



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC MISC.APPL.NO.42 OF 2018**

TATU CITY LIMITED .....1<sup>ST</sup> APPLICANT

KOFINAF COMPANY LIMITED..... 2<sup>ND</sup> APPLICANT

**VERSUS**

ETHICS AND ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> RESPONDENT

ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

**RULING**

The Applicants herein brought this *Notice of Motion* application dated 23<sup>rd</sup> November 2018 and sought for the following prayers:-

***1) That Tatu City Limited and Kofinaf Company Limited, the Applicants herein, be and are hereby granted Leave to bring a Judicial Review application for orders:-***

***a) That an Order of Certiorari does issue to bring into the Environment and Land Court the decision of the 1<sup>st</sup> Respondent contained and reflected in its letter dated 24<sup>th</sup> September 2018, Ref.EACC.6/16/1 Vol/LXVI(30) to the Principal Secretary, Ministry of Lands and Physical Planning advising that the 1<sup>st</sup> Respondent is investigating allegation of tax evasion and money laundering touching on the properties known as LR.Nos.11287, 11294, 11288, 10083, 10083/2, 10877, 11285, 11289, 11294, 11428, 11486, 117, 247/1 and 248/5, 111/1, 110/2, 113/1, 113/2, 7192, 7386, 8182, 28867, 91, 11538/2, 11536/8(104), 6906, 7787 and 5815 respectively for the purpose of being quashed and the said decision be quashed.***

***b) That an Order of Certiorari does issue to bring into the Environment and Land Court the decision of the 1<sup>st</sup> Respondent contained and reflected in its letter dated 24<sup>th</sup> September 2018, Ref.EACC.6/16/1 Vol/LXVI(30) to the Principal Secretary, Ministry of Lands and Physical Planning requesting original documents and other information pertaining to the properties known as LR.Nos.11287, 11294, 11288, 10083, 10083/2, 10877, 11285, 11289, 11294, 11428, 11486, 117, 247/1 and 248/5, 111/1, 110/2, 113/1, 113/2, 7192, 7386, 8182, 28867, 91, 11538/2, 11536/8(104), 6906, 7787 and 5815 respectively, particularly the deed file(s), documents touching on the transfer(s), application forms for stamp duty, valuation report(s), stamp duty receipt(s), official search(es), rent clearance certificate(s), correspondence file(s), part development plan(s), computation files(s) and survey plan(s) so as to facilitate investigation by the 1<sup>st</sup> Respondent of alleged tax evasion and money laundering touching on the said properties for the purpose of being quashed and the said decision be quashed.***

***c) That an Order of Certiorari does issue to bring into the Environment and Land Court the decision of the 1<sup>st</sup> Respondent contained and reflected in its letter dated 30<sup>th</sup> September 2018, Ref.EACC.6/16/Vol.VI(65) from the 1<sup>st</sup> Respondent to the Principal Secretary, Ministry of Lands and Physical Planning requesting that a Government Caveat be placed on the properties known as LR.Nos.11287, 11294, 11288, 10083, 10083/2, 10877, 11285, 11289, 11294, 11428, 11486, 117, 247/1 and 248/5, 111/1, 110/2, 113/1, 113/2, 7192, 7386, 8182, 28867, 91, 11538/2, 11536/8(104), 6906, 7787, 295/15, 5815, 248/1, 1337, 1842, 8810 and***

8321 respectively restricting further transactions pending the outcome of the investigation of alleged tax evasion and money laundering touching on the said properties for the purpose of being quashed and the said decision be quashed.

d) That an Order of Certiorari does issue to bring into the Environment and Land Court the decision of the 1<sup>st</sup> Respondent contained and reflected its letter dated 2<sup>nd</sup> November 2018, Ref.EACC.6/16/1 Vol.VI(78) to the Director of Survey, Department of survey, Ministry of Lands and Physical Planning requesting original documents and other information pertaining to the properties known as LR.Nos.11287, 11294, 11288, 10083, 10083/2, 10877, 11285, 11289, 11294, 11428, 11486, 117, 247/1 and 248/5, 111/1, 110/2, 113/1, 113/2, 7192, 7386, 8182, 28867, 91, 11538/2, 11536/8(104), 6906, 7787, 295/15, 5815, 248/1, 1337, 1842, 8810 and 8321 respectively, particularly RIM(s), survey Plan(s), Maps, Computation file(s) and deed plan(s) so as to facilitate by the 1<sup>st</sup> Respondent of the alleged tax evasion and money laundering touching on the said properties for the purpose of being quashed and the said decision be quashed.

e) That an order of prohibition does issue restraining the 1<sup>st</sup> Respondent from conducting or further conducting any investigations, or taking any step towards investigating or making and taking any step towards making any inquiries, suggestions or recommendations whether to the Director of Public Prosecutions or any other person or instituting any legal proceedings whether civil or criminal in nature before any court of competent jurisdiction in Kenya, as a result of such investigation or inquiry that may be conducted by the 1<sup>st</sup> Respondent concerning any alleged tax evasion and money laundering relating the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, irrespective of whether or not such investigation or inquiry touches on the properties known as LR.Nos.11287, 11294, 11288, 10083, 10083/2, 10877, 11285, 11289, 11294, 11428, 11486, 117, 247/1 and 248/5, 111/1, 110/2, 113/1, 113/2, 7192, 7386, 8182, 28867, 91, 11538/2, 11536/8(104), 6906, 7787, 295/15, 5815, 248/1, 1337, 1842, 8810 and 8321 respectively

2) That the grant of Leave herein do operate as a Stay of the 1<sup>st</sup> Respondent's decision reflected in its letter dated 24<sup>th</sup> September 2018, Ref.EACC.6/16/1 Vol.LXVI(30) to the Principal Secretary, Ministry of Lands and Physical Planning, letter dated 30<sup>th</sup> September 2018 Ref.EACC.6/16/vol.VI(65) from the 1<sup>st</sup> Respondent to the Principal Secretary, Ministry of Lands and Physical Planning, and letter dated 2<sup>nd</sup> November 2018 Ref.EACC.6/17/1 Vol VI(79) to the Director of Survey, Department of Survey, Ministry of Lands and Physical Planning, the implementation of the said decisions of the 1<sup>st</sup> Respondent whether by the Principal Secretary, Ministry of Lands and Physical Planning or any other employee, servant or agent of the Ministry of Lands and Physical Planning including the Director of Survey, Directorate of Survey, or the Chief Land Registrar or any other Land Registrar, pending the hearing and final determination of the intended application by Tatu City Limited and Kofinaf Company Limited, the Applicants herein for Judicial Review Orders in the terms of prayer No.3 hereinabove.

3) That the grant of Leave herein do operate as a Stay of the 1<sup>st</sup> Respondent's decision to investigate and/or make inquiries, any suggestions or recommendations whether to the Director of Public Prosecutions or any other person, or instituting any legal proceedings whether civil or criminal in nature before any court of competent jurisdiction in Kenya, as a result of such investigations or inquiry that may be conducted by the 1<sup>st</sup> Respondent concerning any alleged tax evasion and money laundering touching on the properties known as LR.Nos.11287, 11294, 11288, 10083, 10083/2, 10877, 11285, 11289, 11294, 11428, 11486, 117, 247/1 and 248/5, 111/1, 110/2, 113/1, 113/2, 7192, 7386, 8182, 28867, 91, 11538/2, 11536/8(104), 6906, 7787, 295/15, 5815, 248/1, 1337, 1842, 8810 and 8321 respectively or concerning the 1<sup>st</sup> and 2<sup>nd</sup> Applicants.

This application is based on the grounds stated in the face of the said application and among the said grounds are:-

1) That in June 2015, the majority owner and developer of Tatu City had instituted proceedings in London before the London Court of International Arbitration (LCIA) against Manhattan Coffee Investments Holding Limited, (an off shore entity by which Steve Mwangiru, Vimal Shah and Nahashon Nyagah had fraudulently misrepresented their financial contribution in the Tatu City Project).

2) That after a 2 year process, the LCIA published a fully reasoned 127-page award given by Simon Nesbitt QC on 15<sup>th</sup> February 2018, finding for the majority owner and developer of Tatu City Project, on all counts and confirming that Steve Mwangiru and his partners, Nahashon Nyagah and Vimal Shah had made fraudulent misrepresentations concerning their financial contributions in the Tatu City Project and ordered Steve Mwangiru, Vimal Shah to pay more than USD 17 Million to the project developer for fraudulent misrepresentation.

3) That to help Steve Mwangiru and his partners, Vimal Shah and Nahashon Nyagah avoid enforcement of the LCIA Award and

their international legal obligations, Steve Mwagiru petitioned the Ministry of Lands through one Winfred Wanjiku Gitonga to replace the caveats on land belonging to Tatu City and Kofinaf and, when the Ministry of Lands refused to accede to his request, Steve Mwagiru instituted a case in Thika against the Chief Land Registrar in April 2018 and asked for an injunction to stop Tatu City and Kofinaf from dealing with their land.

4) That thereafter, to pave his way to make further extortive claims, Steve Mwagiru procured Winfred Wanjiku Gitonga to file a Petition before the National Assembly in May 2018 seeking, amongst other things, a resolution of the National Assembly to replace the caveats. However, the Petition was rejected as wholly inappropriate because the power to determine disputes relating to land titles is bestowed on the Environment and Land Court.

5) That the Petition represented another instalment in a string of improper and abusive actions by Steve Mwagiru intended to disrupt the operations of Tatu City and Kofinaf and disrupt their business, in the expectation that they would obtain a larger share of the Tatu City Project from it's the majority share and developer.

6) That the majority owner and developer of Tatu City then requested the Speaker of the National Assembly in October 2018 to review the sincerity of the Petition, which it believed, had been founded on a concoction of deceit, fraud, misinformation, and corruption designed to derail a major foreign direct investment in Kenya.

7) That the Speaker of the National Assembly responded vide his letter dated 26<sup>th</sup> October 2018 stating that because the House had not received either the report of the Lands Committee within the stipulated period of sixty days from when the Petition was committed to the Committee or a request for extension of time, the Petition was therefore spent by operation of law and the Lands Committee had become functus officio on the matter.

8) That Section 82(1) and (2) of the Proceeds and Crime and Anti-money Laundering Act (Cap 59B Laws of Kenya) do not empower the 1<sup>st</sup> Respondent to direct that any registered owner of private land in Kenya be restrained from dealing with any property in cases of money laundering because such power is vested in courts of law which may only issue such preservation orders on the application of the Director of the Assets Recovery Agency if there is reasonable ground to believe that the property concerned either has been used or is intended for use in the commission of an offence or is proceeds of crime.

9) That the string of improper and abusive actions by the 1<sup>st</sup> Respondent represent the most recent unwelcome and wholly unsolicited adverse actions undertaken and perpetrated at Steve Mwagiru's instance in order to cause loss to Tatu City and Kofinaf by paralyzing their operations thereby disrupting their business in the expectation that such a situation will force the majority owner and developer of the Tatu City Project to give Steve Mwagiru a larger share of the project as forbearance for withdrawal of the hostile action.

10) That Tatu City and Kofinaf are apprehensive that the 1<sup>st</sup>

Respondent intends to continue to harass Tatu City and Kofinaf and the harassment will persist in this conduct unless restrained by Court Order.

11) That the Orders of Stay sought herein are urgently needed to preserve Tatu City and Kofinaf's fundamental right to establishment of Tatu City, a World Class comprehensive mixed use development in Kiambu County that seeks to contribute to the Big Four Agenda of contributing 10,000 affordable homes pending the hearing and final determination of their intended application for Judicial Review Orders.

12) That unless the Orders of Stay sought in the present Chamber Summons application are urgently granted, this suit and the relief sought herein will become nugatory.

The application is further supported by the Statutory Statement and the Supporting Affidavit of Christopher Barron, the Chief Operating Officer of Tatu City Limited and Kofinaf Co. Ltd, the Applicants herein. The said Supporting Affidavit basically reiterated the contents of the Grounds in Support of this application and further averred that no sooner had the Speaker of the National Assembly ruled that the Petition was spent and the Lands Committee had become functus officio, than a letter dated 30<sup>th</sup> September 2018 was delivered on 30<sup>th</sup> October 2018 by the 1<sup>st</sup> Respondent to the Principal Secretary, Ministry of Lands and

*Physical Planning* directing that a *Government Caveat* be placed on the properties known as LR.Nos.11287, 11294, 11288, 10083, 10083/2, 10877, 11285, 11289, 11294, 11428, 11486, 117, 247/1 and 248/5, 111/1, 110/2, 113/1, 113/2, 7192, 7386, 8182, 28867, 91, 11538/2, 11536/8(104), 6906, 7787, 295/15, 5815, 248/1, 1337, 1842, 8810 & 8321 respectively restricting further transactions pending the outcome of an investigation on *Tatu City* and *Kofinaf* for alleged tax evasion and money laundering touching on the said properties.

It was his further contention that the decision by the 1<sup>st</sup> Respondent to place the restrictions on the land was made in bad faith without giving the Applicants a hearing because it had been designed to prevent the development of the *Tatu City Project* by paralyzing the operation of *Tatu City* and *Kofinaf* and also disrupt their business. He further averred that he verily believe that the 1<sup>st</sup> Respondent's decision to take original documents and other information pertaining to the properties is designed to cripple the operations of the Applicants, despite the fact that 1<sup>st</sup> Respondent lacks jurisdiction to investigate the alleged *tax evasion* and *money laundering*. He urged the Court to allow the instant application.

The *Attorney General* being the 2<sup>nd</sup> Respondent filed a *Memorandum of Appearance* through *Oscar M. Eredi, Deputy Chief State Counsel*, but did not file any response to the instant application. However, *Mr. Eredi* opposed the application by submitting that this Court lacked jurisdiction to entertain this matter.

However, the 1<sup>st</sup> Respondent filed *Grounds of Opposition* on 28<sup>th</sup> November 2018, and also filed a *Notice of Motion* application dated 27<sup>th</sup> November 2018, and sought for transfer of this matter to the *Anti-Corruption & Economics Crimes Division* of the *High Court at Nairobi*.

In its *Grounds of Opposition*, the 1<sup>st</sup> Respondent averred that:-

- a) *The court lacks jurisdiction to hear and determine the application as the matter falls within the jurisdiction of the Anti-corruption and Economic Division of the High Court.*
- b) *The application is fatally defective, bad in law, an abuse of the court process and ought to be dismissed.*
- c) *The 1<sup>st</sup> Respondent has a statutory duty to undertake an investigation into any conduct amounting to, or suspected to amount to, corruption or economic crime and made recommendations to the 2<sup>nd</sup> Respondent based on the evidence gathered or take any other necessary action.*
- d) *The application is therefore not well founded and/or does not disclose a prima-facie case meriting substantive hearing and therefore ought to be dismissed.*
- e) *The decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to investigate, recommend and prosecute respectively should not be amenable to Judicial Review.*
- f) *Granting the orders sought would be against public interest to have cases concluded at the earliest possible time.*
- g) *The Ex-parte Applicants will not suffer any prejudice nor would the application be rendered nugatory if the orders sought are not granted.*

In its *Notice of Motion* dated 27<sup>th</sup> November 2018, wherein the 1<sup>st</sup> Respondent sought for transfer of this matter to the *Anti-corruption & Economic Crime Division* of the High Court, the 1<sup>st</sup> Respondent relied on the following grounds:-

- i. *That on 8<sup>th</sup> December 2015, the Chief Justice, in the interest of effective case management and in order that similar disputes are effectively and efficiently adjudicated before specialized divisions of the High Court, established the Anti-corruption and Economic Crimes Division of the High Court.*
- ii. *That on 9<sup>th</sup> December 2016, the Chief Justice issued Practice Directions pursuant to Section 5 of the Judicial Service Act No.1 of 2011 and Section 16 of the High Court (Organization and Administration) Act, No.27 of 2015 and directed interalia that all*

*matters relating to corruption and economic crimes be filed, heard and determined in the Anti-corruption and Economic Division of the High Court.*

*iii. That vide the said Practice Directions, the Chief Justice also stated that all matters filed under the proceeds of Crime and Anti-money Laundering Act be heard and determined by the Anti-Corruption and Economic Division of the High Court.*

*iv. That on 20<sup>th</sup> July 2018, the Chief Justice through Gazette Notice No.7262, further directed that all new Anti-Corruption and Economic Crimes matters be filed in the Principal Registry of the Division of Nairobi for hearing and determination.*

*v. That the Respondents application is an application for Leave to seek various Judicial Review Orders against the Applicant's letters/decision/requests to the Principal Secretary, Ministry of Lands as borne in correspondences dated 24<sup>th</sup> September 2018, 30<sup>th</sup> September 2018 and 2<sup>nd</sup> November 2018, whose entire contents in sum inform of the investigations by the Applicant into allegations of tax evasion and money laundering with regards to transactions involving the Respondents' subject parcels of land as well as a requests for original documents relating thereto.*

*vi. That the Judicial Review Orders intended to be sought by the Respondents are in their entirety meant to stop the Applicants from making any further inquiries and/or investigations into the transactions involving the subject parcels of land, or making recommendations with regard to the said investigations to be relevant third parties which matters do not necessarily involve the title to, use and occupation of the properties.*

*vii. That in the premises, it is just and expedient that the instant application and/or proceedings be transferred to the Anti-Corruption and Economic Crimes Division of the High Court for determination.*

The application is also supported by the *Affidavit* of **Diana C. Kenduiwa**, an Advocate of the High Court of Kenya who is in conduct of this matter on behalf of the 1<sup>st</sup> Respondent. She also reiterated the contents of the grounds in support of the instant application and further averred that it is evident that the issues that this Court shall be called upon to adjudicate involve matters of investigations into alleged tax evasion and money laundering for which a special forum has been provided.

It was her contention that the question relate to transactions over the parcels of land *vis-a-vis* questions of title thereto, use or occupation thereof. Therefore the matter herein fall within the jurisdiction of **Anti-Corruption & Economic Crimes Division** of the High Court and she urged the Court to transfer this matter to the said court.

The two applications were canvassed orally and simultaneously in open court on **28<sup>th</sup> November 2018**.

**Mr. Issa** for the Applicants submitted that the *Leave* being sought to institute Judicial Review is in respect of various letters issued by 1<sup>st</sup> Respondent. The first letter is dated **30<sup>th</sup> September 2018**, from the **Chief Executive Officer** of 1<sup>st</sup> Respondent, which urged the **Principal Secretary, Ministry of Lands** to place Government caveats on several land parcels owned by the Applicants herein. **Mr. Issa** also took the court through the various Petitions that had been filed against the Applicants by various persons on instigations of minority Shareholders led by **Steve Mwangiru**. Further he argued that the request by 1<sup>st</sup> Respondent to place caveats on the parcels of land owned by the Applicants is a continuation of the same harassment by the persons who came to court for orders but failed to get them, went to **Parliament** and now are using 1<sup>st</sup> Respondent to try and achieve their goal. He further submitted that transactions worth of Millions of Shillings are in danger of being halted if the 1<sup>st</sup> Respondent is allowed to carry on with its investigations, placing of caveats and obtaining of the **original** documents sought via the various letters.

**M/S Kenduiwa** for the 1<sup>st</sup> Respondent urged the Court to transfer this matter to **Anti-Corruption & Economic Crimes Division** of the High Court as she submitted that the Applicants application for Leave to institute Judicial Review is based on the correspondences by the 1<sup>st</sup> Respondent dated **24<sup>th</sup> September 2018**, **30<sup>th</sup> September 2018** and **2<sup>nd</sup> November 2018**, and that the said correspondences are related to the issues of money laundering and tax evasion and the **Judicial Review** sought herein is only meant to restrain the 1<sup>st</sup> Respondent from carrying any investigations over the subject parcels of land.

It was her further submissions that the said letters merely advised the **Principal Secretary Ministry of Lands** that there are investigations ongoing and that the said letters also requested for documents to enable investigations to be carried out. Therefore this matter falls squarely under the **Anti-Corruption & Economic Crimes Division** of the High Court.

Further that investigations are over transactions involving the Applicants named parcels of land and not ownership of the said parcels of land. Therefore the 1<sup>st</sup> Respondent should not be restrained from carrying out its mandate. It was her further submission that failure to grant the Order of Stay would not render the present proceedings nugatory and that no prima-facie case has been demonstrated by the Applicants herein.

The 1<sup>st</sup> Respondent further submitted that the findings of the *National Assembly* are not binding as Parliamentary findings are not decisions of a *competent court* and that the letters in issue will not affect the Applicants at all.

*Mr. Eredi*, for the 2<sup>nd</sup> Respondent also submitted the Applicants are challenging investigations being carried by 1<sup>st</sup> Respondent and the said offences investigated are Criminal Offences. Therefore, this Court being a specialized court does not have jurisdiction to deal with the issues at hand. It was his submission that Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act do not give this Court jurisdiction to deal with criminal matters and that jurisdiction lies squarely with the High Court. Further, that the documents to be quashed are not addressed to the Applicants but the same are privileged documents and it is against public policy for parties to obtain official government documents not addressed to them and then use them in court for their advantage. *Mr. Eredi* relied on the case of Baseline Architect...Vs...NHIF (2008)eKLR.

On the case of jurisdiction, he relied on the case of *Karisa Chengo* being *Petition No.5 of 2015*, wherein the jurisdiction of each court was set out. It was also his submissions that a court cannot pre-empt an investigation whose outcome is unknown. Further, that since Parliamentary findings are not conclusive, the said findings have no binding effect to this Court and there was *no nexus* between the allegations being investigated and the complaints in *Parliament*. He also submitted that there was no *prima-facie* case to allow the grant of *Leave* to file the Judicial Review.

*Mr. Eredi* further urged the Court to find that the court has no jurisdiction to hear this matter and if it finds that it has jurisdiction, then it should not issue any *Stay* and the sought *Leave* should not operate as a *Stay* as no prejudice will be occasioned to the Applicants.

*Mr. Issa* in response submitted that this Court has jurisdiction to hear and determine the matter herein and not even the Chief Justice through *Practice Directions* could take it away. It was his further submissions that the *Practice Directions* by the Chief Justice did not mean that matters before the *Environment and Land Court* should be referred to the High Court. He also submitted that issues of tax evasion and Stamp Duty taxes are not matters for *Anti-Corruption & Economic Crimes Division* of the High Court and further that valuation of Stamp duty falls squarely under the jurisdiction of the *Environment and Land Court* as provided by Section 13(2)(c) and (e) of the *Environment and Land Court Act*.

On the issue of prejudice, he submitted that the Applicants businesses are in danger of being affected by the allegations and investigations being made by 1<sup>st</sup> Respondent. Further that the placing of *Caveats* would cause damage to the parcels of land as no would be buyers can buy the said parcels of land with *Caveats* placed on them.

On the issue of where and how the Applicants obtained the letters in issue, *Mr. Issa* submitted that the said letters are in public domain and the said letters affect the interests of the Applicants and that the 1<sup>st</sup> Respondent is advancing a notion that goes against the interest of justice. He urged the Court to allow the instant application.

The Court has now carefully considered the instant applications and the annexures thereto. The Court too has considered the oral submissions advanced by the respective parties and the cited authorities, together with the relevant provisions of law.

At the heart of the applications herein are three letters written by the 1<sup>st</sup> Respondent on *30<sup>th</sup> September 2018*, *24<sup>th</sup> September 2018* and *2<sup>nd</sup> November 2018*. The said letters touch on various land parcels belonging to the Applicants and implementation of the said letters would have a ramification on the Applicants' *ownership, transactions* and *use* of the said land parcels.

In the letter of *30<sup>th</sup> September 2018*, contained on *page 836* of the Applicants' bundle of documents, the 1<sup>st</sup> Respondent had requested the *Principal Secretary, Ministry of Lands* to place *Government Caveats* on 33 parcels of land owned by the Applicants on allegations that the 1<sup>st</sup> Respondent was investigating the Applicants herein.

Further, on the letter dated *24<sup>th</sup> September 2018*, the 1<sup>st</sup> Respondent requested for *original documents*, relating to the 28 parcels of

land belonging to the Applicants for reasons that it was carrying out investigation of allegations of tax-evasion and money laundering touching on the stated parcels of land.

Again by a letter dated **2<sup>nd</sup> November 2018**, the 1<sup>st</sup> Respondent requested the **Director of Survey** to provide them with **original documents**, relating to **33** parcels of land belonging to the Applicants herein. Once original documents are removed from the Lands Office, then it means the owners of the parcels of land cannot carry out any transactions on the said parcels of land and that would affect the **use** of their parcels of land.

The Applicant have alleged that the issuance of the above stated letters is a continuation of persistent harassment on the Applicants by its minority shareholders led by **Steve Mwagiru**, who have used various persons and institutions to try and forestall the Applicants progress and work in **Tatu City**. However, the Respondents have alleged that the court herein does not have jurisdiction to deal with the matter because the said letters were issued in furtherance of investigations of criminal activities and this Court therefore has no jurisdiction to deal with matters that are of criminal nature.

The court's jurisdiction has been challenged. It is trite that jurisdiction is everything and when the court is divested of the said jurisdiction, then it has no option but to down its tools. See the case of **The Owners of the Motor Vessel 'Lillian S'...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1**, where the Court held that:-

**"...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

Further a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter then is obliged to decide the issue straightaway. See the case of **Ndimu...Vs...Ndimu & Another (2007) IEA 269**.

It is also not in doubt that jurisdiction of the court is created by the law. See the case of **Samuel Kamau Macharia & Ano...Vs...KCB & 2 Others (2012) eKLR**, where the Court held that:-

**"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law".**

The creation of Environment and Land Court is set out by **Article 162 (2)(b)** which provides:-

**"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**

**(a) .....**

**(b) the environment and the use and occupation of, and title to, land.**

In accordance with the above provision of the Constitution, the Environment and Land Courts were established and are governed by the ***Environment and Land Court Act No.19 of 2011, Section 13(1)*** of the said Act has set out the jurisdiction of the said Court.

Further, **Section 13(2) (a)** provides:-

**"In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—**

**(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources"**

It is apparent from the above provisions of law that the court has jurisdiction to deal with matters relating to **land use, title, tenure,**

*rates, rents and valuations* among other issues.

The Applicants have alleged that the three letters in issue are dealing with the issues of placing of Caveats on the named parcels of land and that would indeed affect the *use* and any *transactions* of the named parcels of land. Further the issue of placing any restraints on land disposition is provided for by Sections 68-78 of the Land Registration Act, No. 3 of 2012.

Further the letters also deal with requisition of *original* documents which documents affect the land *registration, transactions, use* and *tenure*. Therefore this Court finds that on the face of it, the Court has jurisdiction to consider the issue of placing of caveats on the suit properties.

Further the Court notes that the Applicants are seeking for orders of *Judicial Review* which is a special jurisdiction which is neither civil nor criminal. See the case of Commissioner of Lands...Vs...Hotel Kunste, Civil Appeal No.234 of 1995, and Sanghan Investment Ltd..Vs..Officer in Charge, Nairobi Remand and Allocation Prisons (2007) IEA 353, where the Court held that:-

***“Judicial Review jurisdiction is a special jurisdiction which is neither civil nor criminal”.***

The Court herein is therefore not called upon to make a decision in a criminal matter but on an issue of *Judicial Review*, which is the court’s constitutional supervision of public authorities. The public authority herein is the 1<sup>st</sup> Respondent whose correspondences are alleged likely to affect the Applicants’ *use* and *transactions* over their parcels of land and the Applicants are challenging the validity of that decision or action.

However on whether the 1<sup>st</sup> Respondent has authority or power to investigate the transactions relating to the said parcels of land over tax evasion and money laundering, the Court finds that is a preserve of the High Court and not this specialized court.

Therefore after careful consideration of the letter dated *30<sup>th</sup> September 2018*, over the placing on caveats on the Applicants’ parcels of land, the Court finds that it has jurisdiction and can therefore proceed and determine whether *Leave* should be granted to the Applicants to institute Judicial Review proceedings.

On whether the Applicants should be allowed to use the said letters which are **not** addressed to them in court to their advantage, the Court finds that these are not confidential letters but are letters addressed to public officers who are holders of public offices and are therefore in public domain and since the contents thereon are likely to affect the Applicants’ interest over the suit properties, this Court finds that it can consider them irrespective of the manner of their acquisition.

As has been held in several Judicial decisions, Leave of the court is a pre-requisite in institution of *Judicial Review*. See the case of R...Vs...Kenyatta University Exparte Ochieng Orwa Dominic & 7 Others (2018) eKLR, where the Court quoted with approval the case of Meixne & Another...Vs..AG (2005) 1KLR 189, and held that:-

***“Leave of court is a pre-requisite to making a substantive application for Judicial Review”.***

Further the Court held that:-

***“At the Leave stage, an Applicant must show that:-***

- i. He/She has sufficient interest in the matter otherwise known as locus standi.***
- ii. The Applicant must demonstrate that he/she is affected in some way by the decision being challenged.***
- iii. An Applicant must also show that he/she has an arguable case, and the case has reasonable chance of success.***
- iv. The decision complained of must have been taken by a public body and that body is established by a Statute or otherwise exercising a public function.***

The Applicant must also persuade the court that the decision undertaken is unfair and irrational and that the application raises serious issues and serious issue herein is an arguable issue that can only be resolved in full hearing of the **Judicial Review**. Further the Applicant must show he has a *prima-facie* arguable case for leave to be granted.

Have the Applicants herein established the above criteria"

The Applicants herein have argued that if indeed the letter dated 30<sup>th</sup> **September 2018** is actuated and Government caveats placed on the stated parcels of land, then the Applicants will suffer immensely as no-would be buyers would be willing to purchase such parcels of land with caveats. Further, that there have been several attempts to forestall the Applicants' progress on the **Tatu City Projects** and most of those attempts have failed and that therefore these recent alleged investigations are the latest attempts to continue frustrating the Applicants herein.

The Court finds that the Applicants' have demonstrated a *prima-facie* arguable case and that the Applicants would need protection of the Court before the substantive Judicial Review is heard. Consequently, the Court finds that the Applicants have established the above set criteria for grant of leave. Therefore the Court would not hesitate to grant them **Leave** to file a Judicial Review as sought.

On whether the said Leave should operate as a Stay, the Applicants had a duty to demonstrate that the Respondents action was prejudicial to them and that failure to issue a Stay Order, then the whole exercise would be rendered nugatory. It is evident that **Tatu City Project** is an on-going project and investigations can still be carried out without placing **Caveats** on the stated properties. Placing caveats would indeed prejudice the Applicants herein as they would be restrained from any transactions on the said parcel of land without having been given an opportunity to be heard as provided by **Section 76(1)** of the **Land Registration Act**, which provides:-

***“For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge”.***

The Court will rely on the case of **Taib A. Taib....Vs... Minister for Local Government & Others, Mombasa HC MISC.CA.No.158 of 2006**, where the Court held that:-

***“.....In Judicial Review Applications, the court should always ensure that the exparte Applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious, the court should not hesitate to grant it though it must never be forgotten that the Stay Orders are discretionary. He is not required at this stage to go into the depth of the application, he has to show that the application is not frivolous, malicious and futile”.***  
***(See also the case of Simon Mwangi ...Vs... Chief Officer Finance, Enoch K. Nguthi & 2 Others (2018) eKLR.***

Further in considering whether to grant Stay, the Court should ask this question;- Has the decision or action sought to be stayed fully implemented"

Only in cases where either the decision has not been implemented or where the same is in the course of implementation that a Stay may be granted. See the case of **R...Vs...Capital Markets Authority Exparte Joseph Mumo Kivai & Another (2012) eKLR**.

From the above court’s findings, it is clear that where action or decision is yet to be implemented, a **Stay Order** can normally be granted.

Again in the case of **R...Vs...Cabinet Secretary for Transport & Infrastructure & 4 Others, Exparte Kenya, Country Bus Owners Association & 8 Others (2014) eKLR**, the Court held that:-

***“What is sought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.”***

The 1<sup>st</sup> Respondent has sought for placing of caveats on the named properties belonging to the Applicants. The said action has not

yet been implemented and so it can be *Stayed*, but the staying of placing of caveats would not prevent investigations at all by 1st Respondent.

It is trite that grant of Stay pursuant to institution of *Judicial Review* is an exercise of Judicial discretion and that discretion must be exercised judiciously. In exercising this discretion the court should be satisfied that there is a strong case which is not merely arguable case but that the decision being challenged is/or was unlawful.

It is evident herein that what is sought to be quashed has not been Implemented, and *Stay Orders* can be granted. See the case of *R(H)...Vs...Ashworth Special Hospital Authority (2003) IWLR*, where the Court held that:-

***“A Stay halts or suspends proceedings that are challenged by a claim for Judicial Review and the purpose of a Stay is to prevent status quo pending the final determination of the claim for Judicial Review”.***

See also the case of *Munir Sheikh Ahmed...Vs...Capital Markets Authority (2018)eKLR*, where the Court held that:-

***“The purpose of a Stay Order in Judicial Review proceedings is to prevent the decision maker from continuing with the decision making process, if the decision has not been made or to suspend the validity and implementation of the decision that has been made....”***

It is clear that the impact of the letters sought to be quashed by the Applicants herein have not been implemented and therefore a Stay Order can be granted.

For the above reasons, the Court proceeds and makes the following orders:-

***Grants the Applicants Leave to bring a Judicial Review application and/or proceedings, and the said Leave should operate as Stay in terms of :-***

- i. Placing caveats on the named properties vide letter dated 30<sup>th</sup> September 2018.***
- ii. Requisition of original documents in terms of the letter dated 24<sup>th</sup> September 2018.***
- iii. Requisition of original documents in terms of the letter dated 2<sup>nd</sup> November 2018.***

Further, the 1<sup>st</sup> Respondent in its application dated 27<sup>th</sup> November 2018 has sought for this matter to be transferred to the *Anti-Corruption & Economic Crimes Division*, of the High Court in Nairobi, as it alleged that the investigations being sought are in relation to tax-evasion and money laundering. The 1<sup>st</sup> Respondent argued that all matters relating to money laundering and tax-evasion were directed to be heard before the *Anti-Corruption & Economic Crimes Division* of the High Court as per the Practice Directions issued by the Chief Justice on 20<sup>th</sup> July 2018.

The Court finds that it has jurisdiction to deal with the issue of placing caveats on the properties named in the letter dated 30<sup>th</sup> September 2018.

However, since the 1<sup>st</sup> Respondent has alleged that it is investigating the issues of *money laundering* and *tax-evasion* which are criminal offences, then the Court finds that as provided by *Section 3A* of the *Civil Procedure Act*, it has power to make such orders that are necessary for the end of justice. Consequently, the Court proceeds to allow the *Notice of Motion* dated 27<sup>th</sup> November 2018 in terms of *prayer No.1* with costs being in the cause.

For the above reasons, the Court directs the Applicants to file the substantive *Judicial Review Application*, within a period of 21 days from the date hereof at the *Anti-Corruption & Economic Crimes Division* of the *High Court Nairobi*. This matter will therefore be transferred to the *Anti-Corruption & Economic Crimes Division* of the High Court Nairobi

with immediate effect.

In a nutshell, the Court has issued the following orders:-

*i. Allowed the Chamber Summons dated 23<sup>rd</sup> November 2018 in terms of prayer No.1 and has further directed that the said Leave do operate as a Stay of the implementation of the letter dated 30<sup>th</sup> September 2018.*

*ii. Stay of Requisition of original documents as sought in the letter dated 24<sup>th</sup> September 2018.*

*iii. Stay of requisition of the original documents in terms of the letter dated 2<sup>nd</sup> November 2018.*

*The above Stay will remain in force until the substantive Judicial Review application is filed at the Anti-Corruption and Economic Crimes Division of the High Court, Nairobi.*

*iv. Further the application dated 27<sup>th</sup> November 2018 is allowed in terms of prayer No.1 with costs being in the cause.*

*v. Applicants to file the substantive Judicial Review application within a period of 21 days from the date hereof.*

*vi. Matter to be mentioned on 23<sup>rd</sup> January 2019 before the Presiding Judge of the Anti-Corruption & Economic Crimes Division of the High Court, Nairobi for further orders.*

It is so ordered.

*Dated, Signed and Delivered at Thika this 20<sup>th</sup> day of December 2018.*

**L. GACHERU**

**JUDGE**

**20/12/2018**

In the presence of

No appearance for Applicants

M/S Kenduiwa for 1<sup>st</sup> Respondent

M/S Ndundu holding brief for Mr. Eredi for 2<sup>nd</sup> Respondent

Lucy - Court Assistant

**L. GACHERU**

**JUDGE**

**Court** – Ruling read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**20/12/2018**



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