



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC MISC JR NO. 1 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE ETHICS & ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**EX PARTE**

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

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

**CONSOLIDATED WITH ACEC PETITION NO. 37 OF 2019**

**TATU CITY LIMITED .....1<sup>ST</sup> PETITIONER**

**KOFINAF COMPANY LIMITED .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE ETHICS & ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**SIMON GICHARU .....1<sup>ST</sup> INTERESTED PARTY**

**CB RICHARD ELIS LTD.....2<sup>ND</sup> INTERESTED PARTY**

**NCBA BANK KENYA PLC.....3<sup>RD</sup> INTERESTED PARTY**

**AXIS REAL ESTATE LTD .....4<sup>TH</sup> INTERESTED PARTY**

## JUDGMENT

### **Introduction**

1. In these two consolidated cases Tatu City Limited and KOFINAF Company Limited being the applicants in ACEC Judicial Review No. 1 of 2019 and the Petitioners in Petition No. 37 of 2019 seek to prohibit their investigation by the 1<sup>st</sup> Respondent. The Judicial Review Application was the first in time having been instituted at the Environment and Land Court in Thika as ELC Misc. Application No. 42 of 2018 in which leave to file the substantive Judicial Review Application was granted and it operated as stay pending the hearing and determination of the substantive application. The same was subsequently transferred to this court which is seized with jurisdiction to hear and to determine corruption and economic crimes cases. Upon transfer it was assigned the number ACEC Misc. App. No. 1 of 2019.

### **The parties**

2. The 1<sup>st</sup> and 2<sup>nd</sup> applicants/petitioners are limited liability companies incorporated under the provisions of the repealed Companies Act Cap 486 Laws of Kenya. Together, the 1<sup>st</sup> and 2<sup>nd</sup> Exparte applicants undertook development of the Tatu City Project which is a private sector 5000 acre “live-work-play” development in Kiambu County.

3. The 1<sup>st</sup> Respondent is a Constitutional Commission established under the Ethics and Anti-Corruption Commission Act pursuant to **Article 79** of the **Constitution**. It is mandated to investigate and recommend to the Directorate of Public Prosecutions the prosecution of persons who commit acts of corruption, violation of codes of ethics, matters prescribed under the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to chapter six of the Constitution.

4. The 2<sup>nd</sup> respondent is sued in his capacity as the Principal Legal Advisor of the government and representative of the National Government in legal proceedings to which the government is a party.

### **The Judicial Review Application.**

5. In the Judicial Review application, the Ex-parte applicants urged this court to quash and prohibit investigations by the 1<sup>st</sup> Respondent over alleged money laundering offences in the purchase of parcels of land owned by themselves. They contend that the 1<sup>st</sup> Respondent was not exercising its powers in good faith and was influenced by ulterior motives in launching investigations on alleged money laundering and tax evasion in the payment of stamp duty in the transfer of the property known as LR No. 11288(Original No. 6772/3); part of the parcels of land making up the Tatu City project in Kiambu County. The Ex-parte Applicants decried the Commission’s action of seeking to place caveats over 33 parcels of land while its replying affidavit only discloses that one parcel of land was under investigation and whose transfer is not subject to payment of stamp duty. They argued that the Collector of Stamp Duty and the Kenya Revenue Authority confirmed that stamp duty payable on all their transactions was properly assessed and collected. In light of the foregoing the applicants seek orders that:

*“i. That an order Certiorari do issue to bring into this 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 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 allegations touching on the properties known as Land Reference Nos. 11287, 11294, 11288, 10083, 10083/2, 100877, 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 and 5815 respectively for the purpose of being quashed and the said decision be quashed.*

*ii. That an order of Certiorari does issue to bring into this 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 Planning requesting original documents and other information pertaining to the properties known as Land Reference Nos. 11287, 11294, 11288, 10083, 10083/2, 100877, 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 and 5815 respectively, particularly the deed files, documents touching on transfer(s), application forms for stamp duty, valuation reports, stamp duty receipts, official searches, rent clearance certificate(s), correspondence files, part development plan(s), computation file(s) and survey plans 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.*

iii. That an order of Certiorari does issue to bring into this Court the decision of the 1<sup>st</sup> respondent contained and reflected in a 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 Land Reference Nos. 11287, 11294, 11288, 10083, 10083/2, 100877, 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 and 5815 respectively restricting further transactions pending the outcome of the investigation on alleged tax evasion and money laundering touching on the said properties for the purpose of being quashed and the said decision be quashed.

iv. Certiorari orders quashing the 1<sup>st</sup> Respondent's decision in 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 information pertaining to the subject properties particularly RIMs, survey plans, maps, computation files and deed plans to facilitate the 1<sup>st</sup> respondent's investigations

v. Prohibition orders restraining the 1<sup>st</sup> respondent from conducting investigations or taking steps towards making inquiries, suggestions or recommendations to the Director of Public Prosecutions or any other person or instituting civil or criminal proceedings as a result of the 1<sup>st</sup> respondent's investigations concerning alleged tax evasion and money laundering relating to the applicants irrespective of whether or not such investigation or inquiry touches on the subject properties.

vi. Prohibition orders restraining the 1<sup>st</sup> Respondent from inspecting and taking any documents whether copies or originals kept in any Land Registry maintained in Kenya or at any directorate of the Ministry of Lands and Physical Planning including the Department of Survey pertaining to the subject properties

vii. A declaration that the 1<sup>st</sup> respondent does not have jurisdiction to investigate any alleged tax evasion and money laundering claims touching on the subject properties

viii. A declaration that the 1<sup>st</sup> respondent does not have jurisdiction to direct the Chief Land Registrar or any other Land Registrar to place restrictions against the subject properties as a consequence of any purported investigation by the 1<sup>st</sup> respondent

ix. A declaration that section 40 of the Tax Procedures Act mandates the Commissioner General of the Kenya Revenue Authority and not the 1<sup>st</sup> Respondent to order registration of a restriction on private property to secure an obligation to pay tax on account of failure by the taxpayer to pay tax on the due date.

x. A declaration that section 82 of the Proceeds of Crime and Anti-Money Laundering Act (Cap 59B Laws of Kenya) (POCAMLA) does not mandate the 1<sup>st</sup> respondent to prohibit any dealings in private property

xi. A declaration that section 82 of POCAMLA empowers courts of competent jurisdiction on the application of the Director of the Assets Recovery Agency and not the 1<sup>st</sup> Respondent to issue preservation orders prohibiting any dealings with private property on account of any alleged investigation of tax evasion or money laundering

xii. A declaration that if there is any reasonable ground to believe that any property in Kenya has either been used or is intended for use in the commission of an offence or amounts to proceeds of crime, section 82 of POCAMLA empowers courts of competent jurisdiction on the application of the Director of the Assets Recovery Agency (ARA) and not the 1<sup>st</sup> respondent to issue preservation orders restraining any dealings with the said property.

xiii. General damages, exemplary damages, interest on the same and costs of the application be awarded to the applicants.”

### **The Petition**

6. The *ex parte* applicants/petitioners aver that notwithstanding the stay orders granted in Thika Misc. Application No. 42 of 2018, the 1<sup>st</sup> Respondent through correspondence dated 11<sup>th</sup>, 19<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> November and 2<sup>nd</sup> December 2019 sought information concerning the ownership of the Tatu City Project undertaken by the *ex parte* applicants/petitioners, their financial records, bank statements, valuation reports of the project properties and original ownership documents prompting the applicants to file Petition No.37 of 2019. In the Petition they seek the following reliefs:

*“i. A declaration that the petitioners’ right not to have information relating to their private affairs required by the 1<sup>st</sup> Respondent or revealed by the recipients CB Richard Ellis Limited, NCBA Bank Kenya Plc, Axis Real Estate Limited has been violated by the 1<sup>st</sup> respondent or is threatened with violation*

*ii. A declaration that the petitioners’ right to have the dispute in ACEC Misc Application No. 1 of 2019; Republic vs Ethics & Anticorruption Commission and Another ex parte Tatu City Limited and Another decided in a fair hearing by this court has been violated by the 1<sup>st</sup> respondent or is threatened with violation*

*iii. A declaration that the petitioners’ right to fair administrative action that is expeditious, efficient, lawful, reasonable or procedurally fair has been violated by the respondent or is threatened with violation*

*iv. A declaration that the petitioners’ right to access to justice, equal protection and benefit of the law and their right against unreasonable searches have been violated by the 1<sup>st</sup> respondent or is threatened with violation*

*v. Injunction orders restraining CB Richard Ellis Ltd, NCBA Bank Kenya Plc, Axis Real Estate Limited by themselves or through their directors from disclosing to the 1<sup>st</sup> respondent documents or information concerning the petitioners whose disclosure is likely to involve unwarranted invasion of their privacy or prejudice their commercial interests without due process of law.*

*vi. Certiorari orders quashing the decisions of the 1<sup>st</sup> respondent reflected in their letters dated 11<sup>th</sup>, 19<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> November 2019 and 2<sup>nd</sup> December 2019 addressed to the Managing Director CB Richard Ellis Limited, Mr Stephen Jennings Tatu City Limited, Mr John Gachora Group Manager NCBA Bank Limited, Mr Chris Barron CEO Tatu City Ltd and Mr Velzian Gikonyo Gitonga Managing Group Director Axis Real Estate respectively*

*vii. Conservatory orders suspending investigations by the 1<sup>st</sup> Respondent concerning alleged tax evasion, money laundering or corruption touching on properties belonging to the petitioners pending hearing and final determination of ACEC Misc. Application No. 1 of 2019*

*viii. Conservatory orders by way of prohibition restraining the 1<sup>st</sup> respondent by itself or through its officers from instituting legal proceedings, making recommendations in furtherance or as a result of investigation by the 1<sup>st</sup> respondent concerning alleged tax evasion, money laundering or corruption touching on properties belonging to the petitioners pending the hearing and final determination of ACEC Misc 1 of 2019*

*ix. General and exemplary damages be awarded to the petitioners.”*

### **Factual Background**

7. The facts set out in the application for Judicial Review and the respective supporting affidavits sworn by Christopher John Barron, the Country Head of Tatu City Limited and Kofinaf Company Limited, are largely similar to those in the petition and its supporting affidavit. It is the applicants’ case that this litigation stems from a dispute between the majority owner and the developer of the Tatu City Project and the Kenyan Partners, more specifically Stephen Mwangi that arose immediately after completion of the transaction for the acquisition of the Tatu City Project in March 2010. It is their case that the dispute has been characterized by institution of court cases and other hostile actions intended to obstruct the sale of parcels of land acquired under the project. They aver that in June 2010, Stephen Mwangi falsified form CR12 in respect of Tatu City to indicate that he and his mother, Rosemary Wanja Mwangi were the sole shareholders and directors of Tatu City and that using the falsified CR12, they registered several caveats over certain properties owned by the ex parte Applicants/Petitioners for which they were charged with offences relating to forgery and uttering false statements. The Applicant/Petitioners state that shortly afterwards in October 2010, Stephen Mwangi filed winding up petitions against the applicants falsely claiming 14.5% and 15.8% stake in Kofinaf and Tatu City respectively which petitions were dismissed by the High Court in January 2013 on the basis that Stephen and Rosemary had instituted the action to force a buy out on their terms. That thereafter, from February 2015 Stephen Mwangi’s Partners in the Tatu City Project, Vimal Shah and Nahashon Nyagah obtained injunctive orders in Kenya to prevent repayment of the international loan draw down financing the Tatu City Project but that the injunctions were lifted and the suits dismissed after the court found that Nahashon Nyagah and Vimal Shah had not made any significant investment in the Tatu City Project and therefore had very little to lose if the project collapsed. The applicants plead that Nahashon Nyagah conspired with police officers in an attempt to illegally acquire

ownership of part of Kofinaf's coffee estate worth over USD 100 million alleging that Kofinaf's lawyers at the time, Messrs Anjarwalla & Khanna advocates forged documents regarding ownership of the estate. The applicants/petitioners aver that Kofinaf lodged a criminal complaint against Nyagah but a parallel investigation was commissioned to thwart it resulting in constitution of a multi-agency team in March 2016 to examine the disputed inquiry files which resulted in two diametrically opposed recommendations; That in the meantime in June 2015 the majority owner and developer of Tatu City instituted proceedings before the London Court of International Arbitration (LCIA) against Manhattan Coffee Investments Holding Limited (MCIH), an off-shore entity by which Stephen Mwangi, Nahashon Nyagah and Vimal Shah hold their stake in Tatu City Project, for dishonest misrepresentation of their financial contribution to the Tatu City Project and that years later, the London Court of International Arbitration published an award confirming the fraudulent misrepresentation and ordered the three to pay USD 17 million to the project developer. The Applicants/Petitioners allege that in order to avoid enforcement of the award and to force the majority owner to cede a larger share of the project to them Stephen Mwangi and his Partners acting in concert with wealthy businessmen and dealers in Kiambu such as Simon Gicharu and Joel Kibe resorted to harassing international investors in the Tatu City Project by petitioning parliament in May 2018 to pass a resolution directing placement of caveats on the applicant's properties and orchestrating a media campaign to besmirch the Tatu City project.

8. The applicants further state that after the petition was rejected by Parliament Stephen Mwangi filed the petition afresh in June 2018 through Hon. Jude Njomo then Kiambu Member of Parliament seeking assistance to seize the Tatu City Project over alleged tax evasion by the applicants. The Applicants/Petitioners contend that that petition was based on the false premise that the Tatu City project land was acquired by Kiambu County residents in 2007 through a private placement of shares conducted by Suntra Investments Limited and that the applicants had engaged in tax evasion to the tune of Kshs. 1.6 billion. It is the Applicants'/Petitioners' case that however, the Kenya Revenue Authority absolved them of the tax evasion allegations in a report delivered to Parliament by the then Commissioner General, Mr. John Njirani. It is the applicants'/Petitioners' case that the report stipulated that after conducting a tax audit on land sales conducted by Kofinaf from 2013, KRA raised a tax assessment of Kshs. 165,768,400 and the amount was paid by Kofinaf. The Applicants/Petitioners allege that the Speaker of the National Assembly ruled that the petition was spent by operation of the law and the Lands Committee had become functus officio on the matter and terminated the petition.

9. The Applicants further aver that shortly after the termination of the petition in Parliament Stephen Mwangi co-opted the 1<sup>st</sup> Respondent into the scheme to extort the Tatu City project owners and the 1<sup>st</sup> Respondent directed the Principal Secretary of the Ministry of Lands and Physical Planning to place caveats on the properties of the Applicants/Petitioners under the guise of investigating Tatu City for alleged tax evasion and money laundering. The Applicants/Petitioners aver that in turn they lodged ELC Misc. Application No. 42 of 2018 at the Environment and Land Court in Thika and challenged those investigations and that in its ruling dated 20<sup>th</sup> December 2018, the ELC court at Thika granted the applicants leave to institute judicial review proceedings and directed that the leave would operate as stay of the 1<sup>st</sup> respondent's directive that caveats be placed on the subject properties. They aver that according to the ELC court, Tatu City and Kofinaf had demonstrated a prima facie case that placement of caveats would prejudice the applicants and that investigations could still be carried out without placing caveats on the subject properties.

10. The Applicants/Petitioners further aver that upon transfer of the case to this court it extended the interim orders issued by the Environment and Land Court at Thika. Meanwhile, Manhattan Coffee Investments Holding Limited attempted to resist recognition and enforcement of the London Court of International Arbitration award before the Supreme Court at Mauritius on grounds of fraud which application was however withdrawn and the award was adopted as a judgment of the said Supreme Court but the majority owner of Tatu City Development petitioned for the winding up of Manhattan Coffee Investments Holding Limited after it failed to honour its obligations stipulated in the award and a liquidator was appointed.

11. It is the applicants' case that in spite of the ongoing progress in Misc. App. No. 1 of 2019 the 1<sup>st</sup> Respondent wrote letters dated 11<sup>th</sup>, 19<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> November 2019 and 2<sup>nd</sup> December 2019 to CB Richard Ellis Ltd, Mr Stephen Jennings a director of the applicants', the applicants' bankers NCBA Bank Kenya Plc, Mr Chris Barron the applicants' Country Head and Mr. Velzian Gikonyo Gitonga, Managing Director Axis Limited requiring them to produce certain financial, ownership and bank records and information regarding the subject properties. The Applicants/Petitioners contend that the recipients were threatened with penal consequences under **Section 27(4)** of the **Anti-Corruption and Economic Crimes Act** if they failed to accede to the 1<sup>st</sup> respondent's requests that the applicants were apprehensive that the 1<sup>st</sup> respondent's ongoing investigations which were essentially instigated by Stephen Mwangi and his partners Nahashon Nyagah and Vimal Shah would prejudice fair determination of Misc. Appl. No. 1 of 2019 and render it nugatory, hurt their commercial interests by exposing sensitive information in contravention of their right to privacy and create leverage for their harassment by their three adversaries and hence the reason they filed the petition herein.

12. The applicants faulted the 1<sup>st</sup> respondent for initiating investigations against them more than a decade after the suit land was acquired for the Tatu City Project, which they described as a world-class mixed use development, in disregard of constitutional tenets. They contended that the 1<sup>st</sup> respondent's activities contravened their fundamental right to a fair hearing before a court of competent jurisdiction as guaranteed by **Article 50(1)** and asserted that under **Article 25(c)** of the **Constitution** this right cannot be limited. The applicants also decried the 1<sup>st</sup> respondent's investigation into their affairs without a search warrant and stated that this was in contravention of **Article 29** of the **Constitution** that protects citizens against unreasonable searches. They also accused the 1<sup>st</sup> Respondent of not following due process in compelling the NCBA Bank Place, Axis Real Estate Ltd and CB Ellis Limited to release information to it. The Applicants/Petitioners argued that the bank was not an associate of the applicants within the meaning of **Section 27(3)** of the **Anti-corruption and Economic Crimes Act** hence the request for information had no basis. On the threat to disclosure of sensitive information, the Applicants/Petitioners relied on **Article 31(c)** and **(d)** of the Constitution. On right to privacy the Applicants/Petitioners relied on **Section 6(1)(d), (e)** and **(g)** of the Fair Administrative Action Act. They urged this court to grant them the reliefs sought in both the application for judicial review and the petition.

### **Response by the 1<sup>st</sup> Respondent**

13. The 1<sup>st</sup> Respondent filed a replying affidavit sworn by Mark Ndiema on 8<sup>th</sup> February 2019 in response to the judicial review application and a replying affidavit sworn on 4<sup>th</sup> February 2020 by Jarso Dida its forensic investigator. Both deponents were part of the Multi-agency team comprising of investigators from the Commission, the Directorate of Criminal Investigations, Central Bank of Kenya and the Kenya Revenue Authority tasked to investigate the matters raised in the petition. The respondent under **Section 45(d)** of the **Anti-Corruption and Economic Crimes Act** is mandated to investigate loss of government revenue through tax evasion; it disputes the allegation that the investigation is a device in a scheme by Stephen Mwagiru to forestall the development of Tatu City and Kofinaf Estate and avers that all members of the team who are officers of independent authorities conducted investigations privately, objectively and independently with no interferences from any party.

14. The 1<sup>st</sup> respondent agrees with the deposition of Mr. Chris Barron that the outcomes of investigations by the Director of Criminal Investigations led to two diametrically opposed recommendations namely one recommending prosecution of Messrs Anjarwalla & Khanna Advocates the advocates for the applicants for forgery which resulted in the creation of the multi-agency task force to conduct independent investigations. The 1<sup>st</sup> Respondent contended that at the time the matter was a simple case of fraudulent beneficial ownership of LR No. 11288 registered in the name of Purple Saturn Properties Ltd with opposing shareholders and directors claiming competing interest over the subject property, each alleging that the others had forged directorship and shareholding documents of the company which company was the registered proprietor over the suit properties.

15. The 1<sup>st</sup> Respondent states that its attention was drawn to the petitioners' vast parcels of land in Ruiru and Thika previously owned by Kofinaf Co. Ltd which operated 9 coffee estates namely:

Tatu	1068 Ha - LR No. 91, 104, 11538/2, 8182
Karangita	284.1 Ha - LR No. 10887
Wango	277 - LR No. 8749
Gethumbwini	746.6 Ha - LR No. 11428, 11486, 10883/2
Mtaro	346.6 Ha - LR No. 10083
Mchana	906. Ha – LR No. 113/1,113/2, 7386,7192, 111/1,110/2
Ruera	087 Ha - LR No. 11285, 11287, 11288, 11289
Oaklands	688.8 Ha – LR No. 117, 11294, 247/1, 247/5
Eaagads (61%)	384.9 Ha

**16.** It is the 1<sup>st</sup> Respondent's case that though the applicant/petitioner companies are registered in Kenya they are owned by two companies, Cedar IV and CedaSoc Limited which are registered in Mauritius and which are owned by a chain of corporate vehicles including joint ventures registered in Cyprus, Bermuda and Mauritius. The 1<sup>st</sup> Respondent states that these corporate vehicles registered in tax havens such as Mauritius with nominee shareholders and directors are designed to conceal the real control of the companies which control is exercised by beneficial owners. It is also their case that the companies are intended to conceal the origin and destination of funds which is an aspect of money laundering under investigation by the Multi-Agency Taskforce and that preliminary findings revealed that the petitioners' tax evasion and money laundering is effected through paper transactions involving a chain of interlocking companies, nominee shareholders and purported loans and financing structures.

**17.** It is further averred that investigations also revealed fraud whereby Kofinaf incorporates special purpose vehicles (SPVs) such as Purple Saturn Properties with shareholding and directorships held by its nominees specifically to hold its parcels of land, enters into sale transactions with these special purpose vehicles and purports to advance them loans to purchase the properties hence Kofinaf effectively finances its special purpose vehicles to finance its own properties. The 1<sup>st</sup> Respondent avers that this amounts to a form of money laundering known as a loan back scheme and it is also under investigation. The 1<sup>st</sup> Respondent also contends that the petitioners under-declared the value of the suit land in the transfer for purposes of computation under various tax heads to deliberately evade tax and that the Tax audit carried out by Kenya Revenue Authority in January 2016 revealed that the tax values for transferred land parcels as reported in Kofinaf's financial statements were far below market value; That on the strength of its report, Kenya Revenue Authority demanded a sum of Kshs. 249, 355,436 comprising a principal of Kshs. 165,768,400, a penalty of Kshs. 3,000,000 and interest of Kshs. 80, 587,036. According to the deponent, the applicants/petitioners paid the principal but made an application for waiver of the penalty and interest.

**18.** It is also averred that the Kenya Revenue Authority 2016 tax audit was in respect of only 5 parcels namely LR No.s 11428, 11486 and 10883 Gethumbwini; LR No. 10887 Karangaita and LR No. 11287 Ruera but that the report did not factor sales of LR No. 11288 to Purple Saturn Properties Limited, LR No. 11289 to Jojoja Properties Limited and LR No. 11285 to Ginga Properties Limited all transacted in July 2013 which the Commission suspects were transferred through a scheme of under-declaring values. Further that red flags noted by the 1<sup>st</sup> Respondent were highlighted thus for instance with regard to LR No. 11288:

**i.** Kofinaf transferred LR No. 11288 to Purple Saturn Properties Limited at a purchase price of Kshs. 784,839,000 undervalued to evade tax with stamp duty paid as Kshs. 14,976,820

**ii.** No money exchanged hands in transactions of transfer of shares between nominee shareholders but shares were ultimately beneficially owned by a Galba Mining Ltd registered in Mauritius effectively becoming a majority shareholder of Purple Saturn Limited

**iii.** Galba Mining Ltd sold its shares in Purple Saturn Ltd to Daykio Ltd at a consideration of Kshs. 4.095 Billion only 17 months from the sale of the property by Kofinaf to Purple Saturn

**iv.** Galba Mining incorporated special purpose vehicles for the sale and transfer of LR No. 11288 structured in a manner that the full Kshs. 4.095 billion will not be declared in Kenya effectively evading payment of accurate stamp duty or corporation tax

**19.** The 1<sup>st</sup> Respondent asserted that apart from corporation tax, withholding tax, VAT and PAYE that fall within the realm of Kenya Revenue Authority, the government is entitled to revenue generated from the payment of stamp duty assessed by the Chief Government Valuer at the Ministry of Lands but that in this case the Kshs. 165,768,400 paid by the petitioners pursuant to the 2016 tax audit did not include re-assessment of stamp duty. The 1<sup>st</sup> Respondent averred that similar transactions were replicated by MJS Mansions Ltd and Dexamide Properties Ltd in respect of the sale and transfer of LR No. 10887 Karangaita; That the net effect of the transfer of undervalued land parcels using transfer and allotment of shares was adopted to evade tax since such transfer attracts much less stamp duty as opposed to the 2% and 4% value for agricultural and for municipality land respectively. The 1<sup>st</sup> Respondent stated that such downstream transactions raised reasonable suspicion warranting investigation into loss of revenue from stamp duty and other applicable taxes during the first transaction of purchase and transfer from the original owners of Scofinaf Limited to the Petitioners.

**20.** The 1<sup>st</sup> Respondent averred that it obtained information that the Petitioners engaged the services of the 2<sup>nd</sup> to 4<sup>th</sup> Interested Parties to undertake a valuation of the coffee estates for purposes of securing offshore loans and therefore, it was necessary to obtain valuation reports from them to ascertain the real market value of the estates at the time which would form a basis of inquiry as the Petitioners would utilise the market values for their commercial interests and under-declare values for tax purposes. The 1<sup>st</sup>

Respondent stated that information in the custody of the 3<sup>rd</sup> Interested Party was crucial to identify account signatories and ultimate beneficiaries of the transactions relevant to the investigations and for disclosure of income from the sale transactions in order to determine whether there was loss of government revenue. The 1<sup>st</sup> Respondent further stated that invitation to the Interested Parties for recording of statements and the notices to furnish information was in furtherance of the investigations after establishment of the aforesaid patterns which replicated in several transactions involving the Petitioners and subject properties; That the same was done in accordance with the 1<sup>st</sup> Respondents statutory mandate of protection of public property and was not intended to jeopardize the Applicant/Petitioners' commercial interests as alleged.

21. In response to the applicants' claims to their rights to privacy and access to information guaranteed under **Articles 31 and 35 of the Constitution and the Access to Information Act, 2016** the 1<sup>st</sup> Respondent contended that these rights are not absolute and do not fall within the category of non-derogable rights as provided in **Article 25 of the Constitution**; That the commission's mandate to protect public property and safeguard public interest in combatting corruption and economic crime is a limitation envisaged under **Article 24 of the Constitution** and further, that the **Access to Information Act** provides for access of information of significant public interest held by a private entity *inter alia* for the exposure of corruption or illegal actions. The 1<sup>st</sup> Respondent stated that the limitation of the right of access to information under is qualified under **Section 6(4) of the Act** where the law requires disclosure of information in public interest and that in this case loss of tax revenue outweighs private interests.

22. The 1<sup>st</sup> respondent stated that the Commission served notice upon the 3<sup>rd</sup> Interested party under **Section 27(3) of Anti-Corruption and Economic Crimes Act** to furnish it with banker's books of the Petitioners domiciled in its branches which notice was copied to the 1<sup>st</sup> Petitioner, the account holder. The 1<sup>st</sup> Respondent stated that such entries are admissible under **Section 176 and 177(1) (b) of the Evidence Act** and were in the bank's custody and control. The 1<sup>st</sup> Respondent contended that **Section 27(3) of Anti-Corruption and Economic Crimes Act** gives the Commission power to obtain information or documents relating to investigations prior to invoking powers of the court under **Section 28(1)** and that the commission employed this avenue in line with the Court of Appeal guidelines in the *Prof. Ojienda* case. The 1<sup>st</sup> Respondent stated that granting the orders of prohibition to stop investigations and certiorari to quash the notices and invitations for interviews and statement recording are tantamount to interfering with the Commission's investigative mandate and the Petitioners having failed to demonstrate that the Commission's investigations are irrational, malicious, unreasonable, ultra vires or an infringement of fundamental rights and freedoms, their petition and their application for judicial review ought to be dismissed.

#### **Attorney General's (2<sup>nd</sup> Respondent) Response**

23. The Attorney General opposed the judicial review application and the Petition by way of a replying affidavit sworn by Gildine Karani, a Land Registrar at the Ministry of Lands and Physical Planning sworn, on 13<sup>th</sup> May 2019 and Grounds of Opposition dated 3<sup>rd</sup> February 2020. The gist of the replying affidavit is that the Ministry of Lands and Physical Planning received land transfer documents from Ms. PM Ndung'u and Company Advocates on behalf of Wanguthu Holdings Ltd for registration of transfers relating to the subject properties; That the documents were then received by the Lands Registry and submitted to the collector of Stamp Duty for assessment of the duty payable and that the documents were transferred to the Chief Government Valuer who undertook a valuation of the market values of the properties for stamp duty assessment. The deponent of the Replying Affidavit confirmed that the valuer used sales of comparable properties for the assessment; that the assessed stamp duty was paid and respective properties transferred. The deponent concluded by stating that the 1<sup>st</sup> respondent ought to have followed the procedure provided in **Section 46 of the Anti-Corruption and Economic Crimes Act** in regard to application for orders before requesting government caveats on the subject properties.

24. In the Grounds of Opposition, the 2<sup>nd</sup> Respondent vouches for the independence of the 1<sup>st</sup> Respondent as a constitutional institution and contends that should this petition be allowed this court will have overstepped its constitutional mandate and descended into micromanaging independent institutions at the whim of private entities. The Petitioner stated that granting the orders sought would cripple institutional comity and that the 1<sup>st</sup> Respondent is empowered to seek information under **Section 23 of the Anti-corruption and Economic Crimes Act**.

#### **Applicants'/Petitioners Submissions**

25. Learned Counsel for the ex parte applicants in **JR No. 1 of 2019**, submitted that the application seeks orders to quash the decisions by EACC contained in 3 letters annexed to the application for leave; The letter dated 30<sup>th</sup> September 2018 delivered to the PS Ministry of Lands and Physical Planning on 30<sup>th</sup> October 2018 ordered placing of caveats on parcels of land belonging to the applicants pending investigations. The Commission alleged that it was investigating corruption and money laundering in respect of

the 33 parcels of land. Counsel submitted that no investigations were going on and that it was an attempt by the Commission to settle civil suits that had been filed by Kenyan shareholders Stephen Mwangi and his mother.

26. Counsel stated that Stephen Mwangi first made an application on 4<sup>th</sup> April 2018 at the Environment and Land Court Thika in seeking placement of caveats on various subject properties which are the same ones the EACC sought to place caveats on. Counsel contended that Mwangi initially placed the caveats on 10<sup>th</sup> June 2010 so as to force settlement but after the applicants objected the Chief Land Registrar issued a forty-five days' notice and on 25<sup>th</sup> May 2012 when there was no response to her notice she removed the caveat. Mr. Mwangi then sought to have the caveats restored. Counsel stated that the Commission came into the matter when Mr. Mwangi asked it to investigate the Chief Land Registrar but it refused to do so. That Mr. Mwangi deposed that it is imperative that the caveats be placed to protect his interest. Notably, the reason was not because of tax evasion.

27. Counsel pointed out that Winding Up Cause No. 20 of 2010 is also noteworthy because Mr. Mwangi said that the reason he was given the ruling by Musinga J, as he then was, was to protect his interest. At paragraph 41 he said that the 1<sup>st</sup> Interested Party had proceeded in the advertisement of the properties which would defeat his interest. He deposed that the petition in Thika was his only avenue to protect his rights and to compel compliance with the order of the High Court which counsel contends was the genesis of the EACC placing caveats on the properties even before they started investigations on the allegations of money laundering and tax evasion.

28. Counsel submitted that the first petition No. 5 filed on 4<sup>th</sup> April 2018 was withdrawn after the court declined to place caveats on the properties. Counsel narrated that Mwangi withdrew the application even before serving the parties but soon thereafter he filed petition No. 6 of 2018 with the Attorney General and the Chief Land Registrar named as respondents. The two companies who were now the Applicants were no longer Interested Parties and only two relatives of Stephen Mwangi and Walker were enjoined as Interested Parties. Counsel stated that the affidavits in the two petitions were identical and no interim orders were granted. Counsel pointed out that when the judge noted that the named companies were not parties to the suit Mr. Mwangi filed an Amended Petition.

29. It is the applicants' case that when Mwangi failed to get the orders he craved he employed a new tactic by filing a Petition in the National Assembly which action was unsuccessful; That the clerk to the National Assembly told Mwangi and his associates that the power to place caveats and to prohibit dealings on the subject land fell within the jurisdiction of the Environment and Land Court. Counsel submitted that this was the third attempt to seek orders to place caveats on the subject properties. Counsel stated that Mr. Mwangi tried through one Winfred Wanjiku and that a second petition was introduced in the National Assembly by Hon. Jude Jomo. That because the local shareholders had failed to have the foreign shareholders resolve the matter they filed this petition to enforce Musinga J's orders issued in the winding up petition. It was stated that no other matter was pending in any court in Kenya and disclosed that the petition was filed on behalf of Winfred Wanjiku Gitonga among others. Counsel referred to the letter dismissing the petition dated 25<sup>th</sup> October 2018 in which Hon. Muturi Speaker of the National Assembly stated that time lapsed and there was no application for extension of time. The speaker ruled that the application by Hon. Jude Jomo stood dismissed by effluxion of time and could not be heard by the House.

30. It was further submitted that four days later EACC wrote a letter dated 30<sup>th</sup> October 2018 which this Judicial Review seeks to quash. In the affidavit sworn by Mark Ndiema on 8<sup>th</sup> February 2019 he stated that the EACC was following up on one parcel of land. Since EACC was only investigating one parcel of land No 11288 there was therefore no basis for them to ask for caveats on 33 parcels of land. The transactions under investigation took part on 4<sup>th</sup> July 2013, 5 years before EACC sought to place caveats. In those five years there was no communication by EACC to the applicants for non-payment or under declaration of stamp duty. More importantly Mark Ndiema in his affidavit stated that all the transactions by the applicants were all valid and that the Chief Land Valuer assessed the parcels and assessed the time market value specifically for LR 11288 for which stamp duty of (Kshs.748,830,000) was the same one assessed by the Chief Land Valuer and that the stamp duty of Kshs. 14,000,000 was paid. There was therefore, no documented under declaration of stamp duty. With respect to other properties the values as declared were lower but the Chief Valuer raised the same and assessed the stamp duty which was paid.

31. It is submitted that EACC has no statutory mandate to collect stamp duty and to the extent that they seek to do so they continue to act ultra vires their statutory mandate. Under **Section 2** of the **Stamp Duty Act** it is provided that the Kenya Revenue Authority is the collector of stamp duty on behalf of the Government. Counsel referred the court to a letter from Kenya Revenue Authority dated 15<sup>th</sup> December 2015 in which they had assessed the transactions undertaken by the 2<sup>nd</sup> applicant and regarding stamp duty they clearly said that the aforesaid property was not one of the properties flagged by Kenya Revenue Authority. Secondly they had not raised issues in regard to the values declared for stamp duty as that was the jurisdiction of the Ministry of Lands. Counsel averred that that is the correct position in law in accordance with **Section 29(1)** of the **Stamp Duty Act**. If there was any under

payment of stamp duty the collector of stamp duty should have filed a civil suit for recovery under **Section 29(1)** of the **Stamp Duty Act**. That the attempt to impute criminal liability where there is none is a clear abuse of statutory power and the purported allegations are ultra vires the powers of the commission.

**32.** Counsel argued that the EACC cannot therefore say that it is investigating payment of duty. The collector of stamp duty confirmed that there was no stamp duty payable in respect to the parcel they were investigating LR 11288. Secondly, there was no communication to the body which is tasked with collection of stamp duty. Counsel was emphatic that the 1<sup>st</sup> respondent cannot use this judicial process to assist the local shareholders to enforce that which they allege to be their rightful share. Further, the Stamp Duty Act as per **Section 2 of the Tax Procedures Act** is not one of the Acts which fall within the meaning of tax law in the recovery proceedings inclusive of the Income Tax Act, the Value Added Tax Act and the Excise Duty Act. It is a stand alone Act. Counsel contended that the allegation that EACC was investigating “*tax evasion effected through paper transactions involving a chain of interlocking companies, nominee shareholders, purported loans and financing structures*” is misguided, has no statutory basis and is a statutory overreach. That it stems from a misapprehension of the provisions of the Stamp Duty Act. He urged that as confirmed in EACC’s replying affidavit, Galba Mining Limited owns 93% of the shares in Purple Saturn Limited hence any transfer of property between the two companies would be exempt from payment of Stamp Duty under **Section 96** of the **Stamp Duty Act** as the two companies are “associated companies.”

**33.** Counsel continued that the EACC was not acting in good faith. The three letters sought three orders that were highly prejudicial to the applicants. They also sought to paralyze the companies’ operations by asking for all the original files. Counsel was of the view that if EACC was only interested in investigations they would have asked for copies. The effect of their application would be to stop all transactions so that EACC could carry out investigations. They also asked for original documents from the lands office. It was the applicants’ submission that that was intended to paralyze the operations of the companies until Mr. Mwangiru’s interest was met. That this is the kind of investigation the Court of Appeal dealt with in the case of *Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR*. Counsel urged this court to consider paragraph 49 thereof which states as follows:

*“[49] ....The abuse of criminal process was based on the allegation that the complaint by the 5th respondent was not made in the interest of administration of justice – to achieve the purpose that it is designed to serve but in continuation of alien purposes of settling a family property dispute.*

*The society has an interest in both the lawful exercise of prosecutorial powers and in employing a fair procedure that does not amount to oppression and persecution. The Constitution envisions a just society. It would not be consistent with the values of the society as reflected in the Constitution if power is abused or unfair administration of justice is resorted to. Both would shock the conscience of the society and would result in the loss of confidence in the institution of the DPP and in the integrity of the judicial process.*

*The exercise of prosecutorial discretion in such a manner would be in contravention of the Constitution and the court has power to intervene regardless of the seriousness of the alleged offence or the merits of the case. As Article 2(4) provides an act or omission in contravention of the Constitution is invalid.”*

**34.** Counsel restated that the conduct of the EACC in the instant suit amounted to both oppression and persecution of these two companies and asked the court to consider whether the conduct of the 1<sup>st</sup> Respondent constituted abuse of process and whether its decision to proceed with investigations meets the constitutional test of legality and validity as set out in the *Diamond Hasham Lalji* case. Whether there is collateral purpose and delay. On abuse of process, counsel quoted the aforementioned case thus:

*“[51] Secondly, the learned judge failed to appreciate that abuse of process as alleged by the appellants was an integral whole comprising of several elements including abuse of investigative powers, collateral purpose, unjust delay and unjustifiable review of the decision not to prosecute. It is evident from the judgment that the learned judge looked at each of the elements separately and on its own merits and failed to consider the cumulative effect of those elements in public interest; the interest of administration of justice, public confidence in the administration of justice and the integrity of judicial process. It is only after assessing the qualitative and the combined effect of the elements constituting the abuse of process that a proper determination on whether or not the constitutional threshold for prosecution had been met could be made.”*

**35.** Counsel also cited the case of *Ernst & Young and LLP vs Capital Markets Authority & Another (2017) eKLR*, in which Justice Mativo cautioned against development of a two tracked system of Judicial Review as follows:

*“The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution’s principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution. A close examination of decided cases including the cases cited by the parties herein will evidently review this two-tracked system whereby the courts heavily relied on the common law in either allowing or disallowing judicial review orders. My strong view is judicial review is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, then the decision in question cannot stand court scrutiny.”*

36. It is the applicants’ case that KRA categorically stated that the stamp duty due was paid and once again there is no basis for the Commission’s investigations. That with regard to judicial review proceedings, as stated in *Halsbury’s Laws of England 4<sup>th</sup> Ed. 2001 vol1(1) Reissue*:

*“The duty of the Court is to confine itself to the question of legality. Its concern is whether the decision making authority exceeded its powers, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers”*

37. Counsel urged the court to stop this kind of abuse by allowing both the application and petition. That this kind of harassment by EACC should not be allowed and for that reason they should be condemned to the costs of the application and petition. He relied on the following authorities in support of his case:

*Pastoli vs Kabale District Local Government Council and Others (2008)2EA 300*

*“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is where there is such gross unreasonableness that no reasonable authority, addressing itself to the facts and law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercised jurisdiction to make a decision”*

*Prof. Njuguna Ndung’u vs The Ethics and Anticorruption Commission and 3 Others Civil Appeal No. 333 of 2014 [2018] eKLR*

[23] *I have referred to the reasoning of the High Court in paras. 9, 10 and 11 above. It is apparent that the High Court left the matters raised by the appellant and the respondents to the trial court for determination without making any tentative and objective finding on the legality of the charges and the prospect of a conviction.*

*The jurisprudence show that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise of discretion sparingly. In Diamond’s case (supra), the court said in part at para. 42:*

*“The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”*

*In the same case, the court said at para. 45:*

*“In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which the DPP’s decision is made establishes a prima facie case necessitating prosecution. At this stage the courts should not hold a fully-fledged inquiry to find if evidence would end in a conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative.”*

[24] *The charges against the appellant were largely dependent on documentary evidence and most of the facts were not in*

*controversy. The High Court was called upon to find out whether or not the omissions allegedly committed by the appellant prima facie constituted the alleged criminal offences under the procurement law.*

*A decision on that issue could have been made without embarking on a trial by scrutinizing the documents and upon consideration of the circumstances of the case and the law.*

*In my respectful view, the High Court erred in law by failing to scrutinize the charges, the relevant documents including the decisions of Evaluation Committee, Tender Committee, Review Board and the High Court proceedings and reach a conclusive and objective decision on whether or not the charges had any legal or factual foundation and also a realistic prospect of conviction *Alnashir Popat & 8 Others vs Capital Markets Authority (2016)eKLR**

*“104. Procedural fairness is an aspect of both Article 47 and Article 50 of the Constitution, and I will now consider it in light of the right to fair administrative action.*

*105. I start by stating that the importance of a decision to an individual affected or to be affected by a decision, constitutes a significant factor affecting the content of the duty of procedural fairness. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be invited and imposed.”*

*Municipal Council of Mombasa v Republic & another [2002] eKLR*

*“We agree with Mr. Mburu that by and large an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law.”*

38. Mr. Ahmednasir Abdullahi SC associated himself with Mr. Issa’s submissions stating that Mr. Issa provided an excellent exposition of the trials and tribulations that two applicants faced at the hands of many Government institutions and other persons. He termed the 1<sup>st</sup> respondent’s actions as state capture of private goods. That Mr. Issa has shown the various acts of Stephen Mwangi whether he goes to court, to the streets or elsewhere. He uses the instruments of power and authority to get what he wants. Senior Counsel reiterated that the issue as Mr. Issa demonstrated is about stamp duty. The applicants do not build roads. This was an issue of stamp duty concerning one property and what was to be done if stamp duty was under declared and is clearly demonstrated. However, it was not the case in regard to the petitioners.

39. According to Mr. Ahmednasir SC, the mandate of the Commission pursuant to **Article 79 of the Constitution** is to combat and prevent corruption through law enforcement, preventive measures, education and promotion of standards and best practices on integrity and ethics. **Section 55 of the Anti-Corruption and Economic Crimes Act** provides for commencement of proceedings whereupon investigations, the commission is satisfied that a person has unexplained assets, having been afforded a reasonable opportunity to explain the disproportion between the assets concerned and their known legitimate income and that the explanation is inadequate. Counsel asserted that the Commission’s role is limited to investigations concerning public officers and public funding in accordance **with Section 11(1)(d) and (e) of the Ethics and Anti-Corruption Act** which specifically mentions state officers and persons who hold public office. Counsel stated that since the petitioners are body corporates in the business of land development undertaking a private sector project the 1<sup>st</sup> respondent’s investigation into their private affairs is a wanton abuse of court process, mala fides, unconstitutional and contra-statute. Counsel cited the case of *Katiba Institute & Another vs Attorney General & Another (2020) eKLR* which in his estimation defined the extent of powers to investigate as being limited to probing of persons in the public service, state organs or bodies established under the constitution.

40. Counsel contended that the first issue started following the ruling of Nyambura Gacheru J on 20<sup>th</sup> December 2019 and the resultant orders granted by the court. That when the issues narrated by Mr. Issa occurred the petitioners went to court and sought redress stopping the same. Order No.s 2 and 3 stopped the letters written by the Ministry of Transport. The letters were requests for original documents and information yet order 2 of Nyambura J’s ruling stopped anything to do with the title deeds. The 1<sup>st</sup> Respondent restarted the process again the court orders notwithstanding. Counsel continued that another letter complained of asked for *inter alia* ownership and company registration documents all amounting to twenty two documents. The 1<sup>st</sup> Respondent was now no longer referring to LR numbers. Moreover, counsel decried the respondent’s actions in asking for the same documents from different parties.

**41.** Senior counsel termed the impugned letters as contempt of court in elegant breach of Nyambura J's orders. He questioned why the 1<sup>st</sup> respondent would proceed to ask for records and documents surreptitiously yet the court had stopped the same. He claimed that the respondents were in breach of Article 10 of the constitution. That the 1<sup>st</sup> respondent undermined the authority of the court when it restarted the process afresh despite pendency of the orders. They were obligated to call the applicants and request them for what they wanted. He referred the court to **Sections 2 (ii), 3 and 4(3) (a) and (b) of the Fair Administrative Actions Act and Sections 27 and 28 of Anti-Corruption and Economic Crimes Act.** Counsel opined that **Section 27(3)** gives the impression that the commission should ask for information. **Section 24** makes it clearer and is most relevant to this petition in that it requires notice. He emphasized that unlike **Section 27**, under **Section 28** the 1<sup>st</sup> respondent must go to court and also give notice to the affected person. That **Section 28** must be read together with **Section 4** of the **Fair Administrative Actions Act.**

**42.** On the issue of privacy it is the Petitioners' case that article 31 protects them from having information relating to their affairs unnecessarily required, revealed or investigated by the Commission without any factual basis. That the 1<sup>st</sup> respondent's request for documents seeking to investigate the applicants' accounts, without a valid search warrant was not only illegal but also likely to involve an unwarranted invasion of privacy and jeopardize the applicants' commercial interests as per **Section 6(1)(e) of the Access to Information Act.** Counsel also cited **Section 6(1)(d) of the Act** to the effect that the right of access to information under **Article 35** shall be limited in respect to information whose disclosure is likely to involve invasion of privacy of an individual and 6(1)(g) which limits access whereby disclosure is likely to undermine a public or private entity's ability to give adequate or judicious consideration to a matter concerning which no final decision has been taken and which remains subject of active consideration. Further, the applicants decried the respondents' noncompliance with **Section 28(1) of Anti-Corruption and Economic Crimes Act** which requires court approval before production of specified records that may be required in an investigation; or before a person is required to provide explanations or information within his knowledge with respect to such records. The following authorities were cited:

- *Vitu Limited vs The Chief Magistrate's Criminal Application No.475 of 2004 (unreported)*

*"A police officer is not legally empowered to apply for and obtain a warrant to investigate a person's bank account just because he imagines that the person may commit or has committed an offence. There must be substantial acts and circumstances already available to the police officer to enable him to create or have a reasonable suspicion in mind that the account held has committed an offence...there must have been a complaint and investigations"*

- *Samura Engineering Limited & 10 Others vs Kenya Revenue Authority (2012)eKLR*

*The right to privacy enshrined in our Constitution includes the right to not to have one's person or home searched, one's property searched or possessions seized. Since searches infringe the right to privacy, they must be conducted in terms of legislation which must comply with the provisions of article 24. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains of ordinary citizens is one of the features that distinguish a democracy from a police state.*

*...since a warrantless search and seizure is a limitation to the right of privacy, the facts forming the basis of the suspicion must be laid before the court for it to conduct an independent assessment to determine whether the acts are reasonable and justifiable in the open and democratic society based on human dignity, equality and freedom as provided in article 24. The burden to establish that the conduct complained of meets the standards established by article 24 is borne by the party justifying the limitation.*

- *Energy Financing Team limited & Others vs SFO 2005 EWHC 1626 (Admin) Para 24(5)*

*"When there is an ongoing investigation into for example, the affairs of a company such as EPRS, which appears to have been at the centre of the fraud, it will always be difficult to say precisely what documentation of value to the inquiry may be recovered from those justifiably suspected of being in contact with the main target company, but nevertheless the warrant needs to be drafted with sufficient precision to enable both those who execute it and those whose property is affected by it to know whether any individual or class of documents falls within it. If that is done it seems to me that the specificity required will be no less than would be required for a notice under section 2(3) where it is practicable to serve such a notice, and although the terms of the warrant may be wide it will not simply be fishing if it is directed to support an investigation which has apparent merit"*

**43.** It was further submitted that **Section 28 of Anti-Corruption and Economic Crimes Act** ought to be read with **Article 47**, the constitutional safeguard to the applicants'/petitioners' right to fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Counsel placed reliance on the following authorities:

· ***Kenya Human Rights Commission & Another vs Non-Governmental Organizations Board and Another (2018) eKLR***

“35. The Constitution is the **Supreme law** of the Republic and decrees as such in Article 2(1). It binds all persons and all state organs in the course of performing their duties. The provisions in Article 47 to the extent that they require that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person’s right or fundamental freedom, the affected person is entitled to be given written reasons for the action, is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of **Article `19(1)** of the **Constitution** which states that the Bill of Rights is an integral part of Kenya’s democratic state as the framework for social, economic and cultural policies..”

· ***Standard Chartered Financial Services Limited & 2 Others vs Manchester Outfitters Limited (Now Known as King Woollen Millers Limited) (2016 eKLR)***

[62] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal declaration of Human rights (UDHR), and Article 6 of the International Convention on Civil and Political Rights (ICCPR) among other International conventions, which this country has ratified. **Article 25(c)** of the **Constitution 2010** elevates it to an inderogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of Law and public faith in the justice system would inevitably collapse. A fair trial has many facets, and includes the right to have one’s case heard by an independent, impartial and unbiased arbiter or judge. The facet of fair trial we are dealing with here is that of bias or perceived bias on the part of the judge or the court.

**44.** Senior Counsel submitted that Mr. Issa was correct in stating that the issues culminating in this case were created by two local shareholders who held only two shares out of 2,900,000. That there was need to protect business interests even where a person with opposing interests is entitled to a right. Counsel reiterated that in this case the investigation was not in the public interest. If the issue was genuinely about stamp duty there was a way to recalculate it and have it paid. All there is presently is that the 1<sup>st</sup> respondent wants to collect information and hand it over to Stephen Mwangi for his own good as opposed to public good. The applicants’ case began from the time judgment was delivered and Mwangi resorted all avenues from the courts to Parliament to advance his own interests against the applicants. Counsel prayed for exemplary damages in the petition. He implored the court to draw an inference that KRA and the Ministry of Lands having given the applicants a clean bill of health, the action of the 1<sup>st</sup> respondent was malafides and not in the public interest.

**1<sup>st</sup> Respondent’s Submissions**

**45.** In reliance on the affidavit of Mark Ndiema filed on 11/2/2021 and submissions filed 8<sup>th</sup> October 2019, Ms Kenduiwa and Ms Kibogy submitted on behalf of the 1<sup>st</sup> Respondent. Ms Kenduiwa stated that counsel for the applicant submitted at length concerning proceedings brought by the applicant’s shareholders in the midst of their internal wrangles. However, the only documents relevant to these proceedings are the letters written by the 1<sup>st</sup> respondent in the course of investigations. The wrangles between the shareholders were not relevant and were only being used to allege that the Commission was acting on behalf of the shareholders. The said wrangles led to reports being made to Director of Criminal Investigations which reports led to recommendations to the Director of Public Prosecution.

**46.** Learned counsel narrated that a multi-agency team was formed to look into those allegations and the EACC was one body among the multiagency that comprised the task force. That EACC’s involvement was demonstrated in the investigations in paragraphs 7-20 of the 1<sup>st</sup> respondent’s affidavit and in paragraphs 13-33 in the replying affidavit of the 1<sup>st</sup> respondent in petition 37 of 2019. When the EACC took over investigations it disclosed fraud, money laundering and tax evasion with local and international effects. That was when the Commission wrote the letters to call for the documents required by the multi-agency task force. Having given that background Counsel contended that it completely countered the allegation by the applicant that the EACC was being used by a single shareholder. She emphasized that the EACC is an independent institution which does not take orders from any institution or individual.

**47.** Counsel pointed out that the applicants have repeated that they were cleared by the Collector of Stamp Duty and whereas the investigation relates to only one parcel the Commission sought to place caveats on 33 parcels of land. She explained that the letter related to only five parcels of land although at the time investigations considered all 33 parcels. Had the investigations proceeded perhaps there would have been more parcels involved. LR 11288 was the subject of the letter to Director of Criminal Investigation

and is owned by Purple Saturn Ltd, one of the special purpose vehicles created by the 2<sup>nd</sup> applicant/petitioner to aid in money laundering.

48. Counsel referred the court to paragraph 20 of the replying affidavit in Petition 37 of 2019 listing twenty special purpose vehicles of which Purple Saturn Ltd was one. The investigations were therefore not limited to LR 1288. That the issues for determination are whether the 1<sup>st</sup> respondent has jurisdiction to investigate money laundering and tax evasion and whether it has jurisdiction to place caveats on the property concerned. On the 1<sup>st</sup> issue counsel cited the definitions in **Section 2** of the **Anti-Corruption and Economic Crimes Act** of the main offence, tax evasion which is an economic crime and also corruption. She stated that the investigation revealed land transfers to the special purpose vehicle companies and that the applicants/petitioners deliberately under declared the values thereof for the purpose of evading tax reproduced at paragraphs 22 and 23 of the 1<sup>st</sup> respondent's replying affidavit in petition 37 of 2019. Further, there was a Kenya Revenue Authority audit report for the year 2016 that concluded that the petitioner under declared so as to reduce the tax deductible which amounted to dishonesty in connection to stamp duty.

49. Counsel continued that **Section 2** of the **Anti-Corruption and Economic Crimes Act** also defines an economic crime involving dishonesty with **Section 45(1) (d)** focusing on any taxes or any fees, levies or charges payable to any public body or any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges. Accordingly, stamp duty is payable to Kenya Revenue Authority which is a public body and the same being public revenue the EACC has jurisdiction to investigate tax evasion. Ms Kenduiwa cited the case of *Jimmy Mutuku Kiamba & 3 others V Ethics & Anti-Corruption Commission & 4 others (2018) eKLR*. In that case the court noted that there was no demonstration of how the applicant's rights were violated when KRA asked the EACC to investigate tax evasion by the applicant. The commission had acted as part of a multi-agency team and the court referred the petitioner to section 1 of the EACC Act which authorizes the commission to collaborate with other agencies. It was therefore submitted that the 1<sup>st</sup> respondent has jurisdiction to investigate.

50. On the issue of money laundering and the commission's mandate to investigate the same it was submitted that although the applicants seek a relief to the effect that a declaration be issued that EACC has no mandate to investigate money laundering counsel did not submit on the issue and neither was it discussed in their substantive submissions. Counsel asserted that they have demonstrated what money laundering is, that it cannot be separated from corruption and that it is a key economic crime. She relied on the *United Nations Convention against Corruption* which has been ratified by Kenya hence forming part of Kenyan law by dint of **Article 2** of the **Constitution**. Money laundering is therefore an offence in Kenya over which the EACC has investigative powers. The preamble to the Act also gives EACC power to investigate money laundering as well as **Section 47** of the **Anti-Corruption and Economic Crimes Act**. The acts that have been defined in **Section 47** are acts involved in money laundering.

51. It is further submitted that **Section 23** of the **Anti-Corruption and Economic Crimes Act** gives investigators immunity same as police officers. Counsel placed reliance on the case of *Okiya Omtata and 2 others V Attorney and 4 others (2018) eKLR* on interpretation of the law regarding to the powers of the Commission. She posited that whereas money laundering is not expressly mentioned in **Anti-Corruption and Economic Crimes Act** looking at the law it is clear it was intended to be included in the **Ethics and Anti-Corruption Commission Act**

52. With regard to the Commission's powers to direct the Commissioner of Lands to place caveats on suspect property counsel quoted **Section 11** of the **Ethics and Anti-Corruption Commission Act** and **Section 76 of the Land Registration Act** which allows the Registrar to place restrictions on the application of any person. The Commission therefore acted within the law. She submitted that the applicants/petitioners in court pleadings and submissions stated that the only way the Commission can place restrictions was under **Section 56** of the **Anti-Corruption and Economic Crimes Act** but the 1<sup>st</sup> respondent submits that that section only applies to suspect properties amenable to forfeiture. That the applicants seek that this court finds that EACC acted outside its powers even in the existence of the letters; which amounts to asking this court to delve into the merits of those letters yet Judicial Review does not delve into the merits of a decision. Counsel urged this court to dismiss the Judicial Review application and petition with costs as no bad faith or dishonesty has been demonstrated.

53. Miss Kibogy highlighted areas unique to the petition. She placed reliance on the replying affidavit of Jarso Dida sworn on 4<sup>th</sup> February 2020, submissions dated 18<sup>th</sup> June 2020 and the accompanying list of authorities. She referred the court to ELC Misc 42 of 2018. Counsel confirmed that there were indeed stay orders in that file. In her view, the same stopped placing of caveats on the named properties and the requisition of documents from the Ministry of Lands & Planning. There was no order barring the commission from carrying out investigations hence they continued culminating in the letters that resulted into the present petition. She stated that the court has been told how EACC came into the investigation which turned out to be a multifaceted case of tax evasion, fraud and money laundering with preliminary findings stipulated in detail at paragraph 30 of the replying affidavit.

54. Counsel submitted further that the Commission's findings are that the tax evasion fraud and money laundering perpetuated by the applicant/petitioner companies involved a chain of interlocking companies and nominee shareholders. That the money laundering manifests where the applicant companies loan money to Special Purpose Vehicles to in turn purchase its own properties which is a tactic known as money back scheme. The scheme bears no obvious financial commercial benefit but it is a costly process involving advocates and attracting taxes. According to counsel there is absolutely no rationale for engaging in such transactions other than to conceal or disguise the nature, source and the movement or ownership of money or assets. Thus it is the 1st respondents' submission that there is reasonable suspicion that these activities could be from an illicit source which amounts to money laundering.

55. Counsel argued that the 1<sup>st</sup> respondent indeed bears jurisdiction to investigate. She cited **Section 2(g)** of the **Anti-Corruption and Economic Crimes Act** and the definition of corruption as well as **Section 45** of the **Anti-Corruption and Economic Crimes Act**. **Section 45(1) (d)** specifically talks about taxes so EACC has jurisdiction and that the investigation is being conducted by a multiagency team namely Central Bank, KRA, DCI and the EACC. She noted that the applicants/petitioners relied on the case of *Africa Spirits Limited V Director of Public Prosecutions and another (2019) eKLR* which she distinguished from the present cases because unlike the Directorate of Criminal Investigations which relied on the tax legislation EACC has express mandate to investigate tax evasion. On the issue of stamp duty, she submitted that stamp duty is an issue of self-assessment and companies are required to self-assess and declare. She referred the court to paragraph 23 the replying affidavit in which Kenya Revenue Authority conducted an audit and concluded that the petitioner filed an incorrect self-assessment. That it is a fact that Kenya Revenue Authority did contact the petitioners and they paid the amount demanded following the audit. However, that was in regard to five parcels of land. It did not take into consideration the other parcels of land under investigation. Counsel referred the court to Paragraph 26 of the affidavit illustrating a classic example of under declaration where the petitioner transferred to a Special Purpose Vehicle property at Kshs.780,000/= and in two years the same property was transferred to another entity at Kshs.14,000,000. She stated that the government is entitled to revenue which it was denied through the applicants' illicit activities. This was therefore within the mandate of the commission to investigate.

56. With regard to annexures CB50, to CB55 to which counsel for the applicants submitted that his clients were not invited it was submitted in response that the applicants'/petitioners' CEO and directors were invited for interview and statement writing on a given date. The Commission was not therefore acting arbitrarily and adhered to **Section 4** of the **Fair Administration Actions Act**. In relation to **Sections 27(3) and 28** of **Anti-Corruption and Economic Crimes Act** it was stated that **Section 27(3)** is not in regard to information only but also relates to documents. **Section 27(3)** is a notice to "any person" The person need not be an associate or person related to corruption. That **Section 27(3)** is an administrative power employed when the commission wants to obtain information prior to involving the power of the court under **Section 28(1)**.

57. Counsel pointed out that the notices were issued at the time when *Prof Ojienda's decisions* in the High Court and the Court of Appeal were in force which is the reason why the Commission did not carry out a search. Counsel annexed the decision of the Supreme Court staying the Court of Appeal decision. She also restated that **Articles 31 and 35** guarantee the right to privacy and the right to access to information but are not absolute rights. They can be limited in accordance with **Article 24(1)** of the **Constitution**. That the Commission's right to investigate corruption and loss of revenue is one of the limitations contemplated under **Article 24(1)(b)** with respect to the Access to Information Act and the Data Protection Act relied on by the petitioners which statutes are not designed to limit the Commission in obtaining information in public interest. Counsel referred the court to **Section 6(4) of the Access to Information Act**. That a public body or public entity may be compelled to produce the information where the public interest outweighs the danger sought to be protected in accordance with **Section 51(2) (c) of the Data Protection Act**.

58. According to the 1<sup>st</sup> respondent, this is not a case where the court should interfere with the mandate of the Commission as it has not been demonstrated that the Commission acted arbitrarily or in excess of its mandate. On the issue of general and exemplary damages it is the Commission's submission that damages are only awarded when violation of a right is proved. In the circumstances where it is an exercise of power by an entity such as the Commission it must be demonstrated that the entity exercised its power irrationally, unprocedurally, unreasonably and that the exercise of power was tainted with illegality and impropriety. Counsel averred that the Commission was merely pursuing its mandate. That the purpose of exemplary damages is to punish and deter. In this case the Commission cannot be punished and deterred for exercising its mandate. She prayed that the conservatory orders be lifted and the petition be dismissed with costs.

## **2<sup>nd</sup> Respondent's Submissions**

59. Mr. Kamau, learned State Counsel stated that in respect of Misc. App. 1 of 2019 the 2<sup>nd</sup> respondent would rely on the affidavit of Gildine Karani sworn on 13<sup>th</sup> May 2019 and filed on 14<sup>th</sup> May 2019, submissions and a list of authorities filed on 15<sup>th</sup> May 2019.

In respect of *Petition 37 of 2019* he relied on the grounds of opposition filed on 3<sup>rd</sup> February 2020, submissions filed on 6<sup>th</sup> March 2020 and the list and bundle of authorities filed on 6<sup>th</sup> March 2020. State Counsel submitted that the Attorney General is sued on behalf of the Principal Secretary, Ministry of Lands and Physical Planning whose role was merely exercising comity between arms of government when it received communication from the EACC but could not act on the requests after stay orders were issued on 20<sup>th</sup> December 2018.

**60.** Counsel highlighted the decision of the Court of Appeal in *Suchan Investment Ltd vs Ministry of National Heritage & Culture (2016) eKLR*. In this case the court held that there is a shift from the traditional process judicial review considerations to merits of a decision whereby the court is called upon to consider the test of proportionality to evaluate the substantive merits of a decision which test he urged the court to apply. That the same was replicated in the *Prof. Njuguna Ndung'u case (supra)*. State Counsel contends that the Commission did not follow due process in the impugned letters of request for caveats over the applicants' properties. He asserted that the Commission's decision to place restrictions on the basis that the government lost monies on account of stamp duty lacked factual foundation. It was submitted that in as much as the Registrar of Lands can place restrictions on private land pursuant to **Section 76 of the Land Registration Act**, restrictions should not be indefinite. Counsel cited the case of *David Macharia Kinyuru vs District Land Registrar, Naivasha & Another Nakuru ELC Misc App. No. 331 of 2016 [2017] eKLR* in this regard.

**61.** It is submitted that section 76 of the Land Registration Act should be read with section 4(3) of the Fair Administrative Action Act which in Counsel's view obligates the Registrar of Lands to make inquiries into EACC's requests before taking any adverse actions against the applicants/petitioners. That the use of administrative procedures have been challenged in Court occasioning huge pecuniary costs to the government by way of damages. The case of *Ezekiel Misango Mutisya vs National Lands Commission & 6 Others (2014)eKLR* is quoted in support of this submission. To this end, the 2<sup>nd</sup> Respondent contends that the proper approach that ought to have been taken by the commission is adherence to **Section 56 of the Anti-Corruption and Economic Crimes Act** which empowers the High Court on application by the Commission to make a preservation order prohibiting the transfer, disposal or any other dealing with property on evidence of its acquisition by corrupt conduct. To illustrate this exercise counsel cited the Court of Appeal case of *Stanley Mombo Amuti vs Kenya Anti-corruption Commission Nairobi Civil Appeal No. 184 of 2018 [2019] eKLR* in which the Court explained the forfeiture procedure. Counsel submitted that the commission ought to have followed the set procedure in that case as opposed to placement of restrictions that infringe on the applicants'/petitioners' proprietary rights. Further, according to the 2<sup>nd</sup> respondent an alternative procedure available to the Commission is preservation orders provided for in **Section 82 of the Proceeds of Crime and Anti-money Laundering Act. Section 44 of the Act** provides for reporting of suspicious activities to the Director, Financial Reporting Centre for further action that could lead to obtaining of preservation orders.

**62.** State counsel in reliance on the case of *Mumo Matemu of Human Alliance & 5 others V Trusted Society (2013) eKLR* opined that the court must show deference to the jurisdiction granted to independent commissions EACC being one of them. However, he asserted that the Commission ought to discharge its mandate in accordance with the law, in cooperation with other established bodies and in adherence to established procedure as provided under **Proceeds of Crime and Anti-Money Laundering Act. Section 87** thereof provides for placement of restrictions by the Land Registrar on the strength of a preservation court order.

### **1<sup>st</sup> Interested Party's Submissions**

**63.** In response to the Petition and the Judicial review application the 1<sup>st</sup> Interested Party relies on his Replying Affidavit sworn on 9<sup>th</sup> March 2020, Grounds of Opposition and submissions of even date. The gist of which is that he denies any identifiable stake or legal interest whatsoever in the applicants and has nothing to do with the issues raised in the application and petition. He claims that the same are strictly between the petitioners and the respondents who are independent constitutional bodies. That he has no power or ability to influence the decisions of the respondents. The 1<sup>st</sup> interested party submits further that the decision or outcome of this case will not affect him in any way and that all allegations against him are not backed by any proof or cogent evidence. In reliance on the following authorities the Interested Party prays that the case against him be dismissed.

*Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure Rules, 2013; definition of Interested Party*

*"Means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation"*

*Trusted Society of Human Rights Alliance vs Mumo Matemu (2014)eKLR*

*“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause”*

***Kiambu County Tenants Association versus Attorney General & Another (2017)eKLR***

*“With the above observation in mind, the starting point is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

***Edward Akong’o Oyugi & 2 Others vs Attorney General (2019)eKLR***

*“74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.*

**2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties Submissions**

64. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties declined to acquiesce to EACC’s requests requiring that they reveal the applicants’/petitioners’ information. In the 3<sup>rd</sup> Interested Parties’ submissions filed on 4<sup>th</sup> March 2020 it is submitted that in the absence of notice and a court order under **Section 28** of the **Anti-Corruption and Economic Crimes Act** providing such information would be in contravention of the **Data Protection Act, 2019**. It would amount to providing personal information relating to the Petitioner’s without their consent. Further, **Section 30(1) (b)** of the **Act** prohibits processing of data by a data controller or processor unless it is necessary for compliance with any legal obligation.

**Applicants’/petitioners’ replies**

65. In reply Mr. Issa responded that the 1<sup>st</sup> respondent has not discharged the burden shifted to her as to why they requested for documents four days after the attempts by the shareholders failed in Parliament and the Environment and Land Court. That they ought to have demonstrated the same when they instituted the various investigations and when the EACC got involved in the multi-agency investigation. Their affidavit is silent on this aspect hence they have not discharged the burden that there was a clear abuse of the process and that they were not acting independently. Counsel referred to the Tax Procedures Act and the Stamp Duty Act. He opined that the 1<sup>st</sup> respondent’s counsel tried to refer to section 2 and 45 of ACECA but that does not answer the question. Stamp duty is not assessed by the Chief Valuer. In income tax there is self-assessment but for stamp duty the Government must assess what stamp duty is payable so the submission by Ms Kibogy was incorrect.

66. In addition, there is no reference to stamp duty in **Section 2 and 45** of **Anti-Corruption and Economic Crimes Act**. This is because the Stamp Duty Act under **Section 29** never envisaged that it would be enforced by EACC. The Stamp Duty Act predates the EACC Act but was never amended so it is the applicants’/petitioners’ submission that enforcement of stamp duty is only under **Section 29** of the **Stamp Duty Act**. On the **Mumo Matemu case** Counsel replied that this case is an exception. Miss Kenduiwa made reference to section 11 in regard to Justice Ong’udi’s decision in the **Peter Kiamba case**. Counsel asserted that the applicants have absolutely no problem with KRA receiving information on tax evasion from third parties and EACC collaborating with other agencies.

67. Counsel continues that in the affidavit of Mark Ndiema there is no request from KRA to the EACC to investigate any allegation of evasion or under payment of stamp duty. The present case is very different from that of **Peter Kiamba** unless there is evidence that someone complained in regard to the 33 parcels failure to which is no extrication of the submissions that the 1<sup>st</sup> respondent was acting at the behest of the Kenyan shareholders who had unsuccessfully sought those very orders. Further, if the Commission was of the position that they did not want copies there would be no basis for them to ask for certified copies if Ndiema’s deposition is the

correct position in law.

**68.** In regard to the letters the subject of the applicants' Judicial Review proceedings counsel responded that there is a provision in the Land Registration Act but it is for the purpose of preventing fraud or improper dealings of land. Therefore **Section 76** of the Act cannot obtain in the circumstances of this case as it has not been demonstrated that the 33 parcels were fraudulently acquired or that there was improper dealing with the same. Moreover, there is no evidence that the applicants/petitioners acquired these properties from proceeds of crime or that the properties were being purchased by the unnamed parties through proceeds of crime; no explanation as to why it took 5 years for caveats to be placed when there was no allegation of non-payment of stamp duty which is where the abuse of process manifests.

**69.** Counsel argued that the letters were not written under **Section 76** but requested the PS to place government caveats. There was no reasonable basis why the EACC sought for the documents. He reiterated that no one challenged the ownership of the titles. The issue that the respondents were denied of government revenue was not borne out of the evidence tendered by them. It is not the case that they wished to place the caveat until stamp duty was paid. That the case would have been different had the collector of stamp duty supported the claim that stamp duty was under paid. However, the position is that in all the transactions stamp duty was fully paid. The audit by Kenya Revenue Authority was in regard to corporate tax but not stamp duty. Kenya Revenue Authority looked at the structures and came to the conclusion that the transfers to the Special Purpose Vehicles attracted tax. It assessed the tax and the same was paid as demonstrated in the applicants'/petitioners' affidavits. Counsel urged the court to look at the evidence before it as the court of Appeal did in the *Njuguna case (supra)*. He maintained that EACC was at pains to explain the reasons why they were asking to place caveats before investigations were complete and questioned whose agenda EACC was pushing if the collector of stamp duty has no complaints. Counsel concluded that the Commission was pushing the agenda of the Kenyan shareholders. He emphasized that the applicants/petitioners have not asked for adverse orders against the Attorney General. That the Attorney General's purpose was to protect the interest of the public which they have done commendably well. As for costs he submitted that only the applicants'/petitioners' are payable and urged the court to allow the application with costs.

**70.** In reply SC Ahmednasir Abdullahi reiterated that the applicants'/petitioners grievance starts from 20<sup>th</sup> December 2012 when Gacheru J issued conservatory orders. The court stopped the 1<sup>st</sup> respondent in its tracks as submitted by Ms Kibogy. The only thing she said is that at page 9 of the ruling the court allowed them to continue with investigations yet a cursory look at the said page reveals that it was not the case. That page was a mere restatement of the issues. In Counsel's estimation the ruling which is 26 pages long stopped all activities undertaken by the 1<sup>st</sup> respondent.

**71.** Senior Counsel also decried that the identity of Jarso Dida is unknown. That he delved into many things of which he has no knowledge and is a lay person in many aspects. For instance, at paragraph 20, Dida refers to preliminary investigations which amounts to hearsay and ought to be disregarded by this court. Counsel argued that there is no evidence that the companies mentioned were special purpose vehicles (SPVs) or nominees. There should have been documents such as CR12 to demonstrate that there was directorship in common. The depositions were also full of conjecture with no evidence showing that money was transferred. He questioned how one could conceal money coming into Kenya as alleged by Ms Kibogy in her submissions.

**72.** Senior Counsel continued that for any person who knows how banks operate it is pedestrian to allege that the properties were purchased in a process of money laundering. Shares are not sold by land. When one purchases what is purchased is the nominal value. Further, he opines that the *Prof. Ojienda case* has created more smoke than fire. According to senior counsel when one is called by EACC to record a statement it is not in adherence with the Fair Administrative Action Act. It is an interrogation. Section 4 of the Fair Administrative Actions Act was not observed in this case. He stated further that no-one is challenging the power of the respondent or its constitutional jurisdiction to do certain acts. What is challenged is the exercise of the Commission's power to bring applicants/petitioners to their knees until they agree to the terms of the minority Kenyan shareholders. That it is only through damages that the respondents will refrain from such blatant abuse of power.

#### ***Analysis and determination.***

**73.** As stated by the parties in their pleadings and submissions the facts in the Petition and the Notice of Motion and resultant, the issues are largely similar. This issues for determination are:

**a) Whether the 1<sup>st</sup> Respondent has the mandate to investigate allegations of tax evasion and money laundering as it sought to do through the impugned letters.**

*b) Whether the 1<sup>st</sup> Respondent has jurisdiction to direct the Chief Land Registrar to place caveats over the property of the Applicants.*

74. It is the Applicants' case that the Commission does not have power to investigate matters relating to Stamp Duty which shortfalls if any can be recovered as a civil debt in recovery proceedings devoid of any element of criminality. It is also the case of the Applicant that being private entities, they are not within the purview of the Commission which by statutory and constitutional dictates ought to confine itself to public officers and bodies that are run by public funding. The Commission's position however is that it has the power to investigate tax evasion and money laundering and that it properly made the request to the Chief Land Registrar to place Caveats on the Applicant's land. The position of the Attorney General is however different as its contention is that such power is vested in the **Financial Reporting Centre under Proceeds of Crime and Anti-Money Laundering Act.**

75. I am in agreement with the 1<sup>st</sup> Respondent that Anti-Corruption and Economic Crimes Act gives the Commission wide powers in investigation of corruption and economic crimes and that tax evasion falls within the crimes under their docket. This is because it is one of the offences defined as corruption in the Anti-Corruption and Economic Crimes Act. that Section provides:-

*"2. Corruption" means—*

*(g) an offence involving dishonesty—*

*(i) in connection with any tax, rate or impost levied under any Act; or*

*...“economic crime” means—*

*(a) an offence under section 45; or*

*(b) an offence involving dishonesty under any written law providing for the maintenance or protection of the public revenue;*

*Section 45. Protection of public property and revenue, etc states:-*

*(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully—*

.....

*(d) fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.”(emphasis mine)*

76. Tax evasion being an offence under Anti-corruption and Economic Crimes Act it falls within the jurisdiction of the EACC to investigate. Moreover the Commission's mandate as provided in **Section 11(a) (d)** of the **Ethics and Anti-Corruption Commission Act** is to investigate and recommend to the Director of Public Prosecutions prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the Act, the **Anti-Corruption and Economic Crimes Act (ACECA)** or any other law enacted pursuant to **Chapter Six** of the **Constitution**. As earlier seen dishonesty in connection with any act is defined as an offence in **Sections 2 and 45 (1) (d)** of the **Anti-Corruption and Economic Crimes Act**. There can therefore be no doubt that the commission has power to investigate tax evasion. In the case of **Giche Ltd & 2 others v Director of Public Prosecution & 2 others [2020] eKLR** the court was faced with the question whether a person could be prosecuted for failure to pay tax in view of **Section 80 (1) of the Tax Procedures Act** the court stated:-

*“112. In considering the merits of the petitioners' arguments, one must bear in mind the context of the legislation at issue in this petition. The argument that the petitioners advance, as I understand it, is that although they have failed to pay taxes, they should not be prosecuted as section 80(1) of the TPA does not allow the imposition of a penalty by the Commissioner, as well as a prosecution. The question, however, is whether that provision would override the provisions of ACECA, which deals with fraudulent failure to pay taxes. In my view, it does not. The provisions of the TPA were intended to regulate procedures for tax collection, as the object and purpose provisions indicate. They were not intended to apply to circumstances where a tax payer deliberately fails to meet his tax obligation, an act that is expressly defined in the ACECA as amounting to corruption, and is an*

*offence under section 45 of ACECA. The overriding concern in ACECA is deterring corruption in public officers, one element of which, as defined in section 1(g)(i) of ACECA, involves ‘an offence involving dishonesty in connection with any tax, rate or impost levied under any Act.’*

77. As to whether the 1<sup>st</sup> Respondent has power to request the Chief Land Registrar to place caveats/Restrictions on the Applicants land parcels **Section 76(1) of the Land Act** states:-

*“76. (1) A lessee upon whom a notice has been served under*

*section 75, or against whom the lessor is proceeding, by action or reentry, to enforce his right of forfeiture, may apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and the conduct of the parties and the circumstances of the case, thinks fit, and, if it grants relief, may grant it on such terms as it thinks fit.”*

It is clear from a cursory reading of the Section that the Registrar may place a caveat on land for purposes of compulsory acquisition, the prevention of any fraud or improper dealing or any other sufficient cause and may do so either on his/her own motion or upon the application of any person interested in the land. The Section also makes it clear that before placing such a caveat/restriction the Registrar must carry out inquiries and issue notices to the person affected (see Section 77) There is therefore no doubt that the 1<sup>st</sup> Respondent being interested in the property of the Applicants by virtue of the investigations it was carrying out and which in my considered view fall under “other sufficient cause” it could cause or apply for a restriction to be placed on the lands.

78. As to whether the Commission’s mandate extends to private entities my answer is in the affirmative. It is my finding that the Ethics and Anti-Corruption Commission derives that mandate from **Sections 11(1) (d), 11(4) and 13(2) (c) of the Ethics and Anti-Corruption Commission Act** which states:-

*“11. Additional functions of the Commission*

*(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall:-*

*(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution;*

*(4) The Commission shall have all powers necessary or expedient for the efficient and effective execution of its functions, under the Constitution, this Act or any other written law.*

*13. Powers of the Commission*

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

*(c) conduct investigations on its own initiative or on a complaint made by any person;*

The above jurisdiction is exercised within the Anti-Corruption and Economic Crimes Act whose preamble describes the Act as:-

*“An Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto.”*

In my view there is nothing in the Act that would preclude the commission from investigating private entities.

79. As to whether the 1<sup>st</sup> Respondent can issue notice to be provided with information without first obtaining a court order again my answer is in the affirmative. **Section 27 (1) of Anti-Corruption and Economic Crimes Act** upon which counsel for the Ex parte Applicant/Petitioners placed reliance applies only here the commission require a written statement from an associate. That section

states:-

*“27. Requirement to provide information, etc. (1) The Commission may apply ex parte to the court for an order requiring an associate of a suspected person to provide, within a reasonable time specified in the order, a written statement stating, in relation to any property specified by the Secretary, 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 phrase “ associate of a suspected person” is defined in subsection (2) to mean:-

*“(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.”*

Clearly **Section 27 (1) of Anti-Corruption and Economic Crimes Act** is not relevant to the investigations pertaining to the *exparte* Applicants/Petitioners.

**80.** However, **Section 27(4)** empowers the 1<sup>st</sup> Respondent to obtain any information or documents from any person without first obtaining a court order as it did in this case provided that notice is in writing. That section states:-

*“(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.”*

**81.** It was also argued that the investigations by the 1<sup>st</sup> Respondent are designed to aid individual shareholders to pursue their rights and are oppressive, capricious and an affront to the rights of the Petitioners/*exparte* Applicants and that the same should be stopped for those reasons. In the case of **Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya commercial Bank Limited and 4 others [2013] eKLR** the Court of Appeal stated:-

*“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.*

*By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.*

*It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69.*

The court went on to hold that *“it is not in the public interest or in the interest of the administration of justice to use the criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court.”*

**82.** It is my finding that in this case the matters being investigated transcend the dispute between the individual shareholders and the

Petitioners/Ex parte Applicants as they revolve around the commission of the offences of tax evasion and money laundering. I am not persuaded that there are any grounds to warrant this court to interfere with these investigations.

**83.** The interested parties argued that requiring them to give information regarding the accounts of the Petitioners is a breach of the privilege bestowed upon bankers under **Section 140(1) and (2) of the Evidence Act**. It is my finding however that the said privilege is not absolute. For instance, it is now subject to or subservient to the provisions of PART III of the **Proceeds of Crime and Anti-Money Laundering Act** which give banks/financial institutions a mandatory obligation to report unusual or suspicious transactions to the Financial Reporting Centre established under **Section 21 of Proceeds of Crime and Anti-money Laundering Act**. Indeed, **Section 24(c) of the Proceeds of Crime and Anti-Money Laundering Act** outlines the sanctions which the Financial Reporting Centre may impose on reporting institutions for non-compliance. The argument of the interested parties cannot hold.

**84.** As for the argument that the investigations undertaken by the 1<sup>st</sup> Respondent could only have been undertaken under Proceeds of Crime and Anti-Money Laundering Act my finding is that **Section 23 of the Anti-Corruption and Economic Crimes Act** gives the 1<sup>st</sup> Respondent investigative powers. **Section 23 (3)** of the Act provides:-

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

**85.** From the preamble of Anti-Corruption and Economic Crimes Act it is *“an Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences”*. Proceeds of Crime and Anti-Money Laundering Act on the other hand is *“an Act of Parliament to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for identification, tracing, freezing, seizure and confiscation of the proceeds of crime and for connected purposes.”* Depending on what is being investigated both the 1<sup>st</sup> respondent and Assets Recovery Agency which are created in Anti-Corruption and Economic Crimes Act and Proceeds of Crime and Anti-Money Laundering Act respectively, have powers and this extends even to obtaining preservation orders. I have already found that the 1<sup>st</sup> Respondent has power to investigate the offence of tax evasion. My reading of the preamble of both Acts of Parliament does not seem to me to reveal a usurpation of Asset Recovery Agency’s function by the Ethics and Anti-Corruption Commissions and again the argument by Counsel for the Petitioners that only the Proceeds of Crime and Anti-Money Laundering Act applies to this case is not tenable and it is dismissed.

**86.** With respect to fair administrative action it is my finding that if recovery proceedings are instituted against the applicants they will be accorded an opportunity to give an explanation of their dealings. The law pertaining to criminal prosecutions and the constitution have sufficient provisions to safeguard the rights of accused persons and the Petitioners/Exparte Applicants would not be treated differently.

**87.** Mr. Ahmednasir and Counsel for the 3<sup>rd</sup> Interested Party relied heavily on the *Prof. Tom Ojienda Case*. However, this court finds that it cannot rely on the argument bases on that case given the Supreme Court held that: -

“.....

*Consequently, we allow the application and direct that pending the hearing and determination of the appeal NO. 30 of 2019, the effect of the high Court and Court of appeal decision in this matter is hereby stayed. Neither party to this appeal nor any person shall use, apply or in any way rely upon them until the said appeal is heard and determined”*

### **Conclusion**

**88.** In the upshot it is my finding that the investigative powers of the 1<sup>st</sup> Respondent cannot be curtailed based on the grounds advanced by the Petitioners/Ex parte Applicants and accordingly the orders sought in prayers (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix) (x) (xi) (xii) and (xiii) of JR No. 1 of 2019 and in prayers (i), (ii), (iii), (iv) (v), (vi), (vii), (viii), (ix) of the Petition cannot be granted.

**89.** I do however find that the 1<sup>st</sup> Respondent must in asking for documents from the Petitioners/Ex parte Applicants or from any other person(s) confine themselves to copies but not the originals of those documents.

90. That the Petition and Judicial Review cannot stand and are hereby dismissed with costs to the Respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF MARCH, 2022.**

**E.N. MAINA**

**JUDGE**



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