records in his

possession that may be required for an investigation. Any notice under Section 26(1) of the Act to a person reasonably suspected of corruption or economic crime must relate only to the property of that person not of his relatives, including his spouse, for under our law, a spouse is an independent person from either the husband or wife. Each one of them may own his/ her own property. Each one of them would be entitled to a separate notice as a person or persons suspected of corruption or economic crimes.

To the extent therefore that the said notices of 9th January, 2006 purports to call upon the Plaintiff to give particulars of his interest in any property of his relatives we find and hold the same to be incompetent.

It is incompetent because the notice under Section 26 of the Act is specific to the person reasonably suspected of corruption and economic crime. It is incompetent because it is not specific of the time when suspected acts of corruption or economic crimes were committed. It is also incompetent because it is vague. To what property or assets does it refer to" Chickens or Chicken farm", a horse or horse stud" Fundamentally the notice should specify the time frame to which alleged acts of corruption and economic crimes relate. For instance the notice should in the case of this Plaintiff, specify that the information required is for the period he was elected an Hon. Member of Parliament or appointment to Cabinet, and not his private life before he came to power.

Arising from this view of the said notice, we hasten to find and hold that the same cannot therefore be a proper foundation of charges against the Plaintiff under Section 26 (2) of the Corruption and Economic Crimes Act. We therefore further find and hold that Nairobi Chief Magistrate's Court Anti-Corruption Case No 11 of 2006 is incompetent, and direct that the same be terminated forthwith. We further direct that the First Defendant formulate and send proper notices to the Plaintiff and thereafter the matter take course in the manner prescribed under Section 26 of the Act.

**OF THE CONSTITUTIONALITY OF SECTIONS 26, 28 & 58 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT.**

It was the forte of the submissions of Hon. P.K. Muite, Senior Counsel and Mr. Kilukumi, that the said sections are unconstitutional because they impinge upon the Plaintiff's constitutional rights to be presumed innocent (as guaranteed under Section 77 (2) (a)) and not to self-incriminate (as guaranteed by Section 77 (7)) of the Constitution. For the purpose of the conclusion we will draw on these contentions, we again reproduce here below the provisions of Section 77 (1), 77 (2) of the Constitution. They are as follows:-

***77 (1) If a person is charged with a criminal offence then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.***

***(2) Every person who is charged with a criminal offence-***

***(a)*** *shall be presumed to be innocent until he is proved or has pleaded guilty.*

***(3)– (6)*** *inapplicable*

*(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial;*

Senior Counsel for the Plaintiff made a great pun of the manner in which this court should give

these provisions, a ***purposive, liberal, and generous interpretation*** in accordance with the values and principles upon which the fathers wrote these words into the Constitution as basic and fundamental. Counsel submitted that such purposive, liberal, generous, living soul of the Constitution should mean that the right to silence and to non-self incrimination should not only include the trial stage, but also all the aspects of investigation; that we would be following the bold spirit of our brothers and sisters in such cases as:-

**(1)** ***CRISPUS KARANJA –VS- ATTORNEY-GENERAL*** (*supra),*

**(2)** ***MWANGI & 7 OTHERS –VS- ATTORNEY GENERAL***, *(supra)*

**(3)** ***NJOYA & OTHERS –VS- ATTORNEY-GENERAL & OTHERS***

**(4) The Tanzania Case of NDYANABO –VS- ATTORNEY-GENERAL (***supra)* in all of which the theme was to encourage and exhort us to be bold and imaginative, for ***"a timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document."*** And secondly, the provisions touching upon fundamental rights have to be interpreted in a broader and liberal manner, thereby jealously protecting and developing ***the dimensions of those rights and ensuring that our people enjoy their rights,*** our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.

In this submission Senior Counsel, for the Plaintiff invited us to what he called the "***Elmann doctrine****"* it had been discredited by this court in the immediately forementioned cases. But what is the ***"Elmann doctrine***," and whence its origins."

**THE EL MANN "DOCTRINE & PRESUMPTION OF INNOCENCE AND NON-SELF INCRIMINATION.**

What is referred to as the "***Elmann doctrine***" is the literalist interpretation which the court should give a statute where the words of that statute are unambiguous and admit of no other meaning. In **REPUBLIC –VS- ELMANN [1969**] E.A. 357, the issue was whether the Republic might put in evidence against an accused charged with a contravention of the Exchange Control Act answers given by the accused to an investigation officer pursuant to a mandatory questionnaire under powers conferred by paragraph (c) of the General Provisions as to Evidence and Enforcement set out in Part 1 of the Fifth Schedule to the Act which had been amended to expressly to say that any information obtained as a result of the questionnaire should be admissible in evidence in any prosecution for an offence under the Act.

In support of refusing the admission of the information as evidence, Counsel for the accused contended that the fundamental rights under the Constitution of Kenya Sections 21, (7) (now Section 77 (7), namely-

"***No person who is tried for a criminal offence shall be compelled to give evidence at his trial."*** *r*endered the amended sub-paragraph ***ultra vires*** the Constitution.

The Constitutional Court held that (**i**) there was no ambiguity in the wording of Section 21 (7) of the Constitution, which should therefore be construed according to the ordinary and natural sense of the words used and did not protect the accused from the giving of evidence by the prosecution of information provided by the accused before the trial began, (ii) paragraph 1 (5) of Part 1 of the Fifth Schedule to the

Exchange Control Act is not ***ultra vires*** the Constitution; and (iii) the information was admissible in evidence against the accused.

The basic issue before Mwendwa C.J. Farrel and Chanan Singh JJ. (who may have been schooled in the colonial days but were by no stretch of the imagination colonial judges) in the **Elmann Case**, and upon which Counsel on both sides of the case are recorded at page 359 letter cd to have been in substantial agreement, and indeed like in this case, was the principles of construction to be applied and each of the Counsel in that case referred that Court to the same passage in ***CRAIES ON STATUTE LAW*** (6th Edition) at page 66, which read:-

"***The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention as expressed in the Acts themselves. The tribunal that was to construe an Act of legislature or indeed any other document has to determine the intention as expressed by the words used and in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view." per Blackburn in the case of*** *DIRECT UNITED STATES CABLE CO. –VS- THE AGRO-AMERICAN TELEGRAPH CO. [1887] 2 A.C. 394.*

In the same El Mann case, the court referred to **IN BARNESS –VS- JARVIS [**1953] I W.L.R. 649, where Lord Goddard C.J. said-

***"A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered."***

***If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."***

In **WARBURTON –VS- LOVELAND**, (1832) 5 E.R., a case decided in 1832 but whose principles ring true today, TINDAL C.J. said-

***"where the language of an Act is clear and explicit, we must give effect to it, whatsoever the consequences, for in that case the words of the statute speak the intention of the legislature."***

What Senior Counsel Hon. P.K. Muite and his colleague Mr. Kilukumi, asked us to do, is not very different from the arguments adduced in the El mann case.

Like in the ***El mann case***, Counsel for the Plaintiff here emphasized and argued that the Constitution is no ordinary Act of Parliament. It cannot be construed in accordance with ordinary canons or principles of construction. Professor Muigai, and Mr. James Warui Mungai for the 2nd Defendant argued that regard must be heard to the language used. Like the ***El mann case***, Hon. Muite ***urged us*** and his colleague invited us by the use of such expressions as "***purposive", "liberal,"*** and generous construction of a Constitution than we would ordinarily adopt in the construction of an ordinary enactment of the legislature as did the courts in the above captioned cases of Crispus ***Karanja -Vs- Attorney-General, Mwangi & 7 others Vs. Attorney General, Njoya & others –Vs- Attorney General and the Dyanabo -Vs- Attorney General*** *(supra*).

Professor Muigai and his colleagues for the 1st and 2nd Defendants took the opposite view. In his submission Professor Muigai, admitted, that despite the views expressed in his Doctoral thesis on

constitutional law and attitude of the colonial judges, the ***El mann case*** had never been overruled by the Court of Appeal, and was still good and sound law in Kenya. We share this view of the El mann case, and indeed the construction adopted in it in relation to Section 21 (7) now Section 77 (7) of the Constitution. We say so for several reasons.

Firstly all societies are at some stage of development. For instance the doctrine of inalienability of any rights fundamental or otherwise, is inconsistent with the Constitution itself which expressly declares the rights and freedoms of one individual are subject to those of another or others collectively. The Constitution guarantees the right to life, (Section 70 (a)) yet takes it away in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted (Section 71 (1)) Why so" Because society ordained as part of the social contract that if you kill unjustifiably you too may suffer the same fate, after due process. That is a great advance from the laws of the ***Medes*** and ***Persians***, an eye for an eye, a tooth for a tooth, and a death for a death.

Secondly from Hamurabi to ***Moses, Jesus*** and ***Mohammed***, even what we may consider lesser offences as adultery (and bigamy which only exists in the statute books), in today's permissive society, the values and aspirations are not merely those of a person suspected of corruption or economic crime, but of the people or citizenry that there shall be zero tolerance to corruption and economic crimes such as drug trafficking and associated crime of money laundering be it through stock securities or the building of estates at home or overseas or other channels.

Thirdly, when there is any doubt in the interpretation of Statute, what is to be considered the object of which the power was donated or the fundamental right of the individual" In the ***Mwangi Case*** the Court was of the view that recognizing the status of the Constitution, there is room for excluding the general rules of interpretation to see that the purport, spirit and vision of the Constitution are kept intact and in harmony. In the ***Dynabo Case*** – the Constitutions were to be interpreted in accordance with ***the will*** and ***dominant*** aspirations of the people should prevail. And how does a court discover that will and dominant aspiration of the people"

That will and aspiration of the people is not discovered in some wild fantasy and exploration of the liberal, generous, and purpose of the spirit of the Constitution. That will aspiration and spirit will be found only in the language of the Constitution. Das J. in ***KESHAVA MENON –VS- STATE OF BOMBAY [1951] S.C. R. 228***, a Bombay Case, cited in the ***El mann Case*** said-

***"An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion, but a Court of Law has to gather the spirit of the Constitution from the language of the Constitution. What we may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view."***

***Or as Tebbut J. put in Park-Ross & Another –Vs- Director of Office of Serious Economic Offences*** *(supra)* ***…… to hold that a wide interpretation, for which the applicant contends exists, this Court would have to search for and find it in some general considerations and disregard the specificity of the framers of the Constitution in enacting Section 25 should they have wished to extend the right to remain silent to those, one would have expected provision to that effect instead of every specific reference to such right in Section 25 (02) (a) ."***

In the same way the Court in ***El mann –Vs- Republic*** (supra) adopted this dictum, so do we. In addition we may add that to construe the language of a Constitution in its or their literal or ordinary meaning is not to equate the Constitution with any legislative enactment. It must also be always borne in

mind that the Constitution whether adopted by a Constituent Assembly or by way of a plebiscite is still a legislative enactment, the difference only lies in the special or specific majorities for its enactment to be effective. A Constitution will therefore be construed widely or broadly (we avoid the use of the expression "***liberally***" because it has other connotations – like in same sex unions which to the majority of our people would be an abomination, and not so to others) if there is a reason for so doing, the reason usually being that there is some ambiguity in the language used and to give it a literal meaning would lead to an absurdity.

That is not the case here either in terms of Section 77 (1) of 77 (2) (b) or indeed 77(7). The Plaintiff has not been charged in any Court of law. His right to the presumption of innocence, or to testify against himself has not been called into question. This is an investigation. Indeed as Tebutt J. said in the ***Park Ross*** of section 5 of the South-African Act similar to our Section 26-

***"An inquiry under section 5 is not part of any criminal process and cannot be regarded as the investigative stage of criminal process. No one can say that because of such an inquiry takes place, criminal charges are likely to follow therefrom. Nobody is an accused at that stage nor is anyone necessarily likely to be."***

In ***R. Vs HERBERT [1990]*** 57 3 d 1 it was stated at page 10 – any constitutional right to remain silent should not be equated with the related privilege against self-incrimination. The latter is the privilege of limited scope of a witness in Court proceedings not to answer a question which may incriminate him.

It is also observed that the right to silence is not an absolute right. Under Section 157 of the Evidence Act, the Court is allowed to draw adverse inference from an answer of a witness.

Statutes presuming guilt or putting the burden upon the suspect are strewn all over the statute books. For instance under the Traffic Act, (***Cap 403***) a Police officer may stop a motorist for his driving licence and a person who fails to produce one is guilty of an offence (Section 36 of that Act). Similar provisions are to be found in the Customs and Excise Act (Cap 472) the Income Tax Act, (Cap. 470).

OF ALLEGED DISCRIMINATION

Senior Counsel Hon. P.K. Muite, contended that the 1st Defendant was applying the provisions of the Anti-Corruption and Economic Crimes Act selectively and in a discriminatory manner against the Plaintiff in contravention of the provisions of Section 82 (1) and (2) of the Constitution of Kenya.

By the very provision that no person shall be discriminated against on account of his race, tribe, place of origin or residence or other local connection political opinion, colour or creed, the Anti-Corruption and Economic Crimes Act applies to every person in Kenya regardless of race, tribe etc and the Act is not therefore contrary to or inconsistent with provisions of Section 82 of the Constitution of the Republic of Kenya.

**OF ALLEGED INHUMAN & DEGRADING TREATMENT OF THE PLAINTIFF**

The contention here is that the requirement by the First Defendant that the Plaintiff furnishes a list of his assets constitutes torture, inhuman or degrading punishment or other treatment. Frankly we think that this contention would be laughable except for the connotation to treat the court as a theatre of the absurd. The object of the Anti-Corruption and Economic Crimes Act in its entirety is to provide an enforceable legislative or legal framework as its long title clearly states an Act of Parliament to provide

for the prevention, investigation (***or detection***) and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith. Requiring the Plaintiff to declare his earthly possessions in pursuit of this objective may cause a person suspected of corruption or economic crimes, some mental anxiety, but cannot constitute torture, or inhuman or degrading treatment within the meaning contemplated by Section 74 of the Constitution.

Professor Muigai learned Counsel for the 1st Defendant was helpful to us by referring to one case, but the Plaintiff's Counsel did not cite any authority to support the Plaintiff's contention that a demand to furnish particulars of his earthly possessions is torture. In the Ugandan case of ***SUSAN KIGULA & 416 OTHERS -VS- ATTORNEY-GENERAL,*** Kampala **,** Constitutional Court, Constitutional Petition No. 6 of 2003, Twinomujunu J.A. while determining the question of the Constitutionality of the death sentence in Uganda observed as follows-

***"I now turn to the determination of the merits of the questions posed by the first two issues of this petition, namely:-***

***Is a death sentence prescribed by Ugandan Penal laws, cruel, inhuman or degrading treatment or punishment within the meaning of Article 24 of the Constitution""***

The learned Judge of Appeal then continued and said-

***" I have read all the Affidavits filed on behalf of both parties to the Petition. They portray the death sentence as a sordid, barbaric and extremely harrowing experience. I have also studied all the authorities, local and foreign, together with the relevant legislative and Constitutional provisions. I have also studied all international conventions on death penalty. I have no hesitation whatsoever that a death sentence is cruel, inhuman and degrading punishment within the meaning attributed to those words in*** *ATTORNEY-GENERAL –VS- ABUKI, KYAMANYWA –VS- UGANDA REPUBLIC –VS MBUSHUU STATE -VS- MAKWANYANE, KAKU –VS STATE (1998) 13 NWC R. 54,* ***and several others cited from the U.S.A countries, India and Bangladesh. However that is not the issue which fall for determination now. The issue is the death penalty in Uganda, cruel, inhuman degrading punishment or treatment within the meaning of Article 24 of the Constitution of Uganda.....***

***In short the right to life is*** *guaranteed except* ***where deprivation of life is done in execution of a death sentence passed by the court in accordance with the Constitution and the laws of Uganda. My simple understanding of this provision is that though the right to life is guaranteed the right is not absolute because there is one exception where life can be lawfully extinguished. That is when carrying out a death penalty lawfully imposed by courts."***

We have read and considered the Application, the authorities submitted by Counsel for the Plaintiff. In our view the Plaintiff cannot say that his fundamental rights under Section 70(a) & (c), 74, 76, 77 (a) 77 (7), and 84 (1) & (2) of the Constitution have been contravened or are being threatened with contravention. The Plaintiff has not met any of the threshold tests for breach of fundamental rights as laid down in such cases as ***ANARITA KARIMI NJERU –VS- REPUBLIC*** (No. 1) [1979] K.L.R. 154, where Trevelyan and Hancox JJ said:-

***"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 or precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged***

***to be infringed."***

This case has been consistently followed in subsequent recent cases including **PATTNI & ANOTHER -Vs- REPUBLIC [2001] K.L.R. 264 and subsequent cases. NJOYA & 6 OTHERS -VS- ATTORNEY-ENERAL & ANOTHER [2004] I.K.L.R. 232; MEME –VS- REPUBLIC & ANOTHER** [2004] I.K.L.R. 637 holding No. 7.

We therefore find and hold that the Plaintiff has not discharged the burden placed upon him as an applicant to show that any of his fundamental rights as to presumption of innocence, and non-self incrimination, or being subjected torture or inhuman or degrading or other treatment have been contravened or are threatened with contravention.

**OF PRE-TRIAL PUBLICITY**

It is moot argument whether the alleged pre-trial adverse publicity orchestrated by the First Defendant and/or carried with the connivance or both of the electronic and print media is likely to contravene the right to a fair hearing as guaranteed under section 77 (1) and 77 (7) of the Constitution. It is moot because the Plaintiff has not been charged with any offence. There is no promise or assurance from any quarter that the Plaintiff will be charged with any offence. Besides no evidence was adduced or demonstrated to us that the First Defendant has orchestrated any adverse publicity against the Applicant. In any case as it was held in ***KAMLESH PATTNI –VS- ATTORNEY-GENERAI***, media publicity ***per se*** does not constitute a violation of a party's right to a fair hearing.

OF THE PUBLIC INTEREST UNDER SECTION 70 OF THE CONSTITUTION AND SECTIONS 26, 27, & 28 OF THE ACT

In a way we have covered this subject in our discussion on Jean Rousseau and the Social Contract and Fredrick A. Hayek on ***Law and Legislation and Liberty***, (***supra)*** regarding the paramount interest and expectation of the people or citizenry of a country such as Kenya. Section 70 of the Constitution of the Republic of Kenya, makes every right of the individual subject to the public interest and the rights of the people. To that extent therefore Sections 26, 27, and 28 of the Anti-Corruption and Economic Crimes Act, 2003, are intended to foster the objective of the Act, namely, to provide the legal framework for the prevention, investigation (and detection) prosecution through the Attorney-General and punishment of corruption, economic crimes and related offences and for matters incidental and connected therewith. Those provisions are in due accord with the public interest and the rights and interests of the larger body or **corpus** of Kenyans.

**OF THE CONSTITUTIONALITY AND CONSTITUTIONAL JUSTIFICATION OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT.**

We reiterate what we have said above of the constitutionality and constitutional justification of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3) 2003. It is this. The Act pursues an objective that it is sufficiently important to justify the limiting of individual constitutional rights, for indeed no such rights are absolute as we have demonstrated above. They are subject to the public interest enshrined in the welfare or rights of the community whole. As ***JAMES MUIGAI WARUI*** **,** Senior State Counsel aptly put it at paragraph (d) of his Replying Affidavit (***supra)-***

***"The Application by KACC of the provisions of Sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act, 2003, against the Applicant has given rise to the operation of two fundamental principles which every democratic society is called upon to apply from time***

***to time namely:-***

**(i)** that the citizen undertakes to live by the laws which protect him and must accept the penalties that may flow from the application of those laws.

(ii) that when actions of public officers (and we should add political leaders or Ministers) undermine public confidence, the public is entitled through criminal trials to know what those officers (have done or purported to do) in their name."

As stated above, the massive and debilitating cancerous nature of corruption in Kenya has impoverished and continues to impoverish the great majority of the Kenyan masses, and leads to robbing Kenyans of resources to build, repair and maintain a run-down infrastructure inadequate health services, and mediocre and inadequate educational facilities. It has led to spiral inflation and unemployment. In our humble view, therefore, urgent, swift and proper investigations are justified. Section 26, 27 and 28 saves investigative time. The Kenya Anti-Corruption Commission is spared time to investigate basic issues as to who owns what or when or how it was acquired and for what consideration. The furnishing of such information does not necessarily mean that the suspect will definitely be charged or prosecuted. There are many imponderables before a prosecution is availed as we outlined in the case of ***OTIENO CLIFFORD RICHARD -VS- REPUBLIC (MISC. CIVIL CASE NO. 720 OF 2005 (O.S.)).***

Investigations and particularly those involving modern economic crimes and corruption are complex and require investigative skills and knowledge of a specialized nature. Corruption and related offences of economic crimes require the setting up of a special body or unit to deal with them Parliament in its wisdom indeed realised this, and thus provided for the establishment of the Kenya Anti-Corruption Commission. In the discharge of its mandate, the Commission has among its ranks investigators of diverse knowledge and skills, Engineers, Architects, Quantity Surveyors, Auditors and Lawyers. This is the team charged with the investigation, detection and prevention of corruption and economic crimes.

To enable the Commission to operate effectively, it is the provisions set out in Section 26, 27 and 28 of the Act which are a necessary tool in the discharge of the Commission's mandate.

The late ***RUBERT CROSS*** who did much to revive the discussion of the principles of evidence called the right to silence "***a sacred cow***." More recently the London Metropolitan Commissioner called for its abolition, and wondered how the "***so called***" right to silence ever gained any sort of respectable place in the English tradition." The Commissioner concluded by endorsing the view of one of his predecessors that the ***right to silence "has done more to obscure*** the truth and facilitate crime than anything else in this country."

The said comment might be said of the Criminal Law (Amendment) Act that confessions be made before a magistrate – a court which has absolutely no training or knowledge or the techniques in investigation of crime and detection of evidence let alone a confession from a sophisticated criminal.

FINDINGS AND CONCLUSIONS

Being therefore of the above mind, we now revert to the Plaintiffs' prayers and questions set out at the beginning of this long judgement.

***(1) All fundamental rights whether described as inherent, inalienable, universal, fundamental, legal and Constitutional whether to be presumed innocent or to life itself are***

***subject to that qualification, that such rights are subject to such limitations that are designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.***

***In the case of our Constitution, Section 77(2) (a), (the right to be presumed innocent) and Section 77 (7) (the right not to incriminate or bear testimony against self), the language of the Constitution is clear and unambiguous, admitting only of one meaning, that the right to be presumed innocent and not to bear witness against self arise only upon being charged with a criminal offence, and not before.***

***(ii) Sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act are investigatory provisions and do not change or reverse the burden of proof, in criminal cases. The burden of proof rests on the prosecution always not on the shoulders of the investigators. In any event Section 72 (1) (e) clearly provides that a person may be deprived of his personal liberty upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Kenya.***

***An investigation by the Director of the Kenya Anti-Corruption or his Commission under Sections 26, 27 and 28 of the Act is constitutionally permissible pursuant to said section 72 (1) (e). Section 77 (2) (a) (h) and indeed 77 (7) of the Constitution are applicable only when a person has been charged with a criminal offence.***

***(iii) Under the social contract and indeed under the Limitation prescribed under Section 70 of the Constitution that the right not only to the*** *Protection of the Privacy of home and other property* and deprivation of property without compensation, ***but to dear life itself, liberty or security of the person and the protection of the law and freedom of conscience, of expression and of assembly and association, the statutory requirement under section 26 in respect of a person reasonably suspected of corruption under sections 27 and in respect of associates), and section*** *28 (in respect of records books and documents),* ***are a necessary and constitutionally justifiable intrusion of the privacy of home and the property in the interest of the rights and freedoms of others and the public interest. It is not justifiable in a democratic society that communal wealth should be spirited and starched way through corruption and economic crime.***

***(iv) The First Defendant's statutory requirement that the Plaintiff do furnish a list of all the Plaintiff's property and mode of acquisition is neither inhumane, demeaning nor degrading treatment nor in contravention of Section 74 (1) of the Constitution of Kenya which provisions prohibit torture degrading or inhuman treatment).***

***(v) Sections 26 (1), 27 and 28 of the Anti-Corruption and Economic Crimes Act are not inconsistent with the provisions of Section 70 (a), 70 (c) 77(2) (a), 76 (1), 77(7) or 82 of the Constitution of Kenya.***

***(vi) Clearly under Section 77 (7) of the Constitution the Constitutional right against self-incrimination is only available where a person has been charged with a criminal offence. It is not under the clear language of our Constitution available during investigations or prior to being charged. Besides, if life may be taken away, by order of court as prescribed under section 71 (1) of the Constitution, Why would a right not to self-incriminate not be limited to the time of testimony after being charged" It is the same Constitution and no right is superior or higher than another.***

(vii) ***The question whether the pre-trial adverse publicity of the Plaintiff, whether orchestrated by the First Defendant and/or with his connivance (and there was no evidence to that affect before us) both in the electronic and print media is likely or at all to affect a fair trial and a fair hearing as guaranteed under Section 77 (1) & 77 (9) of the Constitution is purely speculative for the Plaintiff has not been charged with any anti-corruption offence or economic crime. The current charges against the Plaintiff under Section 26 (2) of the Act are as a result of the failure by the Plaintiff to comply with the notice under Section 26 (1) of the Act.***

(viii) ***In matters of investigation each individual case is in our opinion treated in accordance with its peculiarity giving rise to reasonable suspicion on the part of the Director of the Commission, and every Kenyan or resident or other person suspected of corruption and economic crime is subject to investigation without regard to his race, tribe, place of origin or residence or other local connection, political opinion, colour, creed or sex. The Plaintiff herein did not adduce any evidence or particulars to show that persons of such description (race, tribe, etc***) are subjected to disabilities or restrictions ***to which persons of another description are not made subject or accorded privileges or advantages which are not accorded to persons of another description. Gazette Notice No. 8587 of 19th October, 2006 showed no less than fifty cases investigated or under investigation by the Commission for the quarter covering 1st July, 2006 to 30th September, 2006. We find and hold that the Plaintiff has not been discriminated in any manner under Section 82 (1) and (2) of the Constitution of Kenya.***

(ix) ***The fundamental right to life, liberty, security of the person and the protection of the law accorded under section 70 (a) of the Constitution is at the same time limited to the extent that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. What the Constitution has itself limited cannot be unconstitutional or be regarded to be contrary to the rule of law the public interest or public policy or public decency.***

***We find and hold that investigations by the First Defendant are in accordance with the law, are neither arbitrary, high handed nor a witch hunt or for extraneous purposes and are not to gain political mileage.***

***On the contrary, we find and hold that the investigations by the First Defendant are in accord with the law, and are intended to uphold and enforce the criminal law in so far as Corruption and economic crime are concerned for these are complex and sophisticated modern crimes and the result of which cause poverty, underdevelopment and misery among our people. Such investigations do not impinge upon the provisions of Section 70 (a) of the Constitution.***

***The presumption of a corrupt act under Section 58 of the Act is not a shift of the burden of proof. The presumption of a corrupt act is reached upon proof, by the prosecution and again, that presumption applies at the trial, not the investigation. We therefore hold that the said section does not offend either Section 77 (2) (a), or Section 77 (7) of the Constitution.***

In the result therefore and save for the limited grant of part only of prayer No. 10 (quashing the notice dated 9th January, 2006, and the prosecution founded on it,) all the Plaintiff's prayers and questions must be answered in the negative, and the Plaintiff's Originating Summons dated and filed on 1st February, 2006 is hereby dismissed with costs to the Defendants.

We further direct that the law should take its course. There shall be orders accordingly.

We thank Hon. Paul K. Muite, Senior Counsel and his team of Mr. Kioko Kilukumi, Professor Muigai for the First

Defendant and Mr. James Mungai Warui learned Counsel for the First and Second Defendants respectively.

Dated and delivered at Nairobi this 1st day of December, 2006.

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J.W. Lesiit

Judge

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R.P.V. Wendoh

Judge

……

M.J. Anyara Emukule

Judge.

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