REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NUMBER 65 OF 2020

IN THE MATTER OF AN APPLICATION BY TELKOM KENYA LTD TO

APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION IN RESPECT OF THE DECISION OF

ETHICS AND ANTI-CORRUPTION COMMISSION DATED 26TH FEBRUARY 2020;

AND

IN THE MATTER OF ARTICLES 24, 25, 27, 40(3) AND 50 OF THE CONSTITUTION OF KENYA, 2010;

AND

IN THE MATTER OF SECTIONS 12, 55 & 56 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT;

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO.4 OF 2015

AND

IN THE MATTER OF:

REPUBLIC.....APPLICANT

-VERSUS-

ETHICS & ANTI-CORRUPTION COMMISSION.....RESPONDENT

Ex parte:

TELKOM KENYA LIMITED

JUDGMENT

1. Introduction

The application before court is the ex parte applicant's motion dated 10 March 2020 and filed on 11March 2020 mainly seeking two prerogative orders; the prayers for these orders have been framed in the motion as follows:

> ***"a. An order of Certiorari to quash the decision of the Ethics and Anti-Corruption Commission ("the Commission" or " Respondent ") contained in its letter of 26th February 2020 directing Telecom Kenya Limited the Ex-Parte Applicant (hereinafter "Telkom" or "Ex-Parte Applicant") to provide a list of its properties and to recall and/or suspend any recent sale of property or further sale of property pending the conclusion of the Respondent's investigations;***

b. An order of Prohibition to prohibit the Respondent from restricting, limiting or otherwise interfering with Telkom's right to dispose, transfer or otherwise deal with its property in any manner that it may deem fit subject to its compliance with the relevant law and due process"

The ex parte applicant company, which I will hereinafter refer to as simply "the applicant" has also sought for an order on costs.

The motion is predicated on Order 53 Rules 1(4) and 3 of the Civil Procedure Rules and supported by a statutory statement dated 5 March 2020; the statement has been verified by an affidavit sworn on even date by Clare Ruto, the applicant's Chief Corporate Affairs Officer. Apart from Ruto's affidavit, there is a supplementary affidavit, sworn by Wangechi Gichuki, the applicant's Director of Legal Affairs, filed in response to the respondent's replying affidavit.

2. The Applicant's case

According to the statutory statement, prior to the enactment of the Kenya Information and Communications Act of 1988, the Kenya Post & Telecommunications Corporation was responsible for postal services, telecommunications and radio communications in this country. In the wake of that Act, the functions which hitherto were performed by the Kenya Telecommunications Corporation were liberalised save for the regulatory and oversight functions; the services were distributed among three entities; Communications Commission of Kenya which was entrusted with regulatory and oversight functions; Postal Corporation of Kenya and Telkom Kenya Limited, the applicant in this matter.

The applicant was incorporated as a private company under the Companies Act with all its shares owned by the Government of the Republic of Kenya (hereinafter "the Government"). Its principal purpose was to take over the assets and liabilities of Kenya Posts and Telecommunications Corporation in relation to telecommunication services and operate as a telecommunications service provider.

In a bid to privatise the applicant, the Government in 2007 disposed of 51 % of its shares to Orange E.A. Limited whose shares were in turn owned by France Telcom. The Government retained 49% of the shares.

In 2012, the applicant recorded an unsatisfactory and impaired financial position and was faced with imminent insolvency. To avert this dire situation, the two shareholders resolved to restructure the applicant's balance sheet. This exercise involved, among other things, writing off part of the applicant's debt; injection of capital by the two shareholders; and, adjustment of the Government shares to 30% and France telecom shares to 70% on account of each shareholder's contribution.

Sometimes in April 2014, the Parliament's Public Investment Committee came up with a report on recapitalisation and restructuring of the applicant's balance sheet and made various findings and recommendations, one of which was that investigations be carried out by the respondent in relation to an alleged misappropriation of the applicant's assets before and after privatisation.

The applicant informed the respondent that the privatisation and recapitalization and restructuring of the applicant's balance sheet was carried out in 2007 when the applicant was a fully owned Government entity. Accordingly, apart from the shareholders themselves, it is only the Ministry of Information Communication and Technology, and the Treasury that could authoritatively respond to any question on whatever transactions that were undertaken during that period.

Unfortunately, the recapitalisation and privatisation did not work out as anticipated and so France Telcom pulled out. With the exit of this company, Jamhuri Holdings Limited which was a subsidiary of yet another company called Helios Investment Partners Limited agreed to purchase Telcom shareholding which stood at 70% in 2016 when France Telcom exited. Jamhuri Holdings Limited transferred 10% of its shareholding to the Government in consideration of the latter foregoing its pre-emption rights; thus, the shareholding was distributed between Government and Jamhuri at 40% and 60% respectively.

In the years 2017 and 2018, the applicant embarked on a turnaround strategy but the strategy did not go that far because neither of the shareholders was willing to recapitalise yet recapitalisation was a necessary component for this strategy to succeed. A consultant who was commissioned to look into the matter recommended that the shareholders of the applicant invest about Kshs. 20 billion in the venture or the applicant shuts down its business and liquidate its assets. The only other alternative was for the applicant to conclude a joint venture with Airtel Networks Kenya Limited ("Airtel").

The applicant's board opted for the joint venture option with Airtel which would see the applicant transfer its mobile enterprise and carrier businesses to Airtel and in consideration, the applicant would acquire approximately 30% of the shares in Airtel with the option of increasing this to 49%.

The applicant never heard from the respondent again until 14 August 2019 when the respondent requested it for various documents saying that it was investigating the allegations of misappropriation of public funds during the process of privatisation and recapitalisation and restructuring of the applicant's balance sheet. However, no details were given of the specific matters that were being investigated by the respondent. It is only in the press, more particularly, the Standard Newspaper of 29August 2019 that the respondent is quoted as having alleged that the Government stake in the applicant was likely to reduce from 40% to slightly below 15%.

Nonetheless, the applicant provided the respondent with all the information it was seeking; this information included documents listing the applicant's assets at various stages of its existence, copies of minutes of the meetings of the applicant's board and statements recorded from the interviews with some of the applicant's directors on allegations of misappropriation of public funds in the course of privatisation and recapitalisation and restructuring of the applicant's balance sheet.

Following these investigations, the Communications Authority of Kenya and the Competition Authority of Kenya informed the applicant that they would only approve the intended merger with Airtel once the transaction was cleared by the respondent.

On 17 October 2019, the applicant wrote to the respondent seeking to be provided with the information on the specific allegations made against it. The respondent responded vide a letter dated 23 October 2019 acknowledging that the proposed merger was a commercial transaction between two private entities.

To finance its working capital, recurrent expenditure and other commercial activities, the applicant has, from time to time, disposed of its assets which include parcels of land in various parts of the country. These assets, according to the applicant, are those that are not required for its immediate commercial activities and have been sold with the approval of the applicant's board.

As a matter of fact, the applicant was in the process of negotiating and concluding sale of other properties when it received the respondent's letter dated 26 February 2020 demanding a list of properties that the respondent may have sold after signing the combination deed for the proposed merger with Airtel. It further directed the applicant to recall any recent sale of property and suspend further sale of properties pending conclusion of investigations. Yet the applicant required funds from the proceeds of these sales to effect its redundancy program.

The letter, in the applicant's view, is draconian, unreasonable, ultra vires, illegal and constitutes a capricious exercise of the respondent's powers and an infringement of the applicant's constitutional rights as there is no legislation that empowers the respondent to restrict or limit one's dealings in his property in the manner suggested by the respondent.

It is the applicant's case that it is not a private entity and does not hold any public assets; accordingly, it is not subject to the respondent's investigation powers under Article 6 of the Constitution.

While the applicant acknowledges the importance of the respondent's role in undertaking the constitutional expectation of upholding ethics and integrity and for that reason, the applicant has been, and is still willing to provide the respondent with such information as may be necessary in undertaking its investigatory functions, the applicant is entitled to a reasonable notice and, at any rate, the respondent's powers can only be exercised within its constitutional or statutory mandate.

As a result of the long-drawn investigations by the respondent, the applicant's reputation has been destroyed because an erroneous impression has been created that the applicant is being managed or run in a dubious manner. Further, the directives by the respondent to other Government agencies to withhold their approvals for the proposed merger with Airtel has resulted to not only in substantial loss and damage to the applicant but it is also a threat to the continued operation of the applicant as a viable business concern. In particular, the proposed merger with Airtel has stalled because of these investigations and there is a real danger that Airtel will also walk away from the negotiations if the respondent is allowed to continue to interfere with the applicant's operations and assets.

Again, the requirement that the applicant recalls any recent sales of property and suspend further sales pending the conclusion of the respondent's investigations will expose the applicant to significant loss and damage including damages for breach of the applicant's obligations under sale agreements concluded with various third parties and would also negatively impact on the applicant's ability to fund the costs of its day-to-day operations.

The applicant concluded its statement by saying that there is nothing to prevent the respondent from conducting its investigations even as the applicant concludes the merger with Airtel or disposes of some of its assets to finance its day-to-day operations.

The submissions filed on behalf of the applicant largely rehashed the averments in the statement and the depositions in the verifying and supplementary affidavits.

As to the legal status of the applicant, it was submitted that the applicant is a private company governed, through its articles and shareholder's agreement and through a board of directors in which the Government is represented. It has, however, been acknowledged that despite this status, the applicant is subject to statutory oversight by the Competition Authority of Kenya and Communication Commission of Kenya.

It was submitted that notwithstanding the deficiencies in the respondent's letter of 26 February 2020, the applicant has not only provided the information sought but, most importantly for our purposes, it has proceeded with the sale of the properties. To quote the applicant's submissions on this issue.

> ***"5.1.8. The Ex-parte Applicant has without prejudice or concession as to the validity of the Respondent's demand, supplied the lists of the properties and their values to the Respondent and by affidavit before this Honourable Court. It has however proceeded with the sale of property where required, following the interim order herein. It being the contention of the Ex-Parte Applicant, that conservation of property is a matter not within the investigative powers of the Respondent and can only be effected through an order of this Honourable Court."***

Since, in the applicant's view, the respondent's decision contained in the impugned letter is illegal, irrational and is procedurally improper, there are valid grounds for seeking and grant of the judicial review orders of Certiorari and Prohibition. In this regard, the learned counsel for the applicant cited the case of **Pastoli vs. Kabale District Local Government Council & Others [2008] 2 EA 300,** where it was held as follows:

> ***"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 making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instance of illegality...irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision...such a decision is in defiance of logic and acceptable moral standards…procedural impropriety is when there is 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 fail 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 statute or legislative instrument by which such authority exercises jurisdiction to make a decision. "

To be precise, the respondent, according to the applicant, has contravened the following provisions of the law, namely:

(a) Section 12 of the Ethics and Anti-Corruption Commission Act which requires that the respondent acts impartially and observes the rules of natural justice when undertaking its functions;

(b) Sections 55 and 56 of the Anti-Corruption and Economic Crimes Act which require the respondent to commence proceedings in the High Court and obtain a court order if it wished to prohibit the applicant from transferring, disposing or otherwise dealing with its property;

(c) Sections 4(1) and 4(3) of the Fair Administrative Action Act under which the applicant is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;

(d) Section 7(2)(a)(ii) of the Fair Administrative Action Act according to which the applicant is entitled to adequate notice of the nature and reasons for the proposed administrative action and prohibits the respondent from acting in excess of jurisdiction and powers conferred to it under any written law.

Besides breach of these statutory provisions, the respondent has also infringed the applicant's constitutional rights, in particular, the rights to; access to justice; fair trial; fair administrative action; lawful limitation of its constitutional right; and protection of the rule of law contrary to Articles 48, 25 & 50, 47, 24 and 10 respectively of the Constitution.

It was submitted further that Article 40(3) of the Constitution prohibits the state from depriving a person of property or any interest in, or right over property of any description unless the deprivation —

a) results from an acquisition of land or an interest in land or title to land in accordance with Chapter Five; or

b) is of public interest and is carried out in accordance with the constitution and any Act of Parliament that (i) requires prompt payment in full or just compensation to the person; and (ii) allows any person who has an interest in or right over that property a right of access to a court of law.

In elucidating these grounds, it was urged that aspects of irrationality and abuse of power were clearly demonstrated in the respondent's letter of 26 February 2020. In particular, no reasons have been given for the drawn out investigations and, in any event, the applicant has not provided any specific aspects of the applicant's operations it is investigating; instead, the respondent has been shifting the scope of its investigation from alleged misappropriation of public funds in the privatisation, restructuring and recapitalization of the applicant's balance sheet, to investigations into the proposed merger with Airtel. The respondent's claim that it was investigating into the misappropriation of the applicant's assets prior to and after the privatisation period, and the requirement that the applicant recalls any recent sales and suspend any further sale of properties pending the conclusion of the investigations are also, in the applicant's view, irrational and a clear demonstration of the respondent's abuse of power. Its claim that the investigations were aimed at protecting third parties from the sale of the applicant's properties is also vitiated for the same reasons more particularly so because it is a reason that has no legal backing.

The applicant also averred that the respondent has not demonstrated any reasonable suspicion that any crime or offence which it is mandated to investigate has been committed in the disposal of the applicant's assets or in the proposed merger with Airtel. According to the applicant, the purported investigations are for purposes other than enforcement of the law.

It has also been submitted on behalf of the applicant that matters of privatization, restructuring and capitalization of the applicant are matters which involve the applicant's shareholders and not the applicant itself.

Further, there is no nexus between the respondent's investigations and the directive to recall all the property sales by the applicant and suspend all future sales of property in the absence of a court order. The applicant has been selling its properties for the last five years and recalling the sales or stopping further sales will jeopardise its only source for working capital.

Citing the decision of **Nedermar Technology BV Limited vs. Kenya Anti-Corruption Commission & Anor [2008] eKLR,** it was submitted for the applicant that the respondent was in no better position than that of an intruder because it has not been appointed by Government to oversee commercial agreements; neither does its constituting Act empower it to adjudicate in commercial agreements involving the Government. The applicant's task, according to this decision, is to deal with specific criminal acts of individuals or companies.

Counsel for the applicant also urged that by its own constituting Act, in particular Section 12(c) of the Ethics and Anti-Corruption Act Commission Act, the respondent is required to observe rules of natural justice, which is, in any event, an inalienable fundamental right and which is provided for under Article 47 of the Constitution.

Counsel relied on the decisions in **Kenya Ports Authority vs. Industrial Court of Kenya [20141 eKLR** and **Republic v. Registrar of Companies ex parte Githungo [2001] KLR 299,** where it was held that failure to give a party opportunity to ventilate its own case amounted to violation of the rules of natural justice and that a person who is likely to be affected by administrative acts must be given adequate notice. The need for a fair hearing was also reiterated in **Republic vs. Commission on Administrative Justice & Another Ex-Parte Samson Kegengo Ongeri [20151 eKLR**.

On the question of what constitutes abuse of power, counsel cited the decision in **Republic vs. Director of Public Prosecutions, ex parte Pius Kipkorir Chelimo & Another [2017] eKLR** in which the dicta in **Reg vs. Secretary of State for Environment Ex-Parte Nottinghamshire County council [1986] AC** was cited with approval. It was held in that case that abuse of power includes the use of power for collateral purposes.

And on the need for timely investigations counsel cited the case of **County Government of Kitui v Ethics & Anti-Corruption Commission [2019] eKLR;** in this case, the respondent was reminded not to cripple services to the public by prolonged and indefinite investigations. On this same point, the decision in **Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others [20131 eKLR** was cited; here, it was held that 'unreasonable delay' depends on the facts and circumstances of the particular case.

Apart from being irrational and an abuse of the respondent's powers, counsel for the applicant also submitted that the impugned letter was also illegal and contrary to proper procedure.

To begin with, Article 40(3) of the Constitution protects every person against deprivation of their interest and right over property of any description, unless it is carried out in accordance with the Constitution or an Act of Parliament. According to the applicant, the respondent ought to have been guided by section 26 of the Anti-Corruption and Economics Crimes Act in its investigations. Contrary to this particular provision, the respondent has not given any information on who it is investigating and for what purpose. In the applicant's understanding, the person required to provide information under this provision of the law has to be a person who is reasonably suspected of corruption or economic crime; the applicant, cannot be suspected of corruption or economic crime in dealing with its own assets.

While this section requires that a notice be sent to the person suspected of having committed a crime, the respondent never served such a notice. Counsel relied on **Republic vs. Commissioner of Income Tax ex parte Sony Holding Limited Miscellaneous Civil Application No 636 of 2018**, where it was held that public bodies can only do what they are empowered to do under the law. That 'the doctrine of legality' requires that power should have the law as its source.

As much as the respondent urged that sections 55 and 56 of the Anti-Corruption and Economic Crimes Act are not relevant to the applicant's application, the applicant urged that the respondent did not demonstrate that it was relying on any other provision in its investigations. Nonetheless, the fundamental right of the enjoyment and interest over property, to which the applicant is entitled, can only be circumscribed by the Constitution following Article 24 thereof.

The applicant urged that section 56 of the Anti-Corruption & Economic Crimes Act prescribes the circumstances under which the respondent can obtain an order for preservation of property; accordingly, if it was intended that the respondent could require of a party to preserve a property without recourse to Court, then nothing could have been easier than to state so in the Act.

Counsel relied on the case of **R vs. Public Procurement Administrative Review Board & 2 Others Ex— Parte Rongo University [20181 eKLR**, for the proposition that a decision which fails to give proper weight to a relevant factor may also be challenged as unreasonable. And that unreasonableness would include 'specific errors of relevancy of purpose, reasoning illogically or irrationally, reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn'.

And in **Republic v. Ethics and Anti-Corruption Commission Ex-Parte Nairobi City County Assembly & 13 Others [20191 eKLR** it was held that an administrative decision could be challenged for illegality, irrationality and procedural impropriety; according to that case, an administrative decision is flawed if it is illegal and it is illegal if it contravenes or exceeds the terms of the power which authorizes the making of the decision; if it pursues an objective other than that for which the power to make the decision was conferred; it is not authorized by any power; or, it contravenes or fails to implement a public duty.

Thus, the decision of the respondent in issuing the demand for the list and value of assets and asking the applicant to recall and suspend sale of its properties was illegal and tainted with procedural irregularities and ought to be quashed by way of the order of certiorari; further, the respondent ought to be restrained from any other breaches by way of an order for prohibition, prohibiting it from restricting, limiting or otherwise interfering with the applicant in dealing with its properties.

The respondent's case

In its rebuttal, the respondent relied on a replying affidavit sworn by Jemimah Githungu who described herself in that affidavit as an investigator and a member of the team of investigators tasked with the investigations in question.

Looking at this affidavit, it would appear that the respondent does not necessarily deny the chronology of events leading to the applicant's present legal status. It is, however, the respondent's position that since the Government has 40% stake in the applicant, the latter is subject to the respondent's constitutional and statutory investigation mandate.

It is against this background that in the year 2015, the respondent commenced investigations into allegations that public officers at the Treasury had committed the Government into signing a recapitalisation and restructuring agreement for the applicant without ensuring adequate budgetary provisions. This failure occasioned loss of taxpayers' money and dilution of Government shareholding in the applicant.

In the course of the investigations, the respondent uncovered instances of conflict of interest and misappropriation of assets during the applicant's privatisation process; the investigations are, however, still underway.

In the course of time, the respondent also investigated the proposed merger between the applicant and Airtel. These latter investigations were prompted by the fact that while the issue of misappropriation of assets was still pending verification and audit, the Government shares, obviously held in trust for the public, were likely to undergo further dilution and there would be further disposal of assets by the applicant.

In order to protect public interest, the respondent requested the applicant to provide a list of all the properties that were disposed of and their valuation after the signing of the combination deed; it also required a list of the properties set to be sold; the request was through the respondent's letter dated 26 February 2020 which is the letter that prompted this suit. It was admitted that the letter requested for recall of the disposed of properties and the suspension of any further sale of the applicant's properties pending the conclusion of investigations.

Thus, the respondent had all along a legitimate basis for seeking verification of assets from the details that were to be provided by the applicant. It further sought to protect any third parties from transfers of properties pending conclusion of its investigations on any misappropriation of assets or corrupt conduct and as such was lawfully acting within its mandate.

During the investigations, the respondent's investigators held meetings, interviewed and recorded statements from some of the applicant's officers including the applicant's chief executive officer and the members of its board of directors. During the interviews, these officers had adequate and reasonable opportunity to make any representations with respect to the privatisation process and the proposed merger.

The decision to request for information through the letter of 26 February 2020 was grounded on a lawful process within the legislative and constitutional mandate of the applicant. In making its request, the respondent did not harbour any personal or ulterior interest or motive but was only making a fair and impartial request based on its investigations in order to safeguard public interest.

At the conclusion of the investigations, the respondent will forward its report to the Director of Public Prosecutions in line with section 35 of the Anti-Corruption & Economic Crimes Act as read with section 11(1) of the same Act for the director to decide whether or not he will mount any prosecutions.

Since the investigation does not relate to unexplained assets, neither sections 55 or 56 of the Anti-Corruption or Economic Crimes Act would be applicable. According to the respondent, the application is meant to avoid the information sought by the respondent in its letter of 26 February 2020 and has nothing to do with the respondent's decision.

Like the applicant, the respondent also rehashed the depositions made in the replying affidavit in its submissions. It started by reiterating that owing to the 40% Government’s stake in the applicant, the latter is subject to the respondent’s mandate to protect the public interest particularly in investigating corruption and economic crimes; this mandate is not limited to public bodies or officers only but extends to any person or body.

Ms. Lai, the learned counsel for the respondent urged the court to follow the decision in **Evans Odhiambo Kidero & 9 others v Chief Magistrates of Milimani Law Courts & 6 others [2020] eKLR** where it was held that the question of the Government having or not having a controlling interest cannot be the only factor in determining the issue whether an entity is private or public; rather there are other factors that ought to be taken into account. Counsel also relied on the case of **United States v Esquinazi 752 F.3d 912 (11th Cir. 2014)** where the court held that other factors would include whether the entity has a monopoly over the function it exists to carry out; whether the Government subsidizes the costs associated with the entity providing the services; whether the entity provides services to the public at large; and, finally, whether the Government generally perceives the entity to be performing a Governmental function. The court ended up dismissing the argument that the legal status of Mumias Sugar Company Limited insulated it from investigations by the Ethics & Anti-Corruption Commission, the respondent in the present application.

Based on this decision, the respondent urged that the argument by the applicant that the ongoing investigations are illegal or unlawful because they are targeting commercial transactions between private entities or investment decisions by Treasury cannot be sustained.

In any event, these investigations stemmed from allegations that public officers at the National Treasury committed the Government into signing a recapitalization and restructuring agreement for the applicant without ensuring adequate budgetary provision occasioning the loss of public funds and dilution of Government shareholding.

On the question whether the applicant has established any grounds to warrant the Judicial Review orders, the learned counsel for the respondent cited the decision in the matter of **Republic v Ethics and Anti-Corruption Commission Ex parte Nairobi City County Assembly & 13 others [2019] eKLR** for the argument that in an application for Judicial Review orders, the court is concerned only with the lawfulness of the process by which the decision was arrived at; that the decision can be set it aside only if that process was flawed in certain defined and limited respects. The role of the Court in Judicial Review is supervisory. However, where the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court of law will not interfere.

The respondent, according to its learned counsel, discovered instances of conflict of interest and misappropriation of assets during the establishment and subsequent privatisation of the applicant. It is as a result of these discoveries that the respondent subsequently exercised its mandate to investigate the proposed merger between the applicant and Airtel Networks Kenya Limited. To be precise, the investigations into the proposed merger were prompted by the fact that while the issue of misappropriation of assets was still pending verification and audit, the shares held by the Government in trust for the public were likely to undergo further dilution and there would be further sale or disposal of assets by the ex-parte applicant. In order to protect public interest, the learned counsel for the respondent urged, the respondent requested the applicant to provide a list of all properties, together with their valuation, that were sold after the signing of the combination deed and a list of all the properties intended to be sold; this request was contained in the letter dated 26th February 2020 that is now at the center of the present application. The letter also requested the applicant to recall any recent sale of property and suspend further sale of property pending conclusion of investigations.

It was also urged that these actions are consistent with section 252(1)(a) and section 13(2)(c) of the Ethics & Anti-Corruption Act which give the respondent power to conduct investigations on its own initiative or on a complaint made by any person. This mandate to investigate is not just confined to investigations of public bodies but to any parties, including private bodies, that may be involved in any acts of corruption, bribery or economic crimes.

Again, under section 25 of the Anti-Corruption and Economic Crimes Act, the respondent is under a legal obligation and duty bound to investigate all complaints it receives and to inform a complainant in writing should it decline to investigate or discontinue any investigation before it is concluded.

Based on these provisions of the law counsel submitted that the respondent had a legitimate basis for seeking verification of assets from details to be provided by the applicant.

As far as the question of abiding by the rules of natural justice is concerned, the respondent submitted that the applicant was involved in meetings with the respondent in the course of investigations; it is from these meetings that statements were recorded, apparently, from the applicant's officers.

Counsel relied on the case **Mape Building & General Engineering vs. The Attorney General & 3 Others (2016) eKLR** in which the Court is said to have laid out the duty of investigative agencies and that investigations can go to any extent subject only to the limits set by an individual's fundamental rights and freedoms as enshrined in the Constitution.

As to what informs the basis of investigations, counsel urged that this may be both volunteer information and suspicion and on this point counsel relied on the South African case of **National Director of Public Prosecutions v Zuma (2007) SCA 137 (RSA)** where Nugent, J.A. held that certain investigations cannot be undertaken merely on the basis of information and material volunteered.

On the accusation that the investigations have been long and drawn out, counsel urged that the investigations were initially concerned with both the past privatisation processes of the applicant and the present impending merger with a third party telecommunications network. Due to what counsel described as 'complex mutation' of the applicant, what appears to be a delay in the conclusion of these investigations was inevitable.

Counsel adopted the words of the court in **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR** on what constitutes inordinate delay in investigations; in that case the court stated that:

> ***"what constitutes 'unreasonable delay' is not a matter capable of mathematical definition but one dependent on the facts and circumstances of the particular case".***

And that that a "relatively high threshold has to be crossed before the delay can be categorized as unreasonable".

Undertaking investigations in any particular manner, so submitted counsel, is the discretion of the respondent's secretary depending on the circumstances of each particular case and it is not in every case that he has to invoke section 26 of the Anti-Corruption and Economic Crimes Act and issue a notice. The applicant cannot be heard to prefer or insist on one form of investigation rather than the other as that would amount to interference with the independence of the respondent.

While reiterating the legality of the respondent's actions, counsel for the respondent submitted that the respondent's letter of 26 February 2020 was not illegal, irrational or procedurally improper and to this end he invited this honourable court to consider the decision in **Republic v Ethics and Anti-Corruption Commission Ex parte Nairobi City County Assembly (ibid)** where it was held that the courts must be mindful that the respondent's constitutional role must be respected; that for the court to intervene, there must be clear evidence of breach of its constitutional duty to act fairly and legally or clear abuse or misuse of discretion; that this court has a constitutional obligation and a duty to foster a culture of integrity in public service by requiring State officers to exhibit high standards of ethical conduct both in public and private; and that the Constitution provides, in peremptory terms, that every person has an obligation to respect, uphold and defend the Constitution.

Counsel insisted that in conducting investigations with respect to the applicant's privatisation, recapitalization and restructuring, the 2nd respondent acted in accordance with its investigative powers donated by the Constitution and the enabling statutes which are the Ethics & Anti-Corruption Commission Act, the Anti-Corruption & Economic Crimes Act and the Leadership & Integrity Act. On the contrary, the applicant has not demonstrated how the respondent has acted illegally, or abused its power, or acted ultra-vires or irrationally in carrying out its investigative mandate.

At any rate, the applicant's individual rights do not override public interest in a just and democratic society and therefore the respondent should not be impeded in executing its constitutional and legislative mandates. In a nutshell, the applicant is not entitled to the judicial review orders sought.

Analysis and Determination

Having considered the applicant's application, the affidavits respectively filed in support of and in opposition to the application and the parties written and oral submissions, I am inclined to conclude that much of the dispute boils down to the respondent's letter of 26 February 2020. And since it is the document that is mainly at the center of the applicant's application, it is imperative that I reproduce it here verbatim. It reads as follows:

> ***EACC.6/11/7(136)*** ***26th February, 2020***
>
> *Mr. Mugo Kibati*
>
> *Chief Exective Officer*

Telkom Orange Kenya

Telkom Plaza, Ralph Bunche Road

P O Box 30301-00100

NAIROBI

Dear Mr. Kibati

RE: PROPERTY SALE SUSPENSION

The Ethics and Anti-Corruption Commission is investigating allegations of misappropriations of Telkom assets. The investigation covers assets owned and disposed (sic) by the company before and after privatisation period.

We have since noted that the company has disposed off (sic) a number of properties while others are in the process of being sold.

To facilitate the investigation, we request that you provide us with:

· *A list of all the properties, together with their values that were sold after the signing of the combination deed.*

· *List and value of all the properties intended to be sold.*

We are also requesting that you recall any recent sale of property and suspend further sale of property pending conclusion of the investigations.

Yours

Signed

Twalib Mbarak, CBS

Secretary/Chief Executive Officer

This the letter that the applicant is aggrieved by and, as a matter of fact, it is the sole trigger of the present dispute. The relatively lengthy pleadings and submissions by parties revolve around this letter and it is for this very reason that the determination of this application has, of necessity, to pay considerable attention to the letter. In my humble view, and with a lot of deference to the learned counsel for both parties, the answer to their respective clients' bone of contention is the proper interpretation to be given to this letter and to this end, the simple question is, whether it is vitiated in either of the ways that would attract the intervention of this court by way of the prerogative orders sought in the motion before court. Another way of asking the same question is whether it is within the powers with which the respondent is clothed under the Constitution and its enabling statutes.

Judicial review jurisdiction which the applicant has moved this honourable to invoke in its favour is, by its very nature supervisory; it is the means though which judicial control over administrative action is exercised and, generally speaking, it is intended to impugn any unlawful decision. Lord Diplock's classic dictum in **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410** provides a useful guide in what an unlawful decision entails; in that case he outlined three heads which he referred to as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial

Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

Going by this statement, the grounds of illegality, irrationality and procedural impropriety are what one would regard as the basic grounds one or all of which may call for intervention by court and grant a judicial review remedy; it has been stated that this list is by no means exhaustive. Even as he listed the three grounds, Lord Diplock himself was quick to point out that "that is not to say that further development on a case by case basis may not in course of time add further grounds". The "principle of proportionality" which he suggested as a further ground has gained sufficient notoriety over time that today it is acknowledged as one of the grounds upon which one may seek judicial review orders.

Turning back to the motion before court, the applicant's case is that the respondent's letter of 26 February 2020 is an embodiment of a decision that is tainted in every respect of what a judicial review court would regard as an unlawful decision; in other words, the applicant is of the firm view that the respondent's decision smacks of illegality, irrationality and procedural impropriety. Proof of any of these grounds would, of course, entitle the applicant to, at least, the prayer for certiorari, to bring into this court and quash the letter that, in the applicant's view, is infamous.

In order to satisfy itself whether the impugned letter is deficient on any or all of these grounds, it is important for this court to consider the respondent's mandate in undertaking the various functions for which it is established, and in particular, the function of investigations which is the context, so I gather, in which the letter in question was written. Thus, in assessing whether the decision or the letter is unlawful, it has to be weighed not only against the grounds for judicial review but it has also to be viewed from the legal perspective of the respondent's mandate and, the shape and form of its investigative mandate which I suppose is the crucial question that emerges from the instant motion.

There is no doubt and indeed it is common ground that the respondent is endowed with constitutional and statutory obligations to investigate economic crimes and corruption offences. The respondent's enabling Act is traced to the Constitution; Article 79 thereof directs Parliament to enact legislation to establish an independent ethics and anticorruption commission whose task is to ensure compliance with, and enforcement of, the provisions of Chapter 6 of the Constitution on leadership and integrity.

In compliance with this provision of the law, Parliament enacted the Ethics and Anti-Corruption Act, cap. 65A which came into effect on 5 September 2011. In its preamble, this legislation states that it is an Act of Parliament to, inter alia, establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution and to provide for the functions and powers of the Commission.

Section 13 (1) of the Act states that the respondent shall have powers generally necessary for the execution of its functions under the Constitution, under the Act itself and under any other written law. The power to conduct investigations is provided for under section 13(2) (c); it is to the effect that the respondent shall conduct investigations on its own initiative or on a complaint made by any person.

Apart from the Ethics and Anti-Corruption Act, there is the Anti-Corruption & Economic Crimes Act, cap. 65 which provides for the prevention, investigation and punishment of corruption, economic crime and related offences.

The law does not just clothe the respondent with power to investigate, it goes further to state which of the commission's officers may investigate and how investigations should be conducted in certain instances.

For instance, section 23 (1) of the Anti-Corruption & Economic Crimes Act specifies the director or any other person authorised by the director may conduct an investigation on behalf of the respondent.

On how the investigations should be conducted, section 26 of this Act comes into play where details of property of a person suspected of corruption or economic crime may be useful in the investigation of the offence of which the suspect is suspected to have committed. In such a case, the director may issue a notice to the suspect requiring him to, among other things, enumerate his property and when such property was acquired and how it was acquired. For better understanding and considering that it is one of the sections which the learned counsel for the applicant submitted that it should have been invoked in his client's case, it is apt to reproduce it here; it states as follows:

26. Statement of suspect's property

(1) If, in the course of investigation into any offence, the Director is satisfied that it could assist or expedite such investigation, the Director may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Director and with regard to such specified property—

(a) enumerating the suspected person's property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

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

(3) The powers of the Commission under this section may be exercised only by the Director.

The respondent or its chief executive officer for that matter would certainly not have invoked this particular provision with respect to the applicant because the acquisition of the applicant's property either before or after the suspected commission of the corruption or economic crimes was not the respondent's concern. To the contrary, the respondent was bothered by the disposal by the applicant of property which the respondent regards as public property.

I would also agree with the respondent's counsel that section 55 and 56 of the Anti-corruption and Economic Crimes would not apply to the investigations into the affairs of the applicant. Section 55 deals with forfeiture of unexplained assets; the investigations under this section are normally commenced when the respondent is satisfied that a person has unexplained assets. This was not the case with the applicant.

Section 56, on the other hand, has to do preservation of property suspected to have been acquired by corrupt conduct in which event the Commission may make an ex parte application seeking an order prohibiting the transfer or disposal or in any other way dealing with the property. The applicant was certainly not suspected to have acquired property by corrupt conduct; as noted earlier, it is the disposal of its assets, which the respondent holds to be public property, that was of interest to the respondent's investigators.

It follows that the applicant cannot be faulted for not complying with any of these provisions since they were inapplicable to the circumstances of the investigations of the applicant's affairs.

But it was not the applicant's responsibility to point out which particular provision of the law that the respondent ought to have invoked in execution of its investigation mandate; that burden fell on the respondent the moment the applicant questioned the lawfulness of the respondent's letter of 26 February 2020. It was up to the respondent to point out the legal basis of its decision and with particular regard to the basis of its 'request' to the applicant to 'recall any recent sale of property and suspend further sale of property pending conclusion of investigations'

When I put this question to the learned counsel for the respondent, she stated the impugned letter was a mere request; I understood her to be saying that the respondent's Chief Executive Officer was, in this letter, counting on the goodwill of his counterpart at the applicant company for the information sought and for 'recall' of the sales and also for suspension of any further sales of the applicant's property. What this would imply is that the respondent's request was not based on any known provision in law because none of the respondent's enabling Acts have provision for such 'requests'.

Although the learned counsel for the respondent admitted that failure to comply with this letter, at least with that part of the letter requesting for recalls or suspension of sales of the applicant's properties, would not necessarily attract any sanctions from the respondent, the applicant was justified in its apprehension about the course the respondent had adopted, firstly, because it was neither implied nor expressly stated in that letter that the applicant had the liberty to comply or ignore any of the requests made; secondly, and more crucial, the respondent is not known to write vain or idle letters to suspects of corruption or economic crimes 'requesting' for one thing or the other, particularly so when the Constitution and the enabling statutes have armed it with the necessary tools to gather whatever information it may require from whomsoever in the course of investigation of corruption and economic crimes. It also has the legal tools that it may wish to employ, where necessary, to seek the intervention of the court to preserve or recover public property which, in its view, is in danger of being disposed of or, has been disposed of, whatever the case may be. At least I did not hear the learned counsel for respondent suggest that the legal framework is so lacking in this regard that the respondent has to resort to the goodwill of suspects in order to achieve any of these things or, generally, to perform its investigative functions effectively.

Without appearing to direct the respondent to carry out its functions in any particular manner, and only for purposes of resolving the question at hand, I would say that of the various provisions of the law available to the respondent and which it could possibly have employed to achieve the twin objectives of recovery and suspension of sale of public property, section 11 (1) (j) of the Ethics and Anti-Corruption Commission Act appeals to me as the most attractive; that section reads as follows:

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 —

(j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

Thus, the only means known in law by which the respondent can protect and recover public property is through court action. This implies that it is only by a court order that any of the assets disposed of by the applicant may be recovered and it is only through the same means that the applicant may be restrained from further disposing its property. This, of course, is subject to section 13 (2)(d) of the Ethics and Anticorruption Commission Act under which the respondent is empowered to conduct mediation, conciliation and negotiation with the applicant, or any other person for that matter, to recover public property that may have been disposed of or prohibit any further dealings, in

any manner whatsoever, with such property.

It follows that to the extent that the respondent purported or attempted to recover public property or prohibit its sale through a letter, its decision is ultra vires section 11. (1) (j) of the Ethics and Anti-Corruption Commission. In the language of judicial review, its decision can be said to be unlawful because it is tainted by all or either of the grounds of illegality, irrationality and procedural impropriety.

And for this reason, the first prayer in the applicant's motion seeking the order of certiorari is merited.

As far as the prayer for prohibition is concerned, all I can say is that it has been acknowledged that the respondent has not only the mandate but it also has the obligation to undertake investigations in the affairs of the applicant company if there is any suspicion of corruption or economic crime.

According to the chronology given of the applicant's existence, the applicant was once a public body incorporated as a limited liability company but whose shares were wholly owned by the Government. Over time, the Government divested and as of to date it has a 40% stake in the applicant. Taking the applicant at its own word, it has been undergoing restructuring, recapitalisation and privatisation processes. In the course of these phases of the applicant's existence, the applicant has not only shed of its shares but has also been disposing of its assets, both moveable and immoveable.

To the extent that it holds public property, the respondent would be interested in how such property has been or is being disposed of particularly where there is suspicion of corruption or economic crime.

Section 45 of the Anti-Corruption & Economic Crimes Act is meant to protect such property; it reads as follows:

> ***45. Protection of public property and revenue, etc.***
>
> ***(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully—***
>
> > ***(a) acquires public property or a public service or benefit;***
> >
> > ***(b) mortgages, charges or disposes of any public property;***
> >
> > ***(c) damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or***
> >
> > ***(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.***
>
> ***(2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—***
>
> ***(a) fraudulently makes payment or excessive payment from public revenues for—***
>
> > ***(i) sub-standard or defective goods;***
> >
> > ***(ii) goods not supplied or not supplied in full; or***
> >
> > ***(iii) services not rendered or not adequately rendered,***
>
> ***(b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or (c) engages in a project without prior planning.***
>
> ***(3) In this section, "public property" means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.***

This section is the entry point for purposes of criminal investigation and the respondent would not be faulted for undertaking any investigations where it has reasonable suspicion that any of the offences prescribed in this provision has been committed. Section11 of the Ethics and Anti-Corruption Commission Act removes any lingering doubt on the respondent's mandate in this regard; it states as follows:

> ***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 or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution.***

It is not in dispute that the applicant has been a company wholly owned by the Government but over time the latter has been shedding off its shares to the extent that it is now a minority shareholder holding 40% of the shares. When I consider the provisions of section 45 of the Anti-Corruption Act, I am satisfied that the disposal of the applicant's assets would be of much interest to the respondent when it was solely owned by the Government as it would be even with the reduced shareholding.

There should not be any controversy about whether the stake the Government holds in the applicant, whatever its size, is so held on behalf of and for the benefit for the public and, for this reason, the protection of applicant's assets would be sanctioned by penal consequences prescribed in section 45 of the Anti-Corruption & Economic Crimes Act. And where these assets have to be disposed of, for the reason of restructuring, or recapitalisation or privatisation or, for whatever reason, such disposal must be subject to the law applicable to disposal of Government or public assets as well. Where there is suspicion that any of the provisions of the Ethics and Anti-Corruption Commission Act, or the Anti-Corruption & Economic Crimes Act or any other written law which the respondent is bound to enforce has been breached in any dealings of the applicant's assets the respondent does not only have the mandate but it has the obligation to intervene and hold the culprits to account. Accordingly, if there is reasonable suspicion of corruption or economic crimes, the respondent would not be out of step to inquire into and investigate how the applicant has disposed of its assets in the process morphing from a once fully owned Government entity to its current status.

But even if the share of the Government's stake in the applicant was of little consequence, it has been submitted that, in the course of different phases of its existence, the applicant has undergone privatisation. If this be the case the respondent would be entitled to investigate whether the law applicable to process of privatisation has been complied with, again, assuming there was suspicion that the law has not been followed.

If I have to say something about this law, it is a law that is found in the Privatisation Act, 2005. According to section 2 of this Act, "Privatisation" is described to mean,

"a transaction or transactions that result in a transfer, other than to a public entity, of any of the following-

a) assets of a public entity including the shares in a state corporation;"

Sale of assets, as was the case here, is one of the means through which privatisation may occur; this is specifically provided for under section 25 (d) of the Act. It states as follows:

"25. Subject to section 28 and 29, the method of privatisation may be any of the following-

(a)….

(b)….

(c)….

(d) sale of assets, including liquidation;

(e)……

Section 28 which has been referred prescribes how a privatisation should be conducted. It states as follows: -

28. The Commission shall conduct a privatisation in an open and competitive way, subject to any pre-existing legal rights, with a view to ensuring that the compensation received represents the fair value of what is privatized.

The "Commission" referred to here is the Privatisation Commission which is established under Section 3 of the Act to formulate, manage and implement a privatisation program and also to make and implement specific proposals for privatisation in accordance with the Privatisation Program.

No doubt this would, most probably, be also an area of interest for the respondent in its investigations.

I a nutshell, there is a whole gamut of laws that would justify the respondent to investigate the applicant or its officers as far as the question of disposal of the applicant's assets is concerned.

It was submitted on behalf of the applicant that the respondent has not provided any evidence that would form the basis of its suspicion that the applicant or any of its officers has committed the offences of corruption or economic crimes. All I can say on this submission is that the investigation of any crime, regardless of whether it is a corruption offence or an economic crime, would normally have its root in suspicion. At that stage the investigator would not have any evidence that a crime has been committed; it is only after the investigations have been conducted that it would be established whether there has been an offence committed or not. There would be no need for investigations if the investigator had in his possession evidence that one is culpable for any crime. The cases of **Shaaban bin Hussien versus Chong Fook Kam & Another [1970] AC 942, 948** and **National Director of Prosecutions v Zuma (2007) SCA 137 (RSA)** fortify this point. In the former case the Privy Council held as follows:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: I suspect but I cannot prove '

> ***<u>Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end</u>. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police." (Emphasis added).***

And in the latter South African case, the court held as follows on this point:

> ***"For an investigation may be initiated on no more than suspicion, and suspicion that an offence has been or is being committed is quite capable of existing without details of that kind being known. It is also unlikely that an investigator will know without further enquiry, what documents or books or objects exist that might have a bearing on the investigation. How else is an investigator then to discover whether an offence has been or is being committed, and if so when, and where, and by whom, and in what manner it was or is being committed, and how else is he or she to discover what evidence there is to substantiate those conclusions, other than to search for and examine objects and documents that might reveal those facts? I do not think that complex criminal conduct, which is the kind of conduct that the directorate was established to investigate, can be expected to be uncovered by relying only on information and material that is volunteered".***

So, the respondent need not have proved anything before it could commence investigations of disposal of the applicant's assets; as long as the respondent had reasonable suspicion that the applicant's assets or properties had been disposed of or were being disposed of in any manner that may contravene the law the result of which the Government or the public at large would end up losing value for its money the respondent was entitled to intervene.

It follows that if I was to grant the order for prohibition in terms sought by the applicant, I would effectively be prohibiting the respondent from carrying out its constitutional and statutory functions. Yet, if I heard the applicant correctly, it has always been and is still willing to co-operate with the respondent and provide all the information that may be required in the course of its investigations.

Accordingly, the applicant's application is allowed only to the extent of bringing to this honourable court for purposes of being quashed the respondent's letter dated 26 February 2020; it is hereby quashed. The prayer for prohibition is disallowed.

Since the applicant has only partly succeeded in its application, it is granted half the costs. Orders accordingly.

Signed, dated and delivered on 22 January 2021

Ngaah Jairus

<u>JUDGE</u>